3

Devonald v Rosser and Sons *(1906): Avoiding One-Sidedness in Contracts for Personal Performance of Work*

ASTRID SANDERS

I. INTRODUCTION

DEVONALD V ROSSER is one of the older cases to be discussed in this volume; however, it is a case with perhaps surprising continued contemporary relevance.[1] For instance, *Devonald* is sometimes cited for a 'general rule' against no 'lay-off' without pay (unless the contract provides otherwise).[2] As but one example, the latter would have been potentially relevant, were it not for statute 'overtaking',[3] even recently when businesses were closed due to Covid-19 related 'lockdowns'.[4] On the other hand, a 'lockdown' might be thought to be more similar to the shortage of supply example in *Devonald* rather than the lack of orders in *Devonald* itself. *Devonald* is also cited for various other different propositions, again with contemporary relevance: including a so-called 'right to work' (at least for some), a 'right to pay', a founding case on 'custom and practice' in the employment context, as an authority for the employee's right to payment being contingent upon 'ready and willingness' to work (compared to actual performance) and, finally, as a case on avoiding unfairness or one-sidedness in the contract of employment. This is even though the decision itself is only 18 pages long, with the judgment by the Court of Appeal only six pages long. This chapter traces the various different

[1] *Devonald v Rosser and Sons* [1906] 2 KB 728 (CA). The author dedicates this chapter to the memory of Roger Sanders.

[2] D Brodie, *The Contract of Employment* (Edinburgh, Green, 2008) para 11.17.

[3] ACL Davies, 'Getting More Than You Bargained for? Rethinking the Meaning of "Work" in Employment Law' (2017) 46 *ILJ* 477, 486. See, also, M Freedland, *The Personal Employment Contract* (Oxford, Oxford University Press, 2005) 134: '… the subject of statutory regulation.'

[4] Coronavirus Job Retention Scheme. (Statutory provision on 'lay-offs' and short-time working more generally: ss 147–154 of the Employment Rights Act 1996.)

implications of *Devonald* as they have evolved in modern case law, to argue that *Devonald*'s legacy should be a judicial desire to mitigate one-sidedness in contracts for personal performance of work.

When giving a historical account, commenting on *Devonald*, Deakin and Wilkinson draw attention to *Devonald* as being unusual for its time, when surrounded by seemingly a sea of, often, less worker friendly judgments.[5] For example, the infamous doctrine of common employment was still applicable, whereby employers were absolved of vicarious liability for torts committed by a fellow worker against another, on the basis of an implied term in the contract of service.[6] Indeed, *Devonald* in this respect can be contrasted with another well-known case of that era: *Addis v Gramophone Co Ltd*.[7]

II. THE FACTS AND OUTCOME

The claim in *Devonald* was brought by Daniel Devonald, a 'rollerman' who had been employed at the defendant tinplate manufacturers, Rosser and Sons, in South Wales for a number of years at the turn of the twentieth century. Transcripts of cross-examination indicate that while Devonald had worked for the defendants for 13 years, he had worked 'in the trade' for 30 years.[8] The facts of the case were that there had been a downturn in trade for the defendants, so that it would have been unprofitable for the employers to remain open at that time. The defendants accordingly closed their tinplate business for a number of weeks. Mr Devonald was a 'piece worker', which meant that he 'received wages pro rata according to the number of boxes turned out in a day'.[9] In other words, if he was given no work to do, he would not be remunerated as he was paid according to the amount of output he produced.[10] On 20 July 1903, the defendants shut down their works. However, they did not give the contractually required 28 days' notice to Mr Devonald to terminate his contract until 3 August 1903; hence there was an additional two weeks of no work. Nor, more importantly, did the employers wait until the end of the notice period before closing the tinplate

[5] S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, Oxford University Press, 2005) 85: 'As a result, the progress made in the *Devonald* case towards contractualising the employment relationship was not continued very far during this period', with reference, eg, to *Marshall v English Electric Co Ltd* [1945] 1 All ER 653 (CA). On 'lay-off' see, eg, *Browning v Crumlin Valley Colleries Ltd* [1926] 1 KB 522 (KB). For a notable exception, see *Hanley v Pease and Partners Ltd* [1915] 1 KB 698 (DC) (as discussed below, see the text accompanying n 168).

[6] *Priestley v Fowler* (1837) 3 M & W 1.

[7] Re the various limitations on damages in *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

[8] 'Tin-Plate Trade' *Evening Express and Evening Mail* (Wales, 25 May 1905) 2.

[9] *Devonald* (n 1) 730.

[10] ibid (Jelf J): 'The rates of payment were fixed, and could not be altered by the defendants without the consent of the masters' association to which the defendants belonged.'

works.[11] In total, the period of no work and no pay amounted to six weeks, under which Mr Devonald remained under contract to the defendants, however earned no wages. Mr Devonald's argument was that it was a breach of contract by his employers not to provide him with a reasonable amount of work over the six weeks and he claimed damages amounting to the wages he would have earned over the six weeks of missed work.[12] Interestingly, newspaper accounts report that Devonald and the other laid off workmen subsequently returned to work for the defendants.[13]

The judge at first instance in *Devonald*, Jelf J, himself described the case as a 'test case'.[14] *Devonald* is similarly described by newspaper accounts at the time, simultaneously being shortened simply to the 'Cilfrew case' or the 'tinplate case'.[15] One newspaper account describes that the 'contracts of employment between plaintiff and defendants … were similar to those in force in the whole of the tin-plate trade in South Wales'.[16] Not only was Devonald's contract similar to those of other tinplate workers, it appears equally that the employer's practice was widespread.[17] The employer in this instance had shut down their works, seemingly on little to no notice for the workmen, when there was a lack of orders and trading conditions were poor.[18] While it was this practice that the plaintiff wished to challenge; as will be discussed below, for the purposes of the claim, Devonald had to argue there was no 'custom', as legally recognised, to shut down, with no notice and no pay for the workmen, for want of remunerative orders. Both because the practice was widespread and because Devonald's contract was representative of contracts in the industry generally, *Devonald* accordingly raised a question 'affecting hundreds of men in South Wales'.[19] It is also widely noted that an unusually large number of witnesses appeared. The case had been transferred from the County Court to the King's Bench Division of the High Court, due to its

[11] 'Tin-Plate Trade' (n 8) 2: 'Plaintiff said they would have had no claim but for the notice which the defendants put up on August 3 after the men left.'

[12] Devonald did not make a claim in debt. See, eg, ACL Davies, *Employment Law* (London, Pearson, 2015) 232: 'the employer's duty to pay can be enforced in two ways at common law: through the action for an agreed sum or through an action for damages'.

[13] 'Tin-Plate Trade' (n 8) 2: 'Witness and other men worked at the harvest in July while the works were shut, and when they re-opened all the men went back.' See similar statements in 'Devonald', *The Times* (London, 7 June 1905) 5.

[14] *Devonald* (n 1) 729.

[15] Eg, 'Alleged Custom to Shut Down Works' *The Economist* (21 July 1906) 212; 'Devonald' (n 13); 'Tin-Plate Trade' (n 8); 'Cilfrew Judgment: Appeal Pending' *The Cambrian* (16 June 1905) 8.

[16] 'Tin-Plate Trade' (n 8).

[17] Eg, P Jenkins, *Twenty by Fourteen: A History of the South Wales Tinplate Industry, 1700–1961* (Llandysul, Gomer Press, 1995) 212: 'Since the Cilfrew case was just another example of what was a common practice within the trade.'

[18] ibid 210: 'workers frequently found themselves dismissed with but a few hours notice'.

[19] 'Tin-Plate Trade' (n 8).

perceived importance.[20] Even before judgment was given, the scene was hence set for a landmark case.[21]

To add to the legal commentary, the wider literature on the iron and steel industry notes the broader trade union context to the case. First, one Daniel Devonald was a 'works representative' (which is not clear from the case report alone).[22] Indeed, the broader trade union context altogether is not clear from the case report.[23] While the case is named after Devonald as claimant, the wider literature describes the case as brought by the Steel Smelters Union.[24] This union backing and support to Devonald does not come across from the case report. Second, Sir Arthur Pugh states that the situation at Cilfrew previously had been referred to the 'Tinplates Dispute Board'.[25] The picture presented by Pugh is that the hope had been to progress Devonald's case as a test claim, with all the various different unions working together.[26] However, matters entirely broke down.[27] As a result, the Steel Smelters Union decided to proceed alone.[28] Indeed, this was apparently the second attempt at litigation on similar facts by the Steel Smelters Union.[29] Pugh notes that because of the (different) employer's success in the first litigation, the practice of laying off workers with little to no notice, if anything, had increased subsequently.[30] On Devonald's case specifically, Jenkins notes that 'officials of the trade union were unbending in their opinion' and 'expressed an intention of seeking a remedy even if it meant expensive litigation to test the case at the highest level of jurisdiction'.[31] In comparison, 'the owners of the Works submitted what they believed to be a strong case'.[32] However, it was Devonald and the trade union's claim which

[20] Jenkins (n 17). The case was presumably not transferred because of its financial value: Devonald was ultimately awarded £14 in damages.

[21] Eg, A Pugh, *Men of Steel: Chronicle of Eighty-eight Years of Trade Unionism in the British Iron and Steel Industry* (London, Iron and Steel Trades Confederation, 1951) 137: 'As the case affected practically all the men in the tinplate trade it aroused considerable interest in South Wales.'

[22] ibid.

[23] See the text accompanying n 130.

[24] Eg, Jenkins (n 17) 211–12: 'What the Union viewed as unlawful frustration'; 'the Union expressed an intention of seeking a remedy'.

[25] Pugh (n 21) 133–34.

[26] ibid 133, eg, 'with a view to all the unions co-operating to fight the case'. Pugh lists the different unions as the Steel Smelters Union, the Tin and Sheet Millmen, the Dockers, Gasworkers and Labourers, and the Welsh Artisans.

[27] ibid 134 (so much so that Pugh notes that subsequently various unions left the Tinplate Disputes Board, seemingly as a direct result).

[28] ibid: 'The union decided to go ahead with the Cilfrew action on its own responsibility'.

[29] Jenkins (n 17) 210: 'This practice had been challenged by the Steel Smelters Union as early as 1893'.

[30] Pugh (n 21) 133: 'This had a tendency to increase following the adverse decision in the action taken by the union against the Morriston and Midland Tinplate Co.'

[31] Jenkins (n 24).

[32] ibid 212. Interestingly Pugh (n 21) 138 said: 'Having heard arguments of the appellants' counsel, the Lord Chief Justice, without calling upon counsel for the respondents ….'

ultimately prevailed, both before Jelf J and then subsequently upheld by the Court of Appeal.[33]

It was held that Rosser and Sons were indeed in breach of contract to Daniel Devonald by not providing him with the opportunity to work and earn wages over the six weeks of shutdown, until his notice period expired. Devonald was awarded damages for six weeks of lost earnings, based on his average earnings previously.[34]

Jelf J opened his judgment at first instance by stating that the onus was on Devonald to establish a contractual right to be provided with work. The claim would immediately fail unless Mr Devonald could do this.[35] If Devonald succeeded in that respect, then the onus would fall on the employers to show a custom and practice 'cutting down' that prima facie right.[36] Jelf J's judgment is significant, on the first question, for stating that Devonald succeeded both on authority but also in principle.[37] Jelf J opined that it would be 'strange if such a right is not implied; for otherwise the bargain is of a very one-sided character. The workman must be at the beck and call of the master whenever required to do so, and yet he cannot, though ready and willing to earn his pay, earn a single penny unless the master chooses'.[38] The implications of this part of Jelf J's judgment will be discussed further below.

Jelf J then proceeded to the second stage, which was to decide whether the employer could rely on the custom and practice they asserted. They asserted a custom and practice to be able to shut their works without pay, whether for a want of orders or whether through a breakdown of machinery or shortage of supplies. Jelf J at this stage seemed to use two criteria: notoriety and reasonableness.[39] The employer's alleged custom failed on both grounds. Memorably on the latter, Jelf J stated: 'and I am of the opinion that the custom set up by the defendant would not be reasonable. It would place the men at the mercy of the masters as to the occasions when, for their own convenience, and looking to their own interests, the masters might think fit to stop the work.'[40]

Accordingly, Devonald succeeded: first, as there was an implied contractual right to provide Devonald, as a piece worker, with a reasonable amount of work

[33] Pugh (n 21) 138: 'For the union it was a decisive victory!'

[34] *Devonald* (n 1) 735 (Jelf J): 'I can think of no better mode of assessing what would have been a reasonable amount of work, and therefore a reasonable amount of pay, than to take the average wages earned by the plaintiff for some time preceding the stoppage. This was agreed to be about 2l. 6s. 8d. per week, making 14l. for the six weeks, and I give judgment for the plaintiff for that amount, with costs on the High Court scale.'

[35] *Devonald* (n 1) 730: 'If he failed in making out that prima facie case he failed altogether ….'

[36] ibid.

[37] ibid 732: 'I am of opinion, therefore, both upon principle and authority ….'

[38] ibid 731.

[39] ibid 733–34.

[40] ibid 734.

while the contract subsisted and, second, because the employer had not proved a custom or practice incorporated into the contract which would cut down that implied agreement.

The Court of Appeal upheld the decision of Jelf J at first instance.[41] The judgment on appeal is noticeably short. Three brief judgments were provided. Two of the members of the Court of Appeal separately described Jelf J's judgment as 'perfectly right'.[42] For completeness, it should, however, be observed that there are some slight differences in the judgment of the Court of Appeal as compared to that of Jelf J.

First, one difference in the Court of Appeal is that each of the judgments referred also to the general contractual authority of *The Moorcock* at what has been described here as the first stage.[43] The Court of Appeal in *Devonald* conceptualised whether there was agreement to provide work on the basis of whether this was a term implied in fact for this particular contract. In other words, the Court of Appeal likely would not have envisaged that the term implied here would be generalised afterwards.[44] Second, Lord Alverstone CJ noted that he interpreted some of the older cases slightly differently from Jelf J, although this did not change the outcome.[45] Third, similar to how the Court of Appeal utilised *The Moorcock* on the question of implied agreement, when deciding if the employer's alleged custom was made out, Farwell LJ appeared to draw upon general contractual authorities by asserting specifically a three-fold test for custom and practice: reasonableness, certainty and notoriety.[46]

There are certainly memorable passages in the judgments in *Devonald*, both by Jelf J and by the Court of Appeal. One of those memorable passages by Jelf J was already included above.[47] Freedland, for example, singles out a different passage by Farwell LJ in *Devonald*, describing this as illustrating a principle of mutuality or reciprocity:[48] 'We must bear in mind that we have to regard the matter from the point of view not only of the master, but of the workman.'[49]

There appears a similar sentiment in Lord Alverstone CJ's statement:

> What, then, is the obligation of the employers under such a contract as the present? On the one hand we must consider the matter from the point of view of the employers

[41] See n 33.

[42] *Devonald* (n 1) 739, 745.

[43] *The Moorcock* (1889) 14 PD 64 (CA). Farwell LJ quoted Bowen LJ without expressly citing *The Moorcock*.

[44] Eg, *Geys v Société Générale London Branch* [2012] UKSC 63, [2013] IRLR 122 [55] on two different types of implied term. On latter type, eg, *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57 (HL) was in 1937.

[45] *Devonald* (n 1) 741.

[46] ibid 743. Lord Alverstone CJ referred, similarly to Jelf J, rather to *Reg v Stoke-upon-Trent* (1843) 5 QB 303 (QB). On the three-fold general contractual test, see, eg, H Beale (ed), *Chitty on Contracts*, 34th edn, (London, Sweet & Maxwell, 2021) para 16–035.

[47] See the text accompanying n 38.

[48] Freedland (n 3) 137 (and generally 134–37).

[49] *Devonald* (n 1) 743.

> who I agree will under ordinary circumstances desire to carry on their works at a profit, though not necessarily at a profit in every week, for it is matter of common knowledge that masters have frequently to run their mills for weeks and months together at a loss in order to keep their business together and in hopes of better times. On the other hand, we have to consider the position of the workman. The workman has to live; and the effect of the defendants' contention is that if the master at any time found that his works were being carried on at a loss, he might at once close down his works and cease to employ his men, who, even if they gave notice to quit the employment, would be bound to the master for a period of at least twenty-eight days during which time they would be unable to earn any wages at all. I agree with Jelf J. that that is an unreasonable contention from the workman's point of view.[50]

Freedland goes on to state that this principle of mutuality or reciprocity is not necessarily always followed in subsequent cases.[51] On the theme of mutuality in particular, Deakin and Wilkinson note the different use of older cases on 'mutuality' in *Devonald*:

> In upholding the claim, the Court of Appeal applied the principle of the parties' mutual obligations under the contract, which it had previously used to support claims for breach of contract by commission agents and other higher status employees. It also relied on the nineteenth century cases on mutuality, which, shorn of their significance as means of invoking the Master and Servant Acts, could now be used for the benefit of the employee.[52]

The tension in the principle of mutuality, generally, in the employment context is well documented.[53] On the one hand, the principle of mutuality assisted the workman in *Devonald*. In the other direction, mutuality can also work against workers, as in the older cases referred to by Deakin and Wilkinson but,[54] moreover, also in cases at the highest appellate level much more recently where, infamously, mutuality of obligation has been used as an exclusionary device to prevent a finding of employee (and possibly also statutory worker) status.[55]

The 'test case' of *Devonald* was hence won by the claimant (and trade union); perhaps, as suggested above, contrary to expectations. Brodie cites *Devonald* as authority for what he calls the 'general rule' that employees, generally, are entitled to be paid during a lay off unless the contract states otherwise.[56] The key word here would appear to be 'general'. The Court of Appeal in *Devonald*

[50] ibid 740.

[51] Eg, Freedland (n 3) 135.

[52] Deakin and Wilkinson (n 5) 81.

[53] Eg, N Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' in A Bogg, C Costello, ACL Davies and J Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart, 2015).

[54] Eg, the seemingly factually similar case of *R v Welch* (1853) 2 E&B 357 (Lord Campbell CJ): 'the magistrates have jurisdiction'.

[55] Eg, *O'Kelly v Trusthouse Forte Plc* [1983] IRLR 369 (CA); *Carmichael v National Power Plc* [2000] IRLR 43 (HL). On application, or not, to statutory workers see, eg, *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, [2016] IRLR 628.

[56] Brodie (n 2).

emphasised the 'obligation is [not] an absolute one to find work at all events': the obligation would not apply where there was a 'breakdown of machinery [or] want of water and materials'.[57] This was the reference to 'shortage of supply' above.[58] Brodie summarises the distinction as between matters which are within the employer's control, the employer's fault or the employer's responsibility (to which the 'general rule' applies), compared to matters not in the employer's control or not the employer's fault.[59] Brodie also notes that this distinction is not necessarily always easy to draw.[60] He suggests that *Devonald* was prescient by invoking modern concepts of risk allocation: 'such a role is now seen as a key function of the law of contract'.[61]

The language in the judgment in *Devonald* suggests a vulnerability or precarity on the part of the claimant. One final point is the interesting observation by Deakin and Wilkinson:

> Rollermen were skilled workers who were in the position of intermediate contractors, employing their own underhands; they were paid a tonnage rate and so were technically piece workers who could not claim wages due as earned if no work was actually done.[62]

Hence, while Jelf J referred to the one-sidedness of the contract and the rollermen as at the 'beck and call' of the master, Daniel Devonald was himself a skilled worker and, on Deakin and Wilkinson's characterisation, was likely himself also an employer.[63]

III. THE IMPLICATIONS OF *DEVONALD*

As stated above, *Devonald* is variously cited as establishing a number of different propositions. This chapter will focus on three implications of *Devonald*: first, that *Devonald* is authority for the employer's obligation to provide work at least for some working persons; second, *Devonald* stated a test for when 'custom and practice' will be contractually incorporated in the employment context; and,

[57] *Devonald* (n 1) 740.
[58] Eg, Brodie (n 2) para 11.18.
[59] ibid para 11.19.
[60] Eg, ibid: 'A difficulty particular to the employer in question, might be thought to present very different issues to, for example, those caused by a national oil-tanker drivers strike.' See, also, 'Devonald' (n 13) on *Devonald* itself: 'They said that these events were outside the control of the masters, but it was impossible to draw a distinction between shortage of materials and shortage of orders.'
[61] Brodie (n 2) para 11.19. See, also, *Devonald* (n 1) 742 (Sir Gorell Barnes): 'It seems, therefore, that the question which really has to be considered is how far that general and necessary implication in such a contract is qualified by considerations as to who takes any particular risks which may affect the continuance of the work.'
[62] Deakin and Wilkinson (n 5) 81.
[63] *Devonald* (n 1) 731.

third, *Devonald*'s potentially wider significance if it is an authority suggesting judges will or should avoid 'one-sidedness' in the contract of employment or in contracts for personal performance of work more generally.[64]

A. Obligation to Provide Work?

Devonald is invoked as an authority for an employer's obligation to provide a reasonable amount of work for piece workers or workers who earn payment via commission.[65] On this account, piece workers and commission workers are thought to be different, on the grounds that payment for these workers is wholly contingent upon the amount of tasks performed. There are indeed specific rules for 'output workers' today in the national minimum wage regulations.[66] On the other hand, immediately this distinction is not entirely convincing. Most obviously, conventionally, a zero hours worker will only be entitled to pay for shifts performed;[67] yet it would not be 'orthodox', to quote the Court of Appeal more recently, to state that they also have a right to be provided with a reasonable amount of work.[68] This leads into one of the more general observations of this chapter: namely, that the modern logical implications of *Devonald* may not have been followed through. If the response to the latter is that *Devonald* was different because the workman in *Devonald* was under contract to remain available to the employer until his notice expired, when a zero hours worker may be under no obligation to remain available, there might however be two responses.[69]

First, newspaper accounts at the time observe that in cross-examination, Mr Devonald stated that he had indeed worked elsewhere during the six weeks, as a harvester.[70] It was hence not the case that he was unable to work at all during those six weeks, contrary to suggestions at points in the judgments.[71] Presumably he was required to return to Rosser and Sons if work were to

[64] Devonald is described in the case as a 'workman'. See, the statutory definition of 'workman' at the Employers and Workmen Act 1875, s 10.

[65] *Langston v AUEW (No 2)* [1974] IRLR 182 (NIRC) 187 (Sir John Donaldson): 'Similarly, the consideration in a commission or piece work contract of employment is the express obligation to pay an agreed rate for work done plus the implied obligation to provide a reasonable amount of work: see *Devonald v Rosser & Sons*.'

[66] National Minimum Wage Regulations 2015, ch 4.

[67] Statutory definition of a 'zero hours contract' at the Employment Rights Act 1996, s 27A.

[68] *Burn v Alder Hey Children's NHS Trust* [2021] EWCA Civ 1791, [2022] ICR 492 [35] (in a different context, as discussed below).

[69] Eg, H Collins, KD Ewing and A McColgan, *Labour Law*, 2nd edn (Cambridge, Cambridge University Press, 2019) 265: 'This result was achieved in part by regarding the contract of employment as a time-service contract, despite the payment mechanism of piece-rates, by referring to them specifying a contractual notice period.'

[70] 'Tin-Plate Trade' (n 8).

[71] Eg, *Devonald* (n 1) 740 (Lord Alverstone CJ): 'who, even if they gave notice to quit the employment, would be bound to the master for a period of at least twenty-eight days during which time they would be *unable to earn any wages at all*' (emphasis added).

become available there, but while work was not available from Rosser and Sons, Devonald (and the other laid off workmen) worked elsewhere. Devonald in this respect seems more similar to a modern zero hours worker, taking shifts as and when available, even if this means from multiple employers.

Second, if the main differentiating feature between *Devonald* and a modern zero hours worker is that a zero hours worker may not be required to remain available (unlike in *Devonald*), the more recent authorities may start to indicate that a more generous approach should be taken when deciding if a zero hours worker is realistically to be described as required to work.[72] The latter point will be discussed more below.[73] Hence potentially more zero hours workers might be considered equivalent to the situation in *Devonald*, contrary to the 'orthodoxy'. In turn, if there is an equivalence between the situation in *Devonald* and at least some zero hours work, this might suggest that employers should be obliged to provide a reasonable amount of work also to some zero hours workers, in the same way that the defendants in *Devonald* were required to make a reasonable amount of work available to Mr Devonald. It might even be suggested that this would be the obvious translation of *Devonald* in the modern setting. However, as will be seen immediately below, this is not the direction, generally, in which case law on the employer's obligation to provide work has developed.[74] Indeed, although Devonald himself contractually had to remain available, a possible third factor is that in subsequent jurisprudence, when a right to work for piece workers and commissioned based workers is frequently asserted, these cases do not always add the caveat that the piece worker must be required to be available.[75] Nor do these subsequent cases state that the piece worker must have a contractual notice period, if that is another differentiating feature.[76] Later cases, more simply, seem to treat the implied term of fact in *Devonald* itself as an implied term of law for piece workers generally.[77]

Case law suggests two main categories when a right to work will today be recognised. First, as above, there is such a right for piece workers and commission-based workers. Second, there are cases where a right to work is recognised because of the importance specifically of performing the task (eg, 'theatrical engagements') or for maintenance of the employee's skills.[78] The more recent decisions on an employer's obligation to provide work have developed rather in the second category, specifically in the context of highly skilled professional workers. The Court of Appeal in *William Hill Organisation Ltd v Tucker* held that the employer there was obliged not only to provide the employee with pay

[72] Eg, *Addison Lee Ltd v Lange* [2019] ICR 637 (EAT) (appeal refused: [2021] EWCA Civ 954).
[73] See discussion in the text accompanying n 115.
[74] *cf*, eg, *Wilson v Circular Distributors Ltd* [2006] IRLR 38 (EAT).
[75] Eg, *Langston* (n 65). See, also *William Hill Organisation Ltd v Tucker* [1998] IRLR 313 (CA) [16].
[76] See Collins, Ewing and McColgan (n 69).
[77] See discussion in the text accompanying n 43.
[78] *Tucker* (n 75).

but also to provide the employee with the opportunity to work, in the context of an employee placed on so-called 'garden leave'. This was because the employee in that instance was employed in a 'specific and unique post', with skills that would atrophy if they were not used.[79] In comparison, the principle in *William Hill* was held not to be satisfied more recently, for example, in *Christie v Carmichael* when the claimant was employed by a firm of chartered accountants as a senior client relationship manager.[80] According to Lady Smith, the duties involved in his post were not unique and there was nothing in the facts to point to a risk that the claimant would become deskilled as a result of not exercising his skills over the period of 'garden leave'.[81] Seemingly, being employed as a 'generalist tax advisor' was not sufficiently skilled or unique for these purposes.

This points towards a potential irony in the subsequent application of *Devonald*. If a piece worker generally is thought potentially to be a more vulnerable category of worker,[82] the subsequent cases on an employer's obligation to provide work develop the right to work for the generally less vulnerable category of professional employees.

B. Custom and Practice

In the subsequent jurisprudence, *Devonald* seems to be most often cited as an authority for the test of custom and practice in the employment context; namely when custom and practice, not expressly included in the contract of employment, becomes legally binding. Farwell LJ stated the threshold for custom and practice to be incorporated in the contract of employment was the trio of reasonableness, notoriety and certainty.[83] Notoriety here appears to refer to the need for general awareness.[84] To refer to the Privy Council in the wider commercial contractual context, the test would seem to be whether an outsider making enquiries would not fail to discover the asserted custom and practice.[85]

The threshold of reasonable, certain and notorious for the incorporation of custom and practice derives from the general contractual context, although it

[79] ibid [21].

[80] *Christie v Carmichael* [2010] IRLR 1016 (EAT).

[81] ibid [50].

[82] Eg, separate discussion of 'piece rates' in M Taylor, *Good Work: The Taylor Review of Modern Working Practices* (2017) assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (accessed 8 April 2022).

[83] *Devonald* (n 1) 743.

[84] Eg, *Garratt v Mirror Group Newspaper Ltd* [2011] EWCA Civ 425, [2011] IRLR 591 [43].

[85] Eg, *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 (PC). (In *Devonald* (n 1) 741 (Lord Alverstone CJ): 'I may say that I have always understood that a custom cannot be read into a written contract unless, to use the language of Lord Denman CJ in *Reg v Stoke-upon-Trent*, it is "so universal that no workman could be supposed to have entered into" the "service without looking to it as part of the contract."')

should be noted that in more recent cases, the wording in commercial contract cases appears to have changed instead to invariable, certain and notorious.[86] The concept of 'reasonableness', in these commercial contract cases, looks to have been dropped.

The next question is how the test for custom and practice has developed specifically in the employment context.[87] Some of the more recent cases apply the test initially from *Devonald*;[88] in other cases, there is discussion as to whether there might now be different tests for establishing industry custom as opposed to incorporating the custom and practice of a single employer.[89] *Devonald* would apply to the former group of cases. On the other hand, even in a case on alleged single employer custom, the Employment Appeal Tribunal in *Solectron Scotland Ltd v Roper* applied *Devonald*.[90] The leading authority, however, today on single employer custom and practice is the restatement by the Court of Appeal in *Park Cakes Ltd v Shumba*.[91] Underhill LJ there sidelined *Devonald* as 'concerned with rather different issues' and chose not to 'review' *Devonald* further.[92] This suggests today a declining role for *Devonald* as an authority on custom and practice in the employment context: first, if there are now less cases on alleged industry custom (as compared to cases on alleged single employer custom) and, second, in light of the treatment of *Devonald* in *Shumba*.[93]

Notwithstanding the latter, in a previous effort by the Court of Appeal to restate the law in this area, the treatment of 'reasonableness' for these purposes was interesting in *Garratt v Mirror Group Newspapers Ltd*.[94] On the one hand, Lord Justice Leveson referred to reasonableness as 'possibly going somewhat further'.[95] On the other hand, it may 'equally need no more than a consideration of the other factors'.[96] The 'other factors' in that instance were, for example, how long the alleged custom had been followed and how consistently it had been applied; which seems somewhat different to the investigation of reasonableness

[86] Eg, *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 WLR 2066.
[87] Eg, *Sagar v H Ridehalgh and Son Ltd* [1931] 1 Ch 310 (CA).
[88] Eg, *Solectron Scotland Ltd v Roper* [2004] IRLR 4 (EAT).
[89] Eg, suggestion in *Garratt* (n 84) [26].
[90] *Solectron* (n 88) [22]–[24].
[91] *Park Cakes Ltd v Shumba* [2013] EWCA Civ 974, [2013] IRLR 800.
[92] ibid [26].
[93] Brodie (n 2) para 15.02: 'However, employment cases of this type would appear to be less common nowadays.'
[94] *Garratt* (n 84) [35] (Leveson LJ): 'I prefer to focus on the broader question of what was agreed between the employers and the employees (as a group), either expressly or by clear implication because, in reality, the factors mentioned by Peter Gibson LJ to which I have referred all go to that issue.' Compare to test latterly in *Shumba* (n 91) [35] (Underhill LJ): 'Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right.'
[95] *Garratt* (n 84) [35].
[96] ibid.

back in *Devonald* itself.[97] In *Devonald*, for Jelf J, the alleged custom and practice was not reasonable because it 'would place the men at the mercy of the masters as to the occasions when, for their own convenience, and looking to their own interests, the masters might think it fit to stop the work'.[98] For Farwell LJ, it would be neither reasonable nor certain, 'because it is precarious, depending on the will of the master'.[99]

C. Avoiding One-Sidedness in Contracts of Employment (or Worker Contracts)

It is submitted that this is the most important implication of the judgment in *Devonald*. The language in this respect in *Devonald* is striking:

> Apart from authority, it would be strange if such a right is not implied; for otherwise the bargain is of a very one-sided character. The workman must be at the beck and call of the master whenever required to do so, and yet he cannot, though ready and willing to work and to earn his pay, earn a single penny unless the master chooses; and this state of things may go on for a period of nearly two months … It would, I think, require some very clear and binding decisions to induce any fair-minded tribunal to accept this view of the law.[100]
>
> …
>
> We must bear in mind that we have to regard the matter from the point of view not only of the master, but of the workman. Both master and workman have to make their living. The master makes his living by realizing a profit; the workman makes his by his wages. The master's profits are ascertained as an ordinary rule de anno in annum. But the workman has to live de die in diem, and his wages presumably do not leave a large scope for saving for a future day when no employment is forthcoming.[101]

A similar passage by Lord Alverstone CJ was included above.[102]

The concern by Jelf J to avoid one-sidedness led Jelf J and then the Court of Appeal to imply agreement by the employer to provide a reasonable amount of work to Mr Devonald until the expiration of his notice period. Freedland describes this as the operation of a principle of mutuality or reciprocity in contracts for personal employment.[103] The language here would be striking at

[97] Eg, with reference to *Albion Automotive Ltd v Walker* [2002] EWCA Civ 946 [15] (but also [18]).
[98] *Devonald* (n 1) 734.
[99] ibid 743 (echoed verbatim in *Solectron* (n 88) [24]).
[100] ibid 731 (Jelf J).
[101] ibid 743 (Farwell LJ).
[102] ibid 740.
[103] Eg, Freedland (n 3) 136–37: 'There are instances where the principle of mutuality or reciprocity has been applied in exactly that way. Perhaps the best illustration of all occurs in the case of *Devonald v Rosser & Sons* …'.

any time, but is surely even more striking when taking into account the age of the case. For example, this is long before Edmund Davies LJ in 1974 telling the judiciary not to refer to older cases applying 'what would today be regarded as almost an attitude of Czar-serf'.[104]

As stated above, *Devonald* has been cited frequently subsequently in cases on custom and practice, plus in cases alleging a right to work. However, it was also memorably utilised in the very different context of *Nethermere (St Neots) Ltd v Gardiner*.[105] In the words of Lord Justice Stephenson in the Court of Appeal in 1984, 'I think that means evidence at least of an obligation to accept work offered by the company, and on the authority of *Devonald v Rosser* the obligation to accept piecework would imply an obligation to offer it.'[106]

This was in the context of a discussion of the 'irreducible minimum of obligation on each side' for there to be a contract of employment.[107] The two claimants in *Nethermere* were casual homeworkers. *Nethermere* is, of course, a well-known case in its own right: the employer's argument was that the claimants could not bring statutory claims for unfair dismissal because, the employer argued, they were not working under contracts of employment. The decision of the Court of Appeal in *Nethermere* was admittedly split and stated to be close to the borderline.[108] Nevertheless, the Court of Appeal there found that the claimants were indeed employees: memorably, even though the relationship had started off on an informal basis, the regular giving and taking of work had 'hardened', or crystallised, from a matter of convenience into a matter of binding legal obligation.[109] This meant then that there was the necessary 'mutuality of obligation' in order to constitute a contract of employment, with later cases confirming that mutuality of obligation is a necessary ingredient for a contract of employment.[110] Mutuality of obligation here is construed as the ongoing promise by an employer to provide work in return for the ongoing promise by an employee to perform work, if the argument is for a single contract.[111]

However, the more specific point for present purposes is the use of *Devonald* in *Nethermere*. *Devonald* in *Nethermere* was authority for the reading in of a matching obligation where there is otherwise a one-sided commitment in the

[104] *P D Wilson v M Racher* [1974] IRLR 114 (NIRC) [5].
[105] *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240 (CA).
[106] ibid [28].
[107] ibid [22].
[108] ibid [28] (Stephenson LJ): 'I agree that the evidence of these obligations is tenuous, so tenuous that the Industrial Tribunal's decision comes dangerously near the ill-defined boundary which separates the grey area of possible reasonable decisions from the jurisdiction of an appeal court to declare the decision wrong and put it right.'
[109] ibid.
[110] See n 55.
[111] Eg, *Carmichael* (n 55) [18]. On the difference between singular and successive contracts, see, eg, the difference between the Employment Appeal Tribunal and the Court of Appeal in *O'Kelly* (n 51). On this, see ch 8 in this volume. See, also, the same chapter for discussion of mutuality of obligation generally.

contract of employment. In Stephenson LJ's example in *Nethermere*, if there is a promise by the worker to accept work, this should be matched by implying a corollary promise by the employer to offer work. While conceivably implying reciprocal promises could add to the employee or worker's burden, it is likely that this would more often operate to the employee or worker's advantage: similarly to how recognition of the implied term of mutual trust and confidence, although which is 'mutual', tends to be regarded as an employee-protective implied term.[112]

More specifically, the example in *Nethermere* might seem to resurrect the idea, discussed above, that employers should also have an obligation to provide casual or zero hours workers with a reasonable amount of work if workers are required to remain available. On the other hand, this was situated, however, in a discussion in *Nethermere* about the prior question of employment status (*Nethermere*) rather than about the consequences of employment status once employment status is established (*Devonald*). The tensions in the concept of mutuality in the employment context were noted above. One of these tensions is that the concept is, problematically, used in very different contexts even within the employment sphere: being used both as a test for employee status but also, as in *Devonald*, when determining the consequences of employment status.[113]

In the more recent cases, it certainly seems that courts and tribunals are latterly interpreting an obligation to accept work more broadly. This is to be welcomed, in comparison to the formalistic approach taken by the House of Lords to this question previously in O'*Kelly v Trusthouse Forte Plc*: the latter which is the subject of a different chapter in this volume and to which the reader is directed.[114] For example, the Employment Appeal Tribunal recently in *Addison Lee Ltd v Lange* referred, amongst others, to the driver's required expenditure on the car for work purposes, meaning drivers had no realistic obligation but to accept work.[115] This was a more 'realistic' approach, to use the vernacular in this area.[116] Courts and employment tribunals may also appear to be taking a more realistic approach to the 'crystallisation' question from *Nethermere*.[117]

While theoretically the example in *Nethermere* using *Devonald* might help a zero hours worker argue also for a right to a reasonable amount of work, the example itself and the more recent cases on a broader interpretation of an

[112] Eg, *Malik v BCCI SA* [1997] IRLR 462 (HL) [55]. *cf* Brodie (n 2) paras 6.05–6.09 on sometimes the difficulties of identifying reciprocal obligations in the employment context.

[113] See Countouris (n 53).

[114] See ch 8 in this volume.

[115] *Lange* (n 72) [63] (and [60]).

[116] With reference initially to *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820 [34]–[35].

[117] Eg, *St Ives Plymouth Ltd v Haggerty* (EAT, 22 May 2008) [28]–[29]. *cf*, eg, *Knight v Fairway & Kenwood Service Ltd* (EAT, 10 July 2012) [16]–[17].

obligation to accept work tend more to occur in cases about prior establishing employment status, whether as an employee or a worker. As another example, in *Wilson v Circular Distributors Ltd*, when the Employment Appeal Tribunal implied an obligation on that particular employer to provide work when work was available, this was not in a case challenging the amount of work as breach of contract but was rather a claimant asserting employee status so that he could bring an unfair dismissal claim.[118] Similarly in the *Addison Lee* example noted above, a broad interpretation of the obligation to accept work was taken there when discussing if the claimant was a statutory worker eligible to bring a working time claim.[119] While then *Devonald* might in theory assist a zero hours worker to argue for a right to a reasonable amount of work, at least current usage in cases suggests that *Devonald* would be more likely to assist the casual or zero hours worker when making a claim for a particular employment status so that they can bring a statutory claim such as for unfair dismissal in *Nethermere* or in *Wilson*,[120] or under the Working Time Regulations 1998 in *Lange*.[121] However, even then, there are limits to the assistance which *Devonald* alone can provide in this respect: for instance, where, even taking the aforementioned 'realistic' approach, there is still no obligation on the zero hour contract worker to accept work. A broader discussion of the issues involving zero hours work goes beyond the scope of this chapter.[122]

The other point to note is Freedland's observation that the 'logic of *Devonald*', contrary to the above, rather than assisting casual workers, could potentially hinder casual workers if seeking employee status.[123] As interpreted by judges subsequently, the logic of *Devonald* may be to suggest that matching promises, to provide work and to perform work, are necessary to constitute a contract of service. If those matching promises cannot be found, the claimant is not an employee. Freedland attributes the outcome in *Carmichael v National Power Plc* to the House of Lords' interpretation of the logic of *Devonald*.[124]

The response here is two-fold: first, there is again the general point about difficulty in the concept of mutuality in the employment context. One timely question is whether the Supreme Court's decision more recently in *Uber BV v Aslam* might possibly obviate the mutuality requirement for employment

[118] *Wilson* (n 74).
[119] *Lange* (n 72).
[120] Employment Rights Act 1996, s 94(1).
[121] Working Time Regulations 1998, reg 2(1).
[122] Eg, A Adams, M Freedland and J Adams-Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimating Precarity?' [2015] *Giornale di Diritto del Lavoro e di Relazioni Industriali* 529.
[123] Freedland (n 3) 477–78 ('logic' at 478).
[124] ibid 478: 'However, in recent cases culminating in the decision of the House of Lords in *Carmichael v National Power plc*, the courts have in effect accepted the logic of *Devonald v Rosser* and have applied it to the effect that a casual or "as required" worker cannot be regarded as having a continuing contract of employment which subsists through periods off work as well as through periods at work.'

status.[125] Lord Leggatt in *Uber* memorably stated that the 'primary question', in relation to employment classification if bringing a statutory claim is 'one of statutory interpretation, not contractual interpretation'.[126] Mutuality is a contractual concept. On the other hand, the signs in the most immediate case law may not be the most promising in this regard, with the Court of Appeal in another case, even on employment classification, finding *Uber* not to be relevant, for example, as there was a substitution clause in this later case and not in *Uber*.[127]

Second, the House of Lords in *Carmichael* would appear to have turned the logic of *Devonald* on its head. The wider literature on the workings of the tinplate industry notes that lay-off without notice and without pay was widespread at the time of *Devonald*: possibly 'a common feature when trading conditions slackened'.[128] Plenty of representatives from the tinplate industry appeared at the court to testify in favour of this custom, albeit Devonald and his witnesses argued there was a difference between a recognised custom to close for 'breakage, repairs and want of water or coal' whilst 'absolutely [denying] the right to shut down for want of remunerative orders'.[129] Indeed, this is the only reference in the entire case report even indirectly to the Steel Smelters Union: 'for the plaintiff, a number of witnesses, including workmen, secretaries of workmen's associations, and others likely to know of the alleged custom if existed' testified.[130] Moreover, Devonald himself in cross-examination apparently conceded that he had been laid off previously without pay.[131] It would have been very easy for Jelf J and the Court of Appeal to rule with the defendants;[132] however, as has been discussed here, they did not.[133] It would have been extremely easy, or even likely, for them to find the employer's alleged custom established; but possibly also easy for them to find there was no implied agreement to provide work on the facts, particularly if Devonald himself had previously accepted lay off without pay.[134] The real logic of *Devonald* was to use concepts of mutuality,

[125] *Uber BV v Aslam* [2021] UKSC 5, [2021] IRLR 407.

[126] ibid [69].

[127] *Independent Workers of Great Britain v Central Arbitration Committee* [2021] EWCA Civ 952, [2021] IRLR 796 [84] (Underhill LJ): 'Equally importantly, however, there was no issue about personal service: Uber did not rely on any substitution clause … Second, the question of how that analysis would apply on the facts of the present case, as found by the CAC, does not seem to me straightforward.'

[128] See Jenkins (n 17) 210.

[129] *Devonald* (n 1) 734 (Jelf J).

[130] ibid.

[131] 'Tin-Plate Trade' (n 8): 'Sometimes the works had been stopped and no reason was given, and then the men received no notice or payment.'

[132] Eg, Pugh (n 21) 125: 'So the secretary remarked: "It would appear that High Court or Low Court the judges have an animus against trade unions …".'

[133] For example, on the criteria of 'certainty', Lord Alverstone CJ referred to 'the closing of the works is a matter that depends entirely upon the will of the employer', see *Devonald* (n 1) 741.

[134] *cf* Pugh (n 21) 125: 'Many of the legal fraternity thought the men's side had made out an unanswerable case ….'

reciprocity and corollaries to read in a matching obligation to assist the worker in a very 'one-sided' situation; not to use the apparent absence of mutuality or reciprocity to deny employment status when individuals are bringing claims for the most basic of statutory employment rights.[135]

With reference to the suggestion in *Devonald* to avoid 'one-sidedness' in contracts of service, this author elsewhere has previously argued for an implied term of fairness to be recognised henceforth in contracts of employment, as an implied term to be read as a default into all contracts of employment and work.[136] The argument was that such an implied term was already latent. *Devonald* was one of the sources used to make that argument.[137]

A suggested implied term of fairness in the contract of employment was discussed more recently once again by the Court of Appeal in *Burn v Alder Hey Children's NHS Foundation Trust*.[138] In the words of Underhill LJ:

> There may not on the orthodox view be a general implied duty on an employer to act fairly in all contexts; but such a term is very readily implied in the context of disciplinary processes – see para. 114 of the judgment of Simler J in *Chakrabarty v Ipswich Hospital NHS Trust*.[139]

Similarly, Singh LJ said: 'For my part, I can well understand why the law does not imply a general obligation to act fairly into a contract of employment.'[140]

While Singh LJ was more tentative in this respect than Underhill LJ,[141] Underhill LJ does, however, seem expressly to recognise a duty of procedural fairness in contracts of employment or an implied term to act fairly during disciplinary procedures.[142] For both Lords Justices, this is stated conceptually to be separate from the well-established existing implied term, in employment contracts, of mutual trust and confidence.[143] The reasoning, however, is admittedly brief.[144]

[135] The claim in *Carmichael* (n 55) was for a statement of employment particulars (now, Employment Rights Act 1996, Part I).

[136] A Sanders, 'Fairness in the Contract of Employment' (2017) 46 *ILJ* 508.

[137] ibid 538.

[138] *Burn* (n 68). See, also, beforehand *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4 (partially summarised in *Smo v Hywel Dda University Health Board* [2021] IRLR 273 (EAT) [205]).

[139] *Burn* (n 68) [35] (the reference to *Chakrabarty* is [2014] EWHC 2735 (QB), [2014] Med LR 379).

[140] *Burn* (n 68) [46].

[141] ibid [48] (Singh LJ): 'I would prefer to leave this important issue of principle open for a future case, in which it may be necessary to decide the point, but it does not appear to me that there would be a legal impediment to such an implied term … In my view, if the law were to imply a term into the contract of employment that disciplinary processes must be conducted fairly, that would be a short step which builds on *Braganza*.'

[142] ibid [35] ('such a term is readily implied in the context of disciplinary processes'), [42] ('the duty of procedural fairness to which I refer at para 35 above').

[143] ibid [42], [47]. See, also, *Malik* (n 112).

[144] In comparison notably to *IBM* (n 138): the judgment in the *Industrial Relations Law Reports* is 56 pages long.

While the tentative recognition of an implied term of procedural fairness is a welcome addition to the corpus of employer's implied obligations in the contract of employment, the reasons for rejecting a substantive version of fairness are not the most convincing. Singh LJ suggests a requirement of substantive fairness in the contract of employment would 'cut across' statutory unfair dismissal law.[145] Two responses can be given. First, procedural fairness is also an aspect of the statutory law of unfair dismissal, if not the most important aspect.[146] Second, not all cases where an implied term of fairness might be argued will be dismissal or discipline cases.[147] On the other hand, in relation to this second point, the Court of Appeal in *Burn* perhaps only intended its comments to be directed to dismissal and discipline cases.[148] Against that, the language used is at times more general;[149] moreover, Singh LJ bases this implied term rather on *Braganza v BP Shipping Ltd*, the latter which evidently was not a dismissal or discipline case.[150] Nevertheless, even if that was the intention, it would not seem sensible to silo off dismissal and discipline cases. For example, even the more reticent jurisprudence on bonuses acknowledges the importance of procedural fairness.[151] However, this is to digress from the broader point.

If only a procedural version of fairness is recognised as opposed to also a substantive version, or if this implied term only extends to disciplinary procedures, as important as fairness is in the latter context; this potentially leaves untouched substantively 'very one-sided' contracts as in *Devonald*. Presumably the workman in *Devonald* would have preferred recognition of an implied agreement to provide a reasonable amount of work, as occurred, rather than the reading in of an internal grievance procedure for him to challenge the unreasonable allocation of work.

In another more recent case, *Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust*, *Devonald* was cited for the following proposition: '*Devonald v Rosser* itself, she submitted, could be seen as an illustration of the court stepping in to protect a vulnerable worker.'[152] This author, as well as other employment law scholars would seemingly agree.[153] Auerbach J's disappointing response in the Employment Appeal Tribunal was as follows:

> I turn to the general authorities on contractual implied terms. *Devonald v Rosser* was concerned with whether the lack of any work for the employees to do excused the

[145] *Burn* (n 68) [46].

[146] Eg, *W Devis & Sons Ltd v RA Atkins* [1977] IRLR 314 (HL) [24] (Viscount Dilhorne): 'Para. 6(8) appears to me to direct the Tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice.'

[147] Eg, bonus cases as discussed at Sanders (n 136) 522–27.

[148] Eg, the text accompanying n 139.

[149] Eg, the text accompanying n 140 and the broader reference to procedural fairness at n 142.

[150] *Burn* (n 68) [48]. See, also, *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487.

[151] Eg, *Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132 [44]–[45].

[152] *Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust* [2022] IRLR 115 (EAT) [30] (Auerbach J).

[153] Eg, Davies (n 3) 486: 'Other examples arise where the courts have been more obviously influenced by a concern for the fair treatment of employees', followed by discussion of *Devonald*.

> employer from its obligation to pay wages, and, specifically, whether there was in fact, in that case, a custom and practice of a sort that could give rise to an implied term to that effect. I do not think that anything in that decision assists the present claimant's case for an implied term conferring a positive right on him, such as is contended for in this case.[154]

This leads to a brief discussion of *Agbeze* to conclude, as in some ways a twenty-first century example of the precarity evident in *Devonald*. Precarity is used in this sense to refer to the otherwise 'very one-sided' nature of the agreement in *Devonald*.

D. A Modern Example of *Devonald*?

The claimant in *Agbeze v Barnet* was a so-called 'bank worker', employed as a health care assistant by the defendant Trust.[155] He would appear to have been a zero hours worker. His contract specifically stated there was no obligation on the trust to offer him any work nor on him to accept any work, and there would be no regular hours. The claimant in *Agbeze* was suspended for some three months, during a disciplinary investigation. The situation seems similar to *Devonald* in the sense that the claimant argued that he could not work elsewhere, in similar employment, for the three months. Seemingly, no other Trust would employ him while he was under investigation.[156] *Agbeze* however is obviously very different from *Devonald* in other key respects: there were entirely different reasons for the lay off in *Devonald*.[157] There is no reference to *Agbeze* as a test case or the involvement of a large number of witnesses across the industry. There is no reference to a trade union in *Agbeze*.

The disappointing feature of *Agbeze* is, first, the seeming lack of substantive engagement with the reasoning by the Supreme Court in *Uber BV v Aslam*.[158] The Supreme Court in *Uber* confirmed and extended a purposive approach to matters of employment status, with Lord Leggatt memorably referring to the undoubted purpose of employment legislation as to protect workers.[159] This approach surely should not stop at employment classification.[160] There is little point in using a purposive approach to classify employment status then not also to deploy a purposive approach to the interpretation of substantive legislation. In *Agbeze*, a purposive approach might suggest a different, less formalistic reading of wages 'properly payable' in section 13(3) of the Employment Rights

[154] *Agbeze* (n 152) [68] (Auerbach J).
[155] ibid. Eg, also, earlier: *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA).
[156] *Agbeze* (n 152) [26].
[157] Although it was a disciplinary investigation in *Agbeze* (n 152) [29] (Auerbach J): 'based on a suspicion that was subsequently found to be unfounded'.
[158] *Uber* (n 125).
[159] ibid [71].
[160] *cf Agbeze* (n 152) [75].

Act 1996.[161] In the same way that contract was not key to matters of employment status classification in *Uber*, contract may not have needed to be key to the interpretation of section 13(3) of the Employment Rights Act 1996.[162]

Second, in *Agbeze*, if the claimant truly was not able to work for the three or so months while an investigation was carried out, this is potentially another example of the aforementioned 'one sidedness' noted, but moreover mitigated, in *Devonald*. In order to avoid one-sidedness, there was surely basis, on the grounds of mutuality or reciprocity, to imply a term in *Agbeze* that the disciplinary procedure would be conducted without undue delay.[163] Indeed, such is arguably already required by existing cases. In 1995, the Employment Appeal Tribunal in *W A Goold (Pearmak) Ltd v McConnell* found 'an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.[164] The key word there for present purposes would be 'promptly'. A requirement to act promptly would also presumably be part of a potential new implied term of procedural fairness as tentatively recognised subsequently in *Burn*.[165]

Third, the Employment Appeal Tribunal in *Agbeze* rejected the suggestion for a general implied term (or a 'so-called "class" or "category" implied term') for statutory workers that suspension will be with pay unless the worker's contract states otherwise.[166] Auerbach J chose to distinguish between two types of contracts of work, at common law, agreeing:

> There is a fundamental difference between a contract the basic architecture of which was of that sort, and a conventional employment contract, which itself provided for guaranteed and required work and hours, and correspondingly guaranteed and required pay, so long as the employee was ready, willing and able to work.[167]

In comparison, in *Hanley v Pease and Partners Ltd* in 1915,[168] indeed which is categorised as the partner case to *Devonald* by Deakin and Wilkinson and by

[161] Eg, traditionally, *New Century Cleaning Co Ltd v Church* [2000] IRLR 27 (CA).

[162] *Uber* (n 125) [69] on which see, eg, A Bogg and Michael Ford QC, 'The Death of Contract in Determining Employment Status' (2021) 137 *LQR* 392.

[163] *Agbeze* (n 152) [26] (Auerbach J): 'the suspension in his case, of several months, could not be described as brief'. Counsel for Agbeze also cited 'para 8 of the ACAS Code' (at [23]): 'this period should be as brief as possible'. *cf Agbeze* (n 152) [40]. However statutory workers also have a statutory right to accompaniment at formal disciplinary and grievance procedures under the Employment Relations Act 1999, s 10.

[164] *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 (EAT) (Morison J).

[165] *Burn* (n 68) [35]. Eg, also, *Chakrabarty* (n 139) [114] (Simler J): 'without unjustified delay'. Once again, the statutory right to accompaniment at formal disciplinary and grievance procedures also applies to statutory workers.

[166] *Agbeze* (n 152) [77]. On the other hand, Auerbach J did seem to recognise that the implied term of mutual trust and confidence would be applicable: ref to 'all working relationships'. *cf*, eg, previously *Bedfordshire County Council v Fitzpatrick Contractors Ltd* (1998) 62 Con LR 64 (QB) 72 (with reference to eligibility of employees only to bring statutory unfair dismissal claims).

[167] *Agbeze* (n 152) [54].

[168] *Hanley* (n 5).

Deakin and Morris, it was held there is no implied right to suspend without pay.[169]

Agbeze differentiated between 'zero hour or bank type contracts' (where the employer could suspend without pay) and 'conventional employee' examples (where the employer cannot suspend without pay, unless there is an express term otherwise).[170] Notably, however, the workman in *Hanley* (where the claim succeeded) was a 'cokeman', different to the professional employee counterexamples discussed in *Agbeze*.[171] Against this, even if it is relevant that there was express reference in *Hanley* to there being a 'continuing' contract, recent case law developments as noted above might support the finding of a continuing contract for casual or zero hours workers in a broader range of circumstances.[172] In comparison to *Agbeze* (2021), the Court of Appeal in *Devonald* (1906) had stated: 'No distinction in principle can be drawn between wages by time and wages by piece.'[173]

IV. CONCLUSION

Devonald is a landmark case for various reasons, but two will be highlighted in this concluding section. First, *Devonald* is noted as an authority for a number of widely different propositions: a right to pay, the employer's obligation to provide work (at least for some employees), protection against lay-off, an authority on what triggers the employee's entitlement to pay, an early modern case on the importance of reciprocity in the contract of employment; as well as an authority for the more technical point as to when custom and practice in the employment context will become legally binding. Strikingly as a much older authority in the employment context, it has endured.[174]

Second, *Devonald* is a remarkable decision for its time. The Court of Appeal implied a contractual right to be provided with a reasonable amount of work to a piece worker, at a time when lay off without pay was widespread in that industry. Initially this was regarded as an implied term in fact but subsequent cases treat this as an implied term of law for piece workers.[175] In comparison, more recently, when it was suggested to the Employment Appeal Tribunal that there

[169] Eg, Freedland (n 3) 475.

[170] Eg, *Agbeze* (n 152) [54]–[55], [77]. For 'conventional employees', in *Agbeze*, this is not via a separate implied term but rather by construing the wage-work bargain: eg, *Agbeze* (n 152) [66].

[171] Examples discussed in *Agbeze* (n 152): senior capacity energy purchasing manager in *Kent County Council v Knowles* (EAT, 9 March 2012) [2] and consultant anaesthetist in *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387, [2019] IRLR 570.

[172] *Hanley* (n 5) 705.

[173] *Devonald* (n 1) 739 (Lord Alverstone CJ). See, also, *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193 (HL) [15].

[174] See, eg, *Wilson* (n 104). Also compare the reception of *Devonald* to the reception of *Addis* (n 7): eg, *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] IRLR 279 [3]–[4].

[175] See discussion in the text accompanying n 77.

should be recognised a far less wide-ranging implied term that zero hour workers be paid during a disciplinary suspension, the Employment Appeal Tribunal refused, stating that to imply such a term would materially change the nature of the contract.[176] Jelf J and the Court of Appeal in 1906 were concerned with mitigating the otherwise 'one sidedness' of the claimant's contract of service, even while the Employers and Workmen Act 1875 was still in use.[177] The Court was concerned that 'all' the risk should not be placed on the workman (unless the contract expressly stated otherwise) and accordingly an implied agreement to provide work was found. By contrast, in that same recent Employment Appeal Tribunal judgment (*Agbeze*), the Employment Appeal Tribunal discussed *Devonald* in a decision recognising two types of contract of work at common law, but at the same time was seemingly content, unlike *Devonald*, with one of those two types of contract placing all the risk on the worker. While one legacy of *Devonald* may, counterintuitively, have been partially to contribute to restrictive decisions on mutuality of obligation, this is to misunderstand *Devonald* by subsequent judges.[178] *Devonald* itself did not use the absence of a matching obligation in an exclusionary fashion to deny employment status but instead to imply a matching obligation where that is possible, in *Devonald* itself positively to provide the workman in that instance with a right to work, perhaps contrary to the odds.[179]

The real legacy of *Devonald* should be the recognition of the words and principle: 'apart from authority, it would be strange if such a right is not implied; for otherwise the bargain is of a very one-sided character'.[180] Devonald, and his trade union, brought a test claim, successfully, on behalf of hundreds of workmen at the turn of the twentieth century.[181] It would be hoped that the desire to avoid 'one-sidedness' would guide developments in the future, judicial and statutory, to the benefit of all workers and employees.

[176] *Agbeze* (n 152) [77].

[177] Eg, S Deakin and GS Morris, *Labour Law*, 6th edn (Oxford, Hart, 2012) para 1.17: 'Under section 3(3) of the Employers and Workmen Act 1875 the court had the power in effect to order specific performance against an employee who was in breach of contract, a right not available under the general law of contract either at that time or since.'

[178] See n 123.

[179] Although the Steel Smelters Union was sure that it had a strong case, see discussion in the text accompanying n 128.

[180] *Devonald* (n 1) 731.

[181] Pugh (n 21) 138: 'It had a salutary effect upon those South Wales employers who had been too ready to take a one-sided view of the contract of notice as between themselves and their work-people.'