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**Preventing the “Most Terrible Punishment”: The Case for a Duty to Protect Dignity within the Employment Relationship**

by

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## I. INTRODUCTION

Fyodor Dostoyevsky wrote that “[t]o crush, to annihilate a man utterly, to inflict on him the most terrible punishment so that the most ferocious murderer would shudder at it beforehand, one need only give him work of an absolutely, completely useless and irrational character.”<sup>1</sup> With this one powerful sentence, Dostoyevsky is able to cut to the heart of one of the most fundamental features of employment, an attribute which still creates difficulty for the modern common law in Canada. The force of Dostoyevsky’s statement flows from its recognition of the immense importance that work plays in a person’s life. Because work is integral to a person’s sense of dignity, sense of autonomy and sense of identity, in the wrong conditions it has the power to “annihilate a man utterly.” As a result, people are heavily dependent on their jobs for their continued social and psychological well-being, and this dependence makes them vulnerable.<sup>2</sup>

But if all people are dependent on work in this way, what does that reliance have to do with employment law specifically? Again, Dostoyevsky’s quote hints at the answer. Within the context of the employment relationship, the employer has an inherent right of control over the employee’s labour and the circumstances in which that labour is performed. As a result, employers have a heightened capacity to create a working life for the employee that is positive and beneficial or that is, in Dostoyevsky’s words, “useless” and “irrational.” Through its control right, then, the employer has a greater ability to affect and abuse the sense of dignity, autonomy and identity that the employee draws from her working life.

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<sup>1</sup> Fyodor Dostoyevsky, *The House of the Dead*, trans. by Constance Garnett (New York: New York Grove Press, 1957).

<sup>2</sup> For brevity, the sense of dignity, autonomy, identity and self-worth that a person draws from work is referred to throughout this paper as the worker’s “dignity-based interest” in work.

This form of vulnerability is highly unique to, and fundamentally characteristic of, the employment relationship. Accordingly, in responding to this vulnerability, it is essential to define and adopt the most principled and justifiable remedial mechanism available. It is therefore asserted that it is now appropriate for the Canadian common law of employment to recognize and apply a general implied duty in all employment contracts, which obligates the employer, in exercising its control right, to respect the dignity, autonomy and self-identity of the employee throughout the entire employment relationship and beyond.<sup>3</sup>

To that end, Part II of this paper explores the theoretical justification for the duty to respect dignity. Specifically, Part II.A briefly reviews the fact that Canadian courts have adopted a purposive approach to employment law, under which the law seeks to remedy the perceived vulnerabilities of employees. Building on this point, Part II.B goes on to describe the way in which the employee's dignity-based interest in the circumstances of work interacts with the employer's control over those circumstances to create a unique form of employee dependence. To counteract the effects of that vulnerability, and to satisfy the purposive approach to employment law, it is therefore argued that the most principled remedial response would be for Canadian courts to imply a duty to respect dignity into all employment contracts, one which cannot be bargained away. Part II.C then responds to the potential charge that the duty is merely a recycled version of previous attempts to establish a duty of good faith or fairness. In differentiating the former from the latter, it is asserted that the harmonization function of the duty to respect dignity limits the potential scope of an employer's liability and shields the duty from allegations of over-breadth. Finally, Part II.D concisely examines another form of employee vulnerability, being economic dependence, which becomes relevant in later sections of the paper.

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<sup>3</sup> Given this relatively cumbersome characterization of the implied duty, it will be referred to hereafter as the "duty to respect dignity".

Having established the theoretical argument for the duty to respect dignity, Part III of the paper argues that this duty is already effectively enforced at every stage of the employment relationship. In particular, Part III.A explores the way in which the duty to respect dignity is reflected at the threshold to the employment relationship, through the tests for employee status. Part III.B then examines the practical enforcement of the duty through the course of the employment relationship under the doctrine of constructive dismissal. Lastly, in Part III.C it is argued that the duty is already effectively policed upon the termination of the employment relationship, by way of damages for the manner of dismissal, and even subsequent to the employment relationship, through the reasonableness requirement for the duty to mitigate. Consequently, the recognition of the duty to respect dignity would not represent more than a small step beyond the existing jurisprudence, and the aforementioned doctrines would ensure that employers are only exposed to certain and justifiable liability. Moreover, acknowledging the duty's existence would serve to add coherence to the existing case law and strength to established employee protections.

Through the duty to respect dignity, then, it is hoped that employees will be given an added measure of defence against that “most terrible punishment” to which Dostoyevsky referred.

## **II. THE DUTY TO RESPECT DIGNITY IN THEORY**

### **A. EMPLOYMENT LAW UNDERSTOOD PURPOSIVELY: PROTECTING VULNERABLE WORKERS**

To understand the theoretical argument for an implied duty to respect dignity, it is necessary to examine the fundamental objectives of employment law, because it is within one of these objectives that the justification for the duty resides. Specifically, the judiciary and academics

alike have been clear that employment law in Canada is to be understood purposively. And at its heart, one of the main purposes of employment law is to provide employees, who are perceived to be vulnerable in relation to their employers, with some degree of protection against abuses of that vulnerability.

This problem begins with the contractual foundations of employment law itself. Contract law has historically been the basic legal mechanism through which the employment relationship has been regulated,<sup>4</sup> but it is also a mechanism that has had difficulty accounting for the unique nature of the employment relationship. In its most simple terms, contract law is essentially about enforcing agreements made between free individuals. Where two parties enter into a contract, they are effectively exchanging promises and those promises will be enforceable if they are part of a bargain.<sup>5</sup> In such a case, the courts will make every effort to understand the precise nature of the promises exchanged and to ensure that they are fulfilled.<sup>6</sup> Where the agreement is reached freely and through a fair process of negotiation, justice would seem to demand that each party get no more or less than what he or she bargained for. Contract law seeks to deliver this outcome.

This framework makes sense in the general commercial context, but because contractual doctrines are only able to give effect to the terms of the actual agreement, they create significant difficulties in the employment law context. Contract law is predicated upon the notion that most agreements are reached through equality of bargaining power, something that rarely exists in employment relationships. Most employees are in a position of weakness relative to their

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<sup>4</sup> Innis Christie, *Employment Law in Canada*, looseleaf, 4<sup>th</sup> ed. by Geoffrey England, Roderick Wood & Peter Barnacle (Markham: LexisNexis, 2005) at paragraph 1.3.

<sup>5</sup> John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 1.

<sup>6</sup> *Ibid.* at 705.

employers, and so their ability to secure an agreement that fully protects their interests is limited.<sup>7</sup> As was stated by Katherine Swinton, in an excerpt adopted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*:<sup>8</sup>

[T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.<sup>9</sup>

Accordingly, one of the primary goals of employment law is to understand the ways in which employees are vulnerable, and to attempt to alleviate the negative effects of that vulnerability.<sup>10</sup>

Davies and Freeland, in an excerpt cited with clear approval by Chief Justice Dickson in *Slaight Communications Inc. v. Davidson*,<sup>11</sup> assert that:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. [...] The main object of labour law has always been, and we venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.<sup>12</sup>

More recently, in *Evans v. Teamsters, Local 31*,<sup>13</sup> Justice Abella in dissent strongly reaffirmed the importance of protecting vulnerable employees, an objective underlying the common law of employment. Justice Abella referenced cases such as *Machtinger* and *Wallace v. United Grain*

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<sup>7</sup> See, for example, Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002) 52 U.T.L.J. 357 at 359.

<sup>8</sup> (1992), 40 C.C.E.L. 1, 91 D.L.R. (4<sup>th</sup>) 491, [1992] 1 S.C.R. 986 [*Machtinger*].

<sup>9</sup> Katherine Swinton, “Contract Law and the Employment Relationship: The Proper Forum for Reform” in Barry J. Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 357 at 363. Cited in *Machtinger*, *ibid.* at paragraph 31.

<sup>10</sup> Christie, *supra* note 4 at paragraph 1.3.

<sup>11</sup> (1989), 26 C.C.E.L. 85, 59 D.L.R. (4<sup>th</sup>) 416, [1989] 1 S.C.R. 1038 [*Slaight*].

<sup>12</sup> P. Davies & M. Freeland, *Kahn-Freund: Labour and the Law*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1983) at 18. Cited in *Slaight*, *supra* note 11 at paragraph 16.

<sup>13</sup> (2008), 65 C.C.E.L. (3d) 1, 292 D.L.R. (4<sup>th</sup>) 577, [2008] 1 S.C.R. 661 [*Evans*].

*Growers Ltd.*,<sup>14</sup> and found that “[t]his Court has recognized employment contracts as a unique subset of contracts marked by an inherent imbalance of bargaining power, making the wholesale, uncritical acceptance of principles from contract law inappropriate.”<sup>15</sup>

It is clear, then, that both academics and the Supreme Court of Canada strongly believe, not only that there is some intrinsic vulnerability attributable to employees, but also that it is an essential function of employment law to attempt to remedy that vulnerability. In order to understand what protections are justifiable in the context of this purposive approach, however, it is essential to first understand the precise character of employee vulnerability: one cannot decide on a cure before understanding the disease. When the true nature of employee vulnerability is understood, it is argued that the theoretical rationale for imposing an implied duty to respect dignity will become apparent.

## **B. THE JUSTIFICATION FOR THE DUTY TO RESPECT DIGNITY: POWER AND DEPENDENCE**

In the jurisprudence and commentary discussed above, the focus with regard to employee vulnerability was centered primarily on the employee’s inequality of bargaining power. Thus, for example, in the excerpt from *Kahn-Freund: Labour and the Law*, Davies and Freeland discuss the need to “counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”<sup>16</sup> Similarly, in *Machtiger*, Justice Iacobucci identified the employee’s “unequal bargaining position”<sup>17</sup> as the harm which needs to be remedied by employment law. As a result, it may be tempting to see this aspect of the employment relationship as the basic justification for all of the protections that employees

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<sup>14</sup> (1997), 36 C.C.E.L. (2d) 1, 152 D.L.R. (4<sup>th</sup>) 1, [1997] 3 S.C.R. 701 [Wallace].

<sup>15</sup> *Evans*, *supra* note 13 at paragraph 93.

<sup>16</sup> Davies & Freeland, *supra* note 12 at 18.

<sup>17</sup> *Machtiger*, *supra* note 8 at paragraph 31.

receive. To do so, however, would be to greatly oversimplify the complex nature of employee vulnerability.

Consider the following hypothetical: one can imagine an independent contractor, perhaps an electrician, who does not have much work and so is desperate to obtain and maintain a contract with a large construction company. Her desperation obviously puts her in a position of vulnerability in terms of bargaining inequality. It is likely that the construction company could insist upon onerous terms in the electrician's contract, terms that would benefit the construction company by substantially limiting the electrician's rights. Notwithstanding the electrician's vulnerability in this context, however, if a court determined that she is in fact an independent contractor, she would be deprived of many of the rights and protections that are afforded to employees.

There must, then, be more to the employment relationship. The added protections that employees receive must be justified by something more than just bargaining inequality. It is asserted that one essential aspect of an employee's vulnerability, an aspect that ultimately justifies the duty to respect dignity, is the product of the interplay between the employer's control right and the employee's social and psychological dependence on work.

## **1. The Employee's Social and Psychological Dependence on Work**

### (i) Origins: Recognizing Dependence in *Alberta Reference*

The notion that employees have an interest in their work beyond mere remuneration is a very familiar concept in the jurisprudence. One of the most significant and oft-quoted assertions of

this principle was made by Chief Justice Dickson in *Reference re Public Service Employee Relations Act (Alberta)*:<sup>18</sup>

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. *Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.*<sup>19</sup>

There are two important points built into this statement. To begin with, the Chief Justice recognizes the worker's dignity-based interest in her work, making the worker highly dependent on the work, not just for remuneration, but also for psychological and emotional well-being. Secondly, the Chief Justice significantly recognizes that this dependence does not just relate to the fact of having work, but also to the very “conditions in which a person works.” Thus, the manner in which a person works is incredibly important to her sense of dignity and identity. While the Chief Justice’s remarks were in dissent in *Alberta Reference*, they have been cited with approval in subsequent Supreme Court cases.<sup>20</sup>

#### (ii) Subsequent Academic and Judicial Recognitions of the Employee’s Dignity-Based Interest in Work

In the time since *Alberta Reference*, both academics and the judiciary have come to view the employee’s dignity-based interest in work as a fundamental aspect of the employment relationship and one that must be addressed by the purposive approach to employment law. Judy Fudge has argued that:

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<sup>18</sup> (1987), 38 D.L.R. (4<sup>th</sup>) 161, [1987] 1 S.C.R. 313 [*Alberta Reference*].

<sup>19</sup> *Ibid.* at paragraph 95 (emphasis added).

<sup>20</sup> See, for example, *Slaight*, *supra* note 11 at paragraph 20; and *Machtinger*, *supra* note 8 at paragraph 30.

[C]oncepts of contract law must accommodate the distinctive object of the exchange in employment – the capacity of human beings to labour. In a liberal society, human beings are to be treated with dignity and respect. The employee is both the subject and the object of the employment contract, with the result that the employment relationship helps to define an individual employee’s self-worth.<sup>21</sup>

This excerpt was cited with approval in *Evans* by Justice Abella in dissent.<sup>22</sup> Further, in that case Justice Abella described the “central role that work plays in the individual’s sense of identity” as a crucial element of the employee’s vulnerability, and so an essential justification for common law based protections.<sup>23</sup> Similarly, in *Wallace*, Justice Iacobucci quoted from *Alberta Reference*, ultimately concluding that “for most people, work is one of the defining features of their lives. Accordingly, any change in a person’s employment status is bound to have far-reaching repercussions.”<sup>24</sup>

Thus, decisions such as *Alberta Reference*, *Evans* and *Wallace* accept the general proposition that workers have an important dignity-based interest in the manner in which they work. Guy Davidov, a leading academic on the nature of the employment relationship, has reached a similar conclusion, arguing that “the need for protections is generated by the fact that workers are human beings, not commodities. Human labour power cannot be bought and sold without limitations, as if it were just another product.”<sup>25</sup> Davidov goes further though, providing an excellent summary of the empirical research that has been conducted on the specific ways in which a worker’s interest in her work goes beyond mere remuneration:

It is widely accepted that work is essential in imparting meaning to our lives. Work gives us opportunities for personal expression and creativity. It is a source of intellectual

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<sup>21</sup> Judy Fudge, “The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?” (2007) 32 *Queen’s L.J.* 529 at 530.

<sup>22</sup> *Evans*, *supra* note 13 a paragraph 93.

<sup>23</sup> *Ibid.* at paragraph 94.

<sup>24</sup> *Wallace*, *supra* note 14 at paragraph 94.

<sup>25</sup> Davidov, *supra* note 7 at 375.

progress and individual advancement. It shapes our personal identities, facilitating self-development and self-realization. It is a venue for individual contribution and self-esteem; it is part of our conception of human flourishing. It is a major framework for social interactions; indeed, many employed people spend more time interacting with colleagues at work than with friends or members of their families. Work provides opportunities to meet our basic need, as social beings, to belong. It influences one's social standing and is necessary to maintain a feeling of 'usefulness in the world.' It is an important aspect of being part of community, of feeling like a citizen, of feeling that your service is wanted and having an interest in being involved. It gives us structure that is necessary for using and enjoying our leisure time as well. With all this in mind, it is hardly surprising that, according to consistent evidence, most people would work even if it were not economically necessary.<sup>26</sup>

This excerpt is extremely useful in laying out the constituent elements of the dignity-based interest. Moreover, when one considers all of the functions that work performs in a person's life, as an outlet for creativity and expression, as a defining feature of self-identity, as a source of a sense of usefulness and desirability, as a site for a large portion of a person's social interactions, and as an indicator of a person's social standing, it becomes clear that the non-pecuniary aspects of work are in many ways the more significant.

Further, and in accordance with *Alberta Reference*, *Wallace* and *Evans*, Davidov's summary also reveals that the worker's non-pecuniary interests in work do not just relate to the simple fact of having a job, but also to the nature of the work performed. For example, a person's sense of identity is tied not just to having a job, but also to all of the elements associated with actually performing the job. People do not just feel useful and desirable because they have work, but also because of how they accomplish their work. Accordingly, a worker's dignity-based interest in her job, which Davidov refers to as the worker's social and psychological dependency, makes the worker highly vulnerable both to changes in the manner of work and to the loss of work itself. The corresponding need for protection is thus apparent.

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<sup>26</sup> *Ibid.* at 388 (footnotes omitted).

(iii) The Missing Link: Is Psychological and Social Dependence on Work Enough to Justify Added Employee-Based Protections?

It is not, however, clear that the above-noted form of vulnerability is exclusively tied to employees. Returning to the hypothetical discussed above, the electrician's work is likely to be just as important to her sense of self-worth and dignity as it would be to an employee. Thus, if the construction company were to cancel her contract, it is likely that the independent contractor would suffer shame, loss of identity and loss of social standing in much the same way as a terminated employee would. Notwithstanding this similarity, once again if a court determined that the electrician was in fact an independent contractor, she would not be entitled to the same protections that an employee would receive. There must be more, then, to an employee's psychological and social dependence, which justifies the added protections that she is entitled to.

Davidov recognizes this difficulty, acknowledging that the dignity-based interest that any employee has in her job "is true for any kind of work, not only wage work. It is true for the plumber working as an independent contractor and, to some extent, for the homemaker working without pay at home."<sup>27</sup> Davidov's response is that employees "rely on [their] relationship with a specific employer for the fulfilment of [their social and psychological] needs. Independent contractors, on the other hand, generally do not depend on their relationship with any specific client for those purposes."<sup>28</sup> The problem with this argument is that there are certainly independent contractors who, though they are clearly engaged in their own businesses, perform a large portion of their work for one client. In such a case, Davidov's explanation has a hard time differentiating between the dignity-based interest of the employee and that of the independent contractor. Further, characterizing that interest as a free-standing justification for added

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<sup>27</sup> Davidov, *supra* note 7 at 388.

<sup>28</sup> *Ibid.* at 389.

employee protections obscures the way in which this specific form of employee vulnerability interacts with another: the employer's right of control. When the two are understood together, the principled justification for the duty to respect dignity becomes apparent.

## **2. The Employer's Right of Control**

### **(i) The Right of Control in General**

One fundamental feature of the employment relationship, a feature which differentiates it from the context of the independent contractor, is the employer's right of control. In order to operate a business, the employer generally needs a secure and reliable source of labour that is adaptable. Christie puts this point very clearly when he states that "given the employer's need for flexibility in deploying its labour force in the dynamic economic and technological environment of the workplace, the primary 'consideration' for which the employer bargains is the right to command, the power to direct the worker to suit the changing needs of the labour process."<sup>29</sup> Thus, with an independent contractor, the client is generally interested in obtaining a work product. In the employment context, however, the employer is interested in securing the employee's very capacity to work. By purchasing labour power, not just the product of that power, the employer is effectively purchasing a control right. Accordingly, and subject to the limitations discussed below, the employer can choose how to utilize the work capacity that it has purchased. Usually, the employer can even choose to waste that capacity as there is no general duty to actually

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<sup>29</sup> Christie, *supra* note 4 at paragraph 2.15.

provide work.<sup>30</sup> This control right is an essential element of the employment relationship, and it is one that creates a tremendous power imbalance between the employer and the employee.

Again, this understanding of the employment relationship is familiar in the jurisprudence and academic writing. In the excerpt from *Kahn-Freund: Labour and the Law* cited in *Slaight* and discussed above, Davies and Freeland assert that “the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.”<sup>31</sup> The notion that it is essential to the employment relationship that the employer occupies a position of control and power over the employee is echoed in *Cabiakman c. Industrielle Alliance*.<sup>32</sup> Though decided in the civil context, Justices LeBel and Fish discussed the contract of employment in general terms, asserting that

The legal subordination of the employee to the employer is the most important characteristic of an agreement where an attempt is made to characterize the agreement as a contract of employment and to distinguish it from other onerous contracts. The creation of the relationship of subordination also implies acceptance by the employee of the employer's power of direction and control.<sup>33</sup>

Similar conclusions have been reached by academics. Davidov argues that control, understood broadly, is the central concept in the organization of employment relationships: it points “generally to the superior power of the employer *vis-à-vis* the employee within their relationship

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<sup>30</sup> *Ibid.* at paragraph 10.57. See also *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653 (Eng. C.A.); and *Cabiakman c. Industrielle Alliance* (2004), 36 C.C.E.L. (3d) 30, 242 D.L.R. (4<sup>th</sup>) 1, [2004] 3 S.C.R. 195 [*Cabiakman*], where the S.C.C. affirmed the right of the employer to suspend the employee for a reasonable period with pay. See also *Carscallen v. FRI Corp.* (2005), 42 C.C.E.L. (3d) 196 (Ont. S.C.J.) [*Carscallen – S.C.J.*], *aff'd* (2006), 52 C.C.E.L. (3d) 161 (Ont. C.A.) [*Carscallen – C.A.*].

<sup>31</sup> Davies & Freeland, *supra* note 12 at 18, cited in *Slaight*, *supra* note 11 at paragraph 16.

<sup>32</sup> *Cabiakman*, *supra* note 30.

<sup>33</sup> *Ibid.* at paragraph 28.

and the resulting inability of the employee to control her own (working) life.”<sup>34</sup> Further, as noted above, Fudge asserts that employees are "both the subject and the object of the employment contract" because of the "distinctive object of the exchange in employment – the capacity of human beings to labour.”<sup>35</sup> By virtue of the employer’s power over the business, then, a power essential to the organization and function of the business, the employer has the capacity to control the employee’s labour output. As a consequence, the conditions of the employee’s working life are subject to the direction of the employer, and so the employee is in this very real sense subordinate and vulnerable.

#### (ii) Reinforcing the Right of Control: The Duties of Fidelity and Obedience

This form of employee vulnerability is reinforced by an implied right that is granted to employers. Fudge asserts that “it is an essential institutional feature of employment that the employer has a unilateral and residual right of control and the employee has an open-ended duty of obedience.”<sup>36</sup> In reality, though, there are actually two different aspects to the employee’s obligation, both of which secure the employer’s right of control. Firstly, the common law imposes a more general duty of fidelity upon employees, which requires them to act in good faith and reasonably in furthering the interests of the employer.<sup>37</sup> Secondly, courts will also read a more specific implied duty of obedience into employment contracts, requiring the employee to

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<sup>34</sup> Davidov, *supra* note 7 at 381.

<sup>35</sup> Fudge, *supra* note 21 at 530.

<sup>36</sup> *Ibid.*

<sup>37</sup> Geoffrey England, “Recent Developments in the Law of the Employment Contract: Continuing Tension between the Rights Paradigm and the Efficiency Paradigm” (Spring 1995) 20 Queen’s L.J. 557 [England, “Rights and Efficiency”] at 564.

obey all lawful and reasonable orders of the employer that are within the scope of the employment contract.<sup>38</sup>

Justifications of these duties are generally based on efficiency. As Christie points out, no single contract could ever address all of the future modifications to the working circumstances that are needed to respond to the ever-changing conditions of the average business.<sup>39</sup> If an employer were expected to re-negotiate each employee's contract, with fresh consideration, every time an unforeseen event arose, the transaction costs would be crippling and the business would grind to a halt.<sup>40</sup> To rectify this problem, the primacy of the employer's interests is ensured by the duty of fidelity, and the employer is given some flexibility in managing the business because the employee is required to obey the employer's reasonable orders as long as they are within the general scope of the employment agreement.

### (iii) Employee Subordination: The Price of Fidelity and Obedience

Though these duties are aimed at increasing efficiency within the workplace, they carry a heavy cost for employees. On a general level, the duties together represent a significant stick in the employer's hand because a breach of either may constitute just cause for dismissal, disentitling the employee to reasonable notice of termination.<sup>41</sup> As a result, the employee is highly vulnerable to exercises of the employer's control right, and risks losing her job without compensation if she challenges the employer's power within the employment relationship.

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<sup>38</sup> Christie, *supra* note 4 at paragraph 11.74. For a strong articulation of the duty of obedience, see *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181, 41 C.C.E.L. 213 (C.A.) [*Stein*] at paragraph 21.

<sup>39</sup> Christie, *ibid.* at paragraph 1.10.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at paragraph 11.74.

Moreover, the severity of the duty of fidelity is evidenced by the fact that its breach can justify dismissal with cause even when the employer suffers no loss.<sup>42</sup> Thus, in *Connolly v. Genera Motors of Canada Ltd.*,<sup>43</sup> when the employee accepted a loan from the employer's supplier, because it violated the employer's conflict of interest policy it was found to constitute cause for dismissal notwithstanding that there was "not proof that the conflict resulted in the conferral of any benefit on [the supplier] or in a quantifiable loss to [the employer]."<sup>44</sup>

Additionally, the implied duty of fidelity and the implied duty of obedience represent onerous obligations upon the employee because the employee has little ability to protect herself against their effects. Christie notes that because the vast majority of employees have "considerably less bargaining power than their employers, the terms of the employment are frequently offered on a 'take it or leave it' basis" and so the standard implied terms represent the norm for most employees.<sup>45</sup> Further, because the employer's control right, and the two duties that enforce it, are deemed to be fundamental to the employment relationship, if an employee was able to negotiate herself out of the duties, she might find that she had also bargained herself out of her employee status and the employee protections that come with that status.

For these reasons, while the employer's control right, and the implied duties of fidelity and obedience that underlie it, are geared towards improving efficiency within the workplace, they come at a significant cost for employees. The subordination of the employee puts her in a position of considerable weakness. When this control-based susceptibility is combined with the

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<sup>42</sup> England, "Rights and Efficiency", *supra* note 37 at 565.

<sup>43</sup> (1993), 50 C.C.E.L. 247 (Ont. Gen. Div.) [*Connolly*].

<sup>44</sup> *Ibid.* at paragraph 20. Citing *Marks v. Addison On Bay Ltd.* (1991), 38 C.C.E.L. 291 (Ont. Gen. Div.); *Duguay v. Maritime Welding & Rentals Ltd.* (1989), 28 C.C.E.L. 126 (N.B. Q.B.); and *Laverty v. Cooper Plating Inc.* (1987), 17 C.C.E.L. 44 (Ont. Dist. Ct.). See also *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429.

<sup>45</sup> Christie, *supra* note 4 at paragraph 1.16.

employee's dignity-based interest in work, the full nature of the employee's vulnerability becomes clear.

### **3. Social Dependence, Psychological Dependence and Employer Control: The Theoretical Argument for an Implied Duty to Respect Dignity**

Davidov sees the employee's psychological and social dependence on work and the employer's control right as two separate and fundamental aspects of the employment relationship, each of which justifies employee protections by itself.<sup>46</sup> While it may be true that each aspect constitutes a free-standing justification for protection, by treating them separately it is difficult to see the way in which they interact to truly undermine the employee's dignity-based interest in work. In fact, these two elements of the employment relationship work together to the employee's detriment in a very unique way, and as a result, they justify a very particular form of protection.

As discussed above, employees are socially and psychologically dependent on work such that an employee's personal dignity, self-esteem and sense of identity are tied up with her working life. While this form of employee vulnerability may more or less apply to other types of workers, remember that *Alberta Reference*, *Wallace* and the empirical evidence summarized by Davidov all support the view that this dignity-based interest applies not just to the fact of having work, but also on the day-to-day circumstances in which that work is performed. As such, it is of crucial significance that through its right of control, the employer has an immense power to affect those day-to-day circumstances. Cases like *Slaight*, *Cabiakman* and *Stein* all show that the employer's control right, and the corresponding duties imposed upon employees, place the employee in a position of subordination where the employer can largely control the manner and conditions in which the employee performs her work. The employer therefore has a tremendous capacity to

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<sup>46</sup> Davidov, *supra* note 7 at 387 and 389.

affect the dignity, self-esteem and sense of identity of the employee, and this capacity is open to abuse. As such, the employee is uniquely vulnerable within the employment relationship.

Because this form of vulnerability results from the interaction between the employer's control right and the employee's dignity-based interest in work, it is particular to the employee and helps to distinguish the employment relationship from other forms of work. For example, without the duty of fidelity, the independent contractor is not required to subordinate her interests to those of the client. Without the duty of obedience, the independent contractor is not subject to the same control in relation to day-to-day working conditions. Accordingly, the independent contractor's dignity-based interest in work is less subject to abuse. As a result, the employer's control right and the employee's social and psychological dependence on the circumstances of work interact to impose a unique form of vulnerability upon the employee, one that justifies a particular form of protection.

If employment law is truly concerned with remedying the unique susceptibilities of employees, it is crucial to determine the form of protection that best cuts to the heart of those vulnerabilities. In this context, we are concerned about the harm that can be caused to the employee's dignity, personal autonomy and self-esteem by virtue of the employer's control over the manner and conditions in which the employee performs her work. The simplest and most effective solution would be for the common law to impose a general duty upon the employer to respect the dignity, self-esteem and autonomy of the employee when exercising its control right, or a duty to respect dignity in short. In this way, the protection provided to employees by the common law would directly correspond to the unique nature of the employee's vulnerability.

One crucial aspect to note about the duty to respect dignity is that it has a built in harmonization mechanism. The theoretical justification for the duty is predicated in part on the existence of the employer's control right, which, as discussed above, is itself justified in terms of efficiency. If the duty to respect dignity is over-enforced to the point where the employer is no longer able to effectively manage the business in the interests of efficiency, the very existence of the control right is undermined and accordingly, so too is the justification for the duty to respect dignity. Put another way, there are very good efficiency reasons for maintaining the employer's right of control over the business, and the duty to respect dignity, which derives its justificatory rationale from the very existence of that right, simply seeks to place rational limits on exercises of the control right so as to protect employees from its most harmful effects. As such, implicit in the duty to respect dignity is the notion that it must be harmonized with the employer's efficiency-based right of control.

#### **4. The Nature of the Duty to Respect Dignity**

##### **(i) An Implied Term of the Contract of Employment**

If a duty to respect dignity should be imposed upon employers, it is argued that the most principled and effective means of doing so would be to treat it as an implied term of the contract of employment. Christie notes that there are two primary ways in which terms are implied into contracts: as a matter of *fact*, reflecting the unstated intentions of the parties and as a matter of *law*, reflecting the judge's view on proper public policy.<sup>47</sup> The latter method conflicts with the strict doctrine of contractual freedom, and so courts do not often acknowledge that they are

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<sup>47</sup> Christie, *supra* note 4 at paragraph 10.12.

implying terms as a matter of law,<sup>48</sup> but Christie argues that “the two methods generally tend to blur into each other and the process of implying terms, whatever doctrinal nomenclature is used, is heavily influenced by judicial policy making.”<sup>49</sup> Specifically, the traditional legal test for determining factual intent is whether the implied term would give “business efficacy” to the contract,<sup>50</sup> and Christie argues that this leaves considerable room for judicial policy choices.<sup>51</sup>

In the context of employment law in particular, courts have shown a clear willingness to imply terms into the contract of employment based on policy grounds. This practice is evidenced by the duties of fidelity and obedience. Both duties support the employer’s control right within the workplace, and as noted above, they are justified by reference to the perceived benefits of flexible and efficient businesses. By providing the employer with clear legal rights designed to secure those benefits, which it did not expressly bargain for, the practice of implying the duties of fidelity and obedience into all employment contracts serves a clear policy function.

Analogously, just as the duties of fidelity and obedience have been determined to be necessary to the proper functioning of the employment relationship, so too should the duty to respect dignity. Cases like *Alberta Reference* and *Wallace*, by advocating the need to protect employees against the exploitation of their psychological and social dependence on work, acknowledge that, in addition to efficiency, our society values respect for the employee’s dignity, self-esteem and sense of identity. The duty to respect dignity ensures that these values are attained within the workplace. Further, because the duty to respect dignity balances out the potential for abuse inherent in the duties of obedience and fidelity, implying the former into the contract creates

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<sup>48</sup> *Ibid.* at paragraph 10.15.

<sup>49</sup> *Ibid.* at paragraph 10.16.

<sup>50</sup> See, for example, *Carscallen – S.C.J.*, *supra* note 30 at paragraph 49; and *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.

<sup>51</sup> Christie, *supra* note 4 at paragraph 11.53.

symmetry within the employment relationship, and harmonizes the competing objectives of efficiency and employee-protection. It is thus argued that the duty to respect dignity should be an implied term in every contract of employment in order carry out what the Supreme Court of Canada views as an essential public policy objective of modern employment law.

(ii) Above the Contract: The Duty to Respect Dignity is Not Trumped by Express Terms

Still, even if the duty to respect dignity is implied into all employment contracts, it should be noted that contract law is clear that such implied terms must in general yield to a conflicting express term.<sup>52</sup> As such, it could be argued that the duty to respect dignity will afford employees with little protection if employers can simply contract out of it. For two reasons, this argument is rejected.

To begin with a practical point, in the employment law context the courts have been clear that express terms that strip away employee protections, such as the implied term of reasonable notice, must be unequivocal and explicit.<sup>53</sup> Thus, in order for the employer to have any chance of contracting out of duty to respect dignity, the contract of employment would have to clearly state that the employer has the right to violate the employee's personal dignity and autonomy. While employees do not generally have much bargaining power, it is very unlikely that employers would actually attempt to include such terms, or that employees would actually agree to them.

More importantly, however, the duty to respect dignity is a remedial response to a very unique form of vulnerability. In cases like *Alberta Reference*, *Wallace*, *Slaight*, *Cabiakman* and *Stein*,

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<sup>52</sup> *Ibid.* at paragraph 10.17.

<sup>53</sup> See, for example, *Ceccol v. Ontario Gymnastic* (2001), 55 O.R. (3d) 614 (Ont. C.A.) [*Ceccol*].

the courts have unambiguously stated the public policy interest in protecting employees from such dangers. Accordingly, the duty to respect dignity should be viewed as an essential aspect of the employment contract, one that is necessary to the achievement of a proper balance between efficiency and rights-protection. As England argues, where an implied term is deemed essential to protect the employee's fundamental human right to personal dignity and autonomy in the workplace, it could be given a special status akin to a ground of discrimination in human rights legislation that prevents it from being overridden by even express terms of the contract.<sup>54</sup>

Finally, while this may seem to be a significant move away from strict contractual principles, the common law has traditionally been willing to void express contractual provisions that conflict with public policy.<sup>55</sup> As discussed above, the duty to respect dignity, which provides principled and remedial protection to employees, is the manifestation of clear public policy in practice. It would not seem so radical for the courts to prevent employers from trumping that established policy, especially given the relative weakness of employees within the bargaining process.

### **C. BREAKING NEW GROUND: WHY THE DUTY TO RESPECT DIGNITY IS NOT JUST A RECYCLED VERSION OF THE DUTIES OF GOOD FAITH AND FAIRNESS**

#### **1. The Duty to Respect Dignity and Efficiency: Avoiding the Concerns in *Wallace***

One theoretical attack that could be made against the duty to respect dignity is that it is just another way of describing a more traditional duty of good faith or fairness. Because it has been argued by some academics that these latter duties were definitively rejected by the reasoning in

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<sup>54</sup> Geoffrey England, "Recent Developments in Individual Employment Law: Tell Me the Old, Old Story" (2002) 9 Can. Lab. & Emp. L.J. (Hardcover) 43 [England, "Old Story"] at 49 through 50.

<sup>55</sup> *Ibid.* at 50. See, for example, *Deckert v. Prudential Insurance Co. of America*, [1943] 3 D.L.R. 747 (Ont. C.A.); and *Fuller v. Stoltze*, [1938] 1 D.L.R. 635 (Sask. C.A.), *aff'd* (1938), [1939] S.C.R. 235.

*Wallace*,<sup>56</sup> it might be thought that the former duty should be similarly discarded. A closer reading of *Wallace*, however, reveals that the concerns addressed in that case do not apply to the duty to respect dignity.

Specifically, Justice Iacobucci did not expressly reject the duties of good faith or fairness in *Wallace*; instead he rejected the plaintiff's argument that "the Court should imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons."<sup>57</sup> In doing so, Justice Iacobucci was refusing to recognize a contractual action for "bad faith discharge", and his reasoning was based on the view that such an action would have an extremely detrimental impact on workplace efficiency.

The duty to respect dignity, however, creates no such difficulty. As discussed earlier, because the duty to respect dignity is only designed to limit abuses of the employer's control right, it does not seek to undermine that right as a whole. Instead, the dignity-based justification for the duty is to be harmonized with the efficiency rationale underpinning the control right. Requiring cause or legitimate business reasons for dismissal would shift the balance too far in favour of employee protection, substantially interfering with the efficiency of business. The duty to respect dignity, then, implies no such requirement and so is not inconsistent with the reasoning in *Wallace*.

## **2. Over-Breadth and the Duties of Good Faith and Fairness**

Returning to a point made earlier, if *Wallace* did not expressly reject the duties of good faith and fairness, why then have some academics interpreted it to have done so implicitly? If those duties can in fact be reconciled with the reasoning in *Wallace*, it might still be argued that the duty to

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<sup>56</sup> See England, "Old Story", *ibid.* at 51; and Fudge, *supra* note 21 at 549.

<sup>57</sup> *Wallace*, *supra* note 14 at paragraph 75.

respect dignity is nothing more than a rehashed duty of good faith or fairness. As will be seen, however, prominent articulations of these duties are susceptible to the argument that they are overly-broad: in seeking to protect employees from abuses of the employer's control right, they impose onerous requirements that substantially impair the employer's ability to operate flexibly and efficiently. Accordingly, they can be seen to stand in opposition to Justice Iacobucci's reasoning in *Wallace*, which, in line with the duty to respect dignity, sought to harmonize employee protections with efficiency considerations. In contrast to the duties of good faith and fairness, then, the duty to respect dignity represents a unique and novel remedial mechanism, and one that does not suffer the fatal flaw of over-breadth.

#### (i) Good Faith and the Requirement of "Just Cause"

In the early 1990s, in response to *Vorvis v. Insurance Company of British Columbia*,<sup>58</sup> two articles in particular opened the door to arguments for a duty of good faith.<sup>59</sup> In a highly influential paper, very much in line with what Davidov would later write, David Beatty stressed that employment provides the "means to dignity and self-respect", it provides the employee with "a positive standing in his community", it provides "a sense of belonging" and it provides "a vehicle for self-expression and determination."<sup>60</sup> Building on Beatty's work, Katherine Swinton similarly argued that a person's labour is "in many cases the central component of an individual's identity structure."<sup>61</sup>

None of this conflicts with the justificatory rationale for the duty to respect dignity. Where the two do diverge, however, is with respect to the scope of the duty. Beatty argued that greater

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<sup>58</sup> [1989] 1 S.C.R. 1085 [*Vorvis*].

<sup>59</sup> Fudge, *supra* note 21 at 534 through 535 and 547.

<sup>60</sup> David Beatty, "Labour is Not a Commodity" in Barry J. Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 313 at 324 through 325.

<sup>61</sup> Swinton, *supra* note 9 at 359.

effect would be given to the personal aspect of employment “if an employer were not permitted to unilaterally terminate the employment relationship unless it had just cause to do so, or in the event of a redundancy, unless the employee were placed in another comparable employment relationship.”<sup>62</sup> Likewise, Swinton asserted that it was time for courts to read in “an implied term of ‘termination only for just cause.’”<sup>63</sup> While such an obligation recognizes the particular character of the employment relationship in terms of the need to protect against abuses of the psychological and social dependence of the employee, it fails to reconcile itself with another fundamental aspect of the employment relationship: the employer’s need to have control over the business in order to operate it efficiently. This overly broad protection for employees is precisely the danger that Justice Iacobucci was concerned about preventing in *Wallace*. Insofar as the duty to respect dignity recognizes the importance of the employer’s right to terminate at will, it does not face the same criticism and so represents a significantly different, and more carefully tailored, form of employee protection.

#### (ii) The Duty of Fairness

England has argued that the duty of fairness should include an obligation on the employer to provide procedural fairness and a substantive requirement of proportionality.<sup>64</sup> England asserts that such a duty would “establish symmetry with similar implied duties in other contexts: *e.g.* the duty on employees to act reasonably in the best interest of their employer.”<sup>65</sup> The duties of fidelity and obedience, however, create a very specific form of employee vulnerability: the employer’s control right gives it an added capacity to affect and abuse the employee’s dignity-

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<sup>62</sup> Beatty, *supra* note 60 at 355.

<sup>63</sup> Swinton, *supra* note 9 at 374.

<sup>64</sup> England, “Rights and Efficiency”, *supra* note 37 at 585.

<sup>65</sup> *Ibid.* at 586.

based interest in the circumstances of her work. The protection that responds to this vulnerability should specifically address the danger created by the duties of fidelity and obedience in a targeted and well-tailored manner. It is not clear that the duty of fairness actually accomplishes this objective.

There are likely many instances within the employment relationship where the employer acts in a way that is not procedurally fair or proportional, but which do not rise to the level of affecting the employee's dignity-based interest in her work. For example, imagine that an employer grants one employee's request for a new stapler, but turns down another employee's similar request with no reasons and with no opportunity for the second employee to justify her request. In such a case, there clearly seems to have been a violation of procedural fairness, but it would be hard to argue, without more abuse on the employer's part, that being forced to use a slightly older stapler impinges on one's dignity and self-esteem in any significant way. England himself recognizes this problem in acknowledging both that a substantive proportionality requirement could easily stray too far into the domain of the employer's expertise in making business decisions<sup>66</sup> and that a procedural fairness requirement could open up a potentially huge range of management decision-making to review, substantially impairing the employer's efficiency.<sup>67</sup>

For this reason, the traditional view is that there is no independent implied duty of fairness,<sup>68</sup> a view that is reinforced by the desire in *Wallace* to reject employee protections that significantly damage the employer's efficiency. Once again, however, the duty to respect dignity, with its internal mechanism for reconciling employee protection with the employer's right of control, does not face these problems. In this sense, it is a well-tailored and entirely different remedial

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<sup>66</sup> England, "Old Story", *supra* note 54 at 58.

<sup>67</sup> *Ibid.* at 59. See also Christie, *supra* note 4 at paragraph 13.64.

<sup>68</sup> England, "Rights and Efficiency", *supra* note 37 at 585.

measure, which has the capacity to avoid the criticisms of over-breadth that attach to the duties of good faith and fairness.

#### **D. ECONOMIC DEPENDENCE: A SIDE-NOTE**

Before proceeding on to consider the practical implications of the duty to respect dignity, a brief side note should be made. As has already been seen, the primary focus of this paper is on the way in which the employer's control right interacts with the employee's dignity-based interest in the manner of work to create a unique form of employee vulnerability, one that justifies the imposition of a duty to respect dignity. This is not, however, the only aspect of the employment relationship that creates employee vulnerability and that justifies protection. Davidov points out that the "employment relationship is characterized by the employee having to take the risks of the relationship itself, thus relying and depending on it, while independent contractors spread their risks in the market."<sup>69</sup> In effect, by entering the employment relationship, the employee places all its eggs in one basket, while independent contractors generally "*self-insure* themselves, to some extent, by *spreading* their risks. Employees, on the other hand, find themselves in a position of *inability* to spread their risks."<sup>70</sup> For these reasons, an employee is generally financially dependent upon the employer in a way that an independent contractor is not. As a consequence, this fundamental aspect of the employment relationship creates vulnerability for the employee, and the purposive approach to employment law would thus require some form of remedial action.

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<sup>69</sup> Davidov, *supra* note 7 at 389.

<sup>70</sup> *Ibid.* at 393 (emphasis in original).

This form of employee dependence is, again, not central to the paper, and it is not a direct justificatory basis for the duty to respect dignity. It does, however, drive other forms of employee protection that arise in the context of this paper, and so it is important to understand.

### **III. THE DUTY TO RESPECT DIGNITY IN PRACTICE**

Returning to the primary focus of this paper, assuming that the theoretical argument for the duty to respect dignity is accepted, it still may be open to criticism on the basis that it would be a radical departure from the present practice under the common law of employment. The case for the duty to respect dignity, however, does not simply rest on a theoretical foundation. As will be seen, throughout the full course of the employment relationship courts will enforce what is effectively a duty to respect dignity, though they will not often explicitly articulate that they are doing so. Specifically, dignity-based protection for employees is provided during each of the three phases of the employment relationship: first, during the threshold phase, when courts must determine whether an employment relationship even exists; secondly, throughout the course of the actual relationship; and third, upon termination of the relationship and thereafter.

As a consequence, the potential dangers of expressly recognizing a duty to respect dignity are significantly reduced. As discussed above, the duty is inherently limited by its harmonization function. However, the existing doctrines through which the duty is currently enforced in practice provide further guidance and boundaries for the application of the duty, ensuring that it will not result in an undefined area of employer liability. Likewise, by expressly articulating the fundamental principles upon which the existing doctrines are predicated, the duty to respect dignity will ensure that those doctrines continue to be applied in a principled manner. In this way, the theoretical argument for the duty to respect dignity and the doctrines through which it is

enforced in practice will exist in a symbiotic relationship, with each helping to inform and guide the other.

## **A. THE DUTY TO RESPECT DIGNITY AT THE THRESHOLD TO THE EMPLOYMENT RELATIONSHIP**

### **1. The Employee Status Tests: Highlighting the Specific Vulnerabilities Addressed by the Duty to Respect Dignity**

As discussed earlier, employment law should be understood as a purposive project, which tries to identify and remedy the specific vulnerabilities faced by employees. Because of this remedial approach, employees are entitled to many protections that other workers are not, and so “employee” status represents a gateway to these added safeguards. Accordingly, Christie asserts that:

The test for “employee” status, therefore, fixes the boundary between, on the one hand, the economic zone in which business entrepreneurs are expected to compete with only a modest safety net being provided by the state; and, on the other hand, the economic zone in which workers will be afforded the relatively substantial protections of the labour standards and other employment-related legislation and of the common law.<sup>71</sup>

As such, the distinction between employees and independent contractors draws a line between those workers who are entitled to substantial protections and those who are not.<sup>72</sup> In order to draw this line, the tests for employee status must be geared towards identifying those workers who have the specific forms of vulnerability that we identify with employees and that we deem deserving of protection. The criteria that the tests use, then, should be a practical indicator of

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<sup>71</sup> Christie, *supra* note 4 at paragraph 2.1.

<sup>72</sup> See also Judy Fudge, Eric Tucker & Leah F. Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 Can. Lab. & Emp. L.J. (Hardcover) 193 at 194; Brian A. Langille & Guy Davidov, “Beyond Employees and Independent Contractors: A View from Canada” (1999), 21 Comp. Lab. L. & Pol’y J. 7; and Davidov, *supra* note 7 at 359.

those types of susceptibilities. In particular, the employee status tests reveal that the courts are highly concerned with the impact that the employer's control right has upon employees.

(i) Early Employee Status Tests: Economic Dependence and Employer Control

Fudge, Tucker and Vosko have noted that in the early 20<sup>th</sup> century, courts determined employee status based primarily on whether the employer had control over the manner in which the worker conducted her work.<sup>73</sup> Over time, as employees have become more specialized and so less susceptible to employer supervision relating to the way in which work is done, this control factor has come to emphasize the “where and when” of work rather than then the specific manner in which it is done.<sup>74</sup> Further, the number of tests has increased, broadening the scope of employee status and shifting the focus from a sole emphasis on control and subordination to include economic dependence as a basis for providing workers with employment law protections.<sup>75</sup>

Thus, for example, in *Doyle v. London Life Insurance Company*,<sup>76</sup> where a commission sales agent claimed he was an employee, a five-fold test for employee status was used. The test considered (1) whether the worker is limited exclusively to the service of the principal; (2) whether the worker is subject to the control of the principal, not only as to the product sold, but also as to the when, where and how it is sold; (3) ownership of tools; (4) chance of profit and risk of loss; and (5) whether the worker is part of the business organization of the principal.<sup>77</sup> Putting aside the fifth element for the moment, the importance of economic dependence is evidenced by

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<sup>73</sup> Fudge, Tucker & Vosko, *ibid.* at 199.

<sup>74</sup> Christie, *supra* note 4 at paragraph 2.15. Citing *Truong* (1997), 40 B.C.L.R. (3d) 208, 32 C.C.E.L. (2d) 291 (B.C. S.C.).

<sup>75</sup> Fudge, Tucker & Vosko, *supra* note 72 at 200.

<sup>76</sup> [1984] B.C.W.L.D. 1196 (B.C. S.C.) [*Doyle*], *aff'd* (1985), 68 B.C.L.R. 285, 23 D.L.R. (4<sup>th</sup>) 443 (B.C. C.A.), leave to appeal refused (1986), 64 N.R. 318n (S.C.C.). This test was applied in *Belton v. Liberty Insurance Co. of Canada* (2004), 34 C.C.E.L. (3d) 203, 72 O.R. (3d) 81 (C.A.) [*Belton*].

<sup>77</sup> *Doyle*, *ibid.* at paragraph 17.

the first, third and fourth elements, and the second element highlights the continued relevance of control. Specifically, courts must consider whether the employer's control over the worker is of such a degree that it enables the employer to determine "when, where and how" the worker engages in the primary function of her work. It is apparent that such control would give the employer a tremendous power to affect the worker's dignity-based interest in her work. Given that these criteria are used to determine whether workers are entitled to employee-based protections, it is clear that economic dependence and the potential abuse of the employer's control right are the primary areas of concern for the remedial project of employment law.

#### (ii) The Fifth Factor: A New Name for a Familiar Approach

The fifth element from *Doyle*, which has received increased attention from courts in recent years,<sup>78</sup> reinforces this conclusion. In *Braiden v. La-Z-boy Canada Ltd.*,<sup>79</sup> a wrongful dismissal action, Justice Gillese considered the five-fold approach from *Doyle* and *Belton v. Liberty Insurance Co. of Canada*,<sup>80</sup> and found that:

In many ways, the question posed at the end of the fifth principle – whose business is it? – lies at the heart of the matter. Was the individual carrying on business for him or herself or was the individual carrying on the business of the organization from which he or she was receiving compensation?<sup>81</sup>

Still, despite the apparent primacy of this fifth factor, it is merely a way of encapsulating the employee-specific vulnerabilities that the other factors point to. Specifically, the "whose business is it?" test again reflects a concern for the employee's economic dependence and the dangers inherent in the employer's control right.

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<sup>78</sup> See, for example, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 11 C.C.E.L. (3d) 1, 204 D.L.R. (4<sup>th</sup>) 542, [2001] 2 S.C.R. 983 [*Sagaz*].

<sup>79</sup> (2008), 294 D.L.R. (4<sup>th</sup>) 172, 238 O.A.C. 71 (Ont. C.A.) [*Braiden*] at paragraph 32.

<sup>80</sup> *Belton*, *supra* note 76.

<sup>81</sup> *Braiden*, *supra* note 79 at paragraph 34.

To begin with, when a worker becomes part of another person's business, she aligns herself economically with the interests of that business. As Justice Gillese noted, she receives a set amount of compensation and must support the business in order to continue receiving that compensation.<sup>82</sup> A worker who is carrying on business for herself, by contrast, is not so invested in the client's continued success because, in Davidov's words, such workers have the ability to "self-insure themselves, to some extent, by spreading their risks."<sup>83</sup> Thus, the fifth *Doyle* factor again points to the economic dependence of the employee as a justification for providing protection.

Further, by becoming part of another person's business, the worker must submit to that person's control and authority. Inherent in the notion of running one's own business is the idea that such a worker gets to make her own decisions about how to operate the business. The worker who is integrated into another person's business, however, is put in a position of subordination, where the employer is able to control the manner in which the work is performed. As has been noted, such control over the conditions of work puts the worker's dignity-based interest in the job in a position of considerable vulnerability. By encapsulating this form of employee susceptibility, the fifth *Doyle* factor also points to it as a justification for employee-based protections.

Accordingly, the tests for employee status reinforce in practice the theoretical notion that the employer's control over the manner of work and the employee's economic dependence are the two forms of vulnerability that employment law is most concerned with remedying. As Langille and Davidov put it, "both control/subordination and economic dependency are reasonably related

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<sup>82</sup> *Ibid.* at paragraph 35.

<sup>83</sup> Davidov, *supra* note 7 at 393 (emphasis in original).

to the basic purpose of identifying workers in need of certain forms of protection.”<sup>84</sup> As the employee’s economic dependence is not the primary focus of this paper, there is one crucial point to draw from this understanding of the employee status tests: they confirm that the employer’s ability to control the conditions of work creates a form of employee vulnerability that is fundamental to the employment relationship, and which justifies employee-based protections.<sup>85</sup>

## **2. Employee Status and Contracting Out: No Power without a Corresponding Responsibility**

It has long been held that the parties’ description of their relationship is not determinative of the worker’s status.<sup>86</sup> Accordingly, the parties cannot contract out of employee status by describing the worker as an independent contractor in the agreement that governs the relationship. The justification for this principle is obvious: if the parties’ description of the relationship was determinative, given that the employer generally has significantly more bargaining power, the vast majority of workers would be described as independent contractors, thereby stripping them of the protections afforded to employees and defeating one of the primary objectives of employment law.

Significantly, this principle has led the courts to stretch the employee status tests in order to capture workers who do not easily fit within the strict confines of the tests, but who exhibit the forms of vulnerability that are characteristic of the employment relationship.<sup>87</sup> For example, where the employer has a high degree of bureaucratic control over the worker, notwithstanding

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<sup>84</sup> Langille & Davidov, *supra* note 72.

<sup>85</sup> See Christie, *supra* note 4 at paragraph 2.15.

<sup>86</sup> *Ibid.* at paragraph 2.21. See also, for example, *Belton*, *supra* note 76 at paragraph 11; and *Braiden*, *supra* note 79 at paragraph 33.

<sup>87</sup> Christie, *ibid.* at paragraph 2.30; and England, “Rights and Efficiency”, *supra* note 37 at 561.

that the worker accepts a greater share of the economic risks, which would generally be associated with an independent contractor, the courts have been willing to widen the tests and find that the worker is an employee.<sup>88</sup> Thus, in *Jaremko v. A.E. LePage*,<sup>89</sup> though a real estate salesman was able to set his own working hours, though his pay was entirely based on commission, and though he was described as “self-employed” for tax purposes, Justice McKinlay found the salesman to be an employee because: response

[S]ubstantial control was exercised by A.E. LePage over his operations. He made use of A.E. LePage office space and secretarial assistance; he was subject to company policy and company discipline; he received memoranda material from A.E. LePage referring to him as one of a group of “salespeople ... employed by our Company”; he was permitted to, and did in fact apply for, a promotion within the company; and he was included in the company bonus and profit-sharing plan.<sup>90</sup>

In this case, the employer had a tremendous capacity to affect the salesman’s social and psychological interest in work through these mechanisms of control, and accordingly, Justice McKinlay found that the salesman was entitled to the protections ordinarily afforded to employees.

In an even greater deviation from the rigid confines of the employee status tests, the Ontario Court of Appeal has recognized a special “intermediate” status for workers whose circumstances place them right at, or even beyond, the threshold to employee status.<sup>91</sup> This special status has been found to entitle the worker to reasonable notice of termination, while imposing a reciprocal

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<sup>88</sup> Christie, *ibid.* at paragraph 2.32.

<sup>89</sup> (1987), 17 C.C.E.L. 262, 59 O.R. (2d) 757, 39 D.L.R. (4<sup>th</sup>) 252 (Ont. H.C.J.) [*Jaremko*], *aff’d* (1989) 69 O.R. (2d) 323, 60 D.L.R. (4<sup>th</sup>) 762 (C.A.). See also *Goldberg v. Western Approaches Ltd.* (1985), 7 C.C.E.L. 127 (B.C. S.C.); and *Roberts v. Libman & Co.* (1991), 38 C.C.E.L. 240 (Ont. Gen. Div.).

<sup>90</sup> *Jaremko*, *ibid.* at paragraph 3.

<sup>91</sup> *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.) at paragraph 7. See also Christie, *supra* note 4 at paragraph 2.33.

duty of fidelity in favour of the employer.<sup>92</sup> Thus, courts have adopted a broad understanding of the “no contracting out of employee status” principle, seeking to provide workers with as much protection as possible where the workers have the types of susceptibilities that are held to be characteristic of the employment relationship.

Though this is a familiar legal principle, its relevance to the argument for the duty to respect dignity is significant. Effectively, it overrides the general contractual rule that the express terms of the agreement govern the relationship, and in so doing, it provides concrete evidence of the reciprocal nature of the purposive approach to employment law: where aspects of the working relationship create employer power, where that power puts the worker in a position of vulnerability, and where that vulnerability is of a type that has been held to be fundamental to the employment relationship, then regardless of the express terms of the governing contract, the detrimental effects of the worker’s vulnerability should be offset by corresponding employee-based protections. More succinctly, there will be no power without a corresponding responsibility.

Applying this approach, given the employee’s dignity-based interest in the circumstances of work, a dependency which creates a powerful and unique form of vulnerability when combined with the employer’s power to control those circumstances, the concept of reciprocity demands a remedial form of protection. As previously asserted, the most carefully tailored response is the implied duty upon the employer to respect the dignity of the employee. Moreover, just as the employee’s general right to employment law protections cannot be trumped by the express terms of the contract, as argued above, the employer should not be able to avoid the more specific duty

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<sup>92</sup> Christie, *ibid.* See also *Tiltins v. RIM Transportation International Inc.* (2003), 32 C.C.E.L. (3d) 284 (Ont. S.C.J.).

to respect dignity simply by contracting out of it. Otherwise, the employer is given a power with no counterbalance, and the purposive approach to employment law is undermined. .

Through their regulation of the division between employees and independent contractors, then, it is clear that the courts have attempted to respond to the vulnerabilities that are particular to employees. Specifically, by identifying the effects of the employer's control right as a primary justification for employee protection, and by supporting the "no power without a corresponding responsibility" reciprocity principle, the employee status tests provide practical backing for the view that a duty to protect dignity should be a necessary component of the purposive approach to employment law, and one that overrides even the express terms of the employment contract.

## **B. PROTECTING DIGNITY THROUGH THE COURSE OF THE EMPLOYMENT RELATIONSHIP: CONSTRUCTIVE DISMISSAL**

Beyond the threshold employee status tests, throughout the course of the actual employment relationship the dignity-based interest of employees in work is protected under the doctrine of constructive dismissal. In regulating the relationship in this way, the courts are essentially giving effect to a general implied duty to respect dignity in all employment contracts.

### **1. The Theory of Constructive Dismissal: Protecting More than Just Express Contractual Rights**

One of the most oft-quoted statements on the theory of constructive dismissal arose in the case of *Farber c. Royal Trust Co.*<sup>93</sup> In that case, Justice Gonthier for the Court held that:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. [...] The employee can then treat the contract as resiliated for breach and can leave. In

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<sup>93</sup> (1996), 27 C.C.E.L. (2d) 163, 145 D.L.R. (4<sup>th</sup>) 1, [1997] 1 S.C.R. 846 [*Farber*].

such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.<sup>94</sup>

Accordingly, under the doctrine of constructive dismissal, the employer's right to re-organize the business, in effect the employer's control right, is limited by the terms of the contract of employment.<sup>95</sup> This notion is directly built into the duty of obedience, which, as discussed above, only obligates the employee to follow orders of the employer that are within the general purview of the employment contract.<sup>96</sup> Thus, the express terms of the employment contract, as enforced by the doctrine of constructive dismissal, impose significant restrictions on the employer's capacity to flexibly respond to changes to the circumstances of the business. For this reason, the doctrine has been criticized as unduly impairing the employer's ability to maximize the efficiency of the business, but as England notes, the doctrine has survived such attacks.<sup>97</sup> Accordingly, courts will not generally imply into employment contracts a provision allowing the employer to change the terms of the contract for legitimate business reasons.<sup>98</sup>

As a result, it may at first seem that the doctrine of constructive dismissal is simply about balancing the employee's strict contractual rights with the employer's right of control. As noted in *Farber*, the whole doctrine is predicated upon the traditional contractual principle that when one party breaches a fundamental term, the other party can treat the contract as resiliated and sue for contractual damages.<sup>99</sup> Courts, however, do not just use the doctrine to enforce the express terms of the employment contract. As discussed in the next section, courts will also find that

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<sup>94</sup> *Ibid.* at paragraph 24.

<sup>95</sup> See England, "Rights and Efficiency", *supra* note 37 at 579.

<sup>96</sup> Christie, *supra* note 4 at paragraphs 1.10 and 1.11.

<sup>97</sup> England, "Rights and Efficiency", *supra* note 37 at 580.

<sup>98</sup> *Ibid.* See, for example, *Gilbert v. Wittmauer Worldwide, L.P.* (2002), 23 C.C.E.L. (3d) 35 (Ont. C.A.) [*Gilbert*], where the Court of Appeal found that a substantial reduction in managerial responsibility, the removal of the employee's office, and the perceived and actual loss of leadership within the company constituted constructive dismissal, notwithstanding that the company had effected the changes in response to financial difficulties and a high level of uncertainty regarding the future of the business.

<sup>99</sup> *Farber*, *supra* note 93 at paragraph 24.

implied terms of the contract have been breached by the employer, thereby justifying an action for constructive dismissal. Given that these implied terms often relate to the employee's social and psychological interests in the work, constructive dismissal is frequently more about protecting the employee's dignity than about enforcing the express terms of the contract. As England notes: “[c]onstructive dismissal is often grounded in loss of status, or in fundamentally different job duties which the employee finds unsatisfying, despite the fact that there is no direct financial loss. This tacitly recognizes the importance of the psychological dimension of the employment contract.”<sup>100</sup>

Thus, by providing protection to employees in situations where the main “breach of contract” is essentially an infringement of the employee's dignity-based interest in work,<sup>101</sup> courts have signalled that they will enforce what effectively amounts to a duty to respect dignity.

## **2. Constructive Dismissal in Practice: Policing a Duty to Respect Dignity**

It is not within the scope of this paper to canvass all of the constructive dismissal cases where the courts focus on protecting the employee's dignity rather than on enforcing the express terms of the contract. A few examples of such cases, however, will serve to strongly support the argument that the courts are already effectively policing a duty to respect dignity through the doctrine of constructive dismissal.

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<sup>100</sup> England, “Rights and Efficiency”, *supra* note 37 at 581.

<sup>101</sup> See England, “Old Story”, *supra* note 54 at 52. Citing *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4<sup>th</sup>) 18 (Man. C.A.) [*Whiting*]; *Shah v. Xerox Canada Ltd.* (1998), 49 C.C.E.L. (2d) 30 (Ont. S.C.J.) [*Shah – S.C.J.*], *aff'd* (2000), 49 C.C.E.L. (2d) 166 (Ont. C.A.) [*Shah – C.A.*]; *Dick v. Canadian Pacific Ltd.* (2000), 4 C.C.E.L. (3d) 6 (N.B. C.A.) [*Dick*]; and *Schumacher v. Toronto Dominion Bank* (1999), 44 C.C.E.L. (2d) 48 (Ont. C.A.) [*Schumacher*], leave to appeal to S.C.C. refused (2000), 252 N.R. 394 (note).

### (i) Hostile Working Environments I: Express Recognitions of the Duty to Respect Dignity

The cases in which this point is most clearly evident are obviously those in which the courts expressly recognize the employer's implied obligation to respect the employee's dignity. Such express recognitions often occur in the context of actions where the employer's main transgression relates to the creation of a hostile working environment.

One such case, which involved a very powerful recognition of the duty to respect dignity, is *Lloyd v. Imperial Parking Ltd.*<sup>102</sup> In that case, the employee's supervisor became frustrated with the employee's performance and became extremely verbally abusive, repeatedly shouting, swearing and threatening the employee with termination.<sup>103</sup> After several months of this behaviour, the employee resigned and brought an action for constructive dismissal.<sup>104</sup> While there was no violation of any express term of the employment contract, the supervisor used his power of control in the workplace to demean and undermine the self-respect of the employee. This is the precise form of vulnerability that the duty to respect dignity is geared towards addressing.

In *Lloyd*, Justice Sanderman expressly adopted this approach, finding that:

*A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees "reasonably" in all aspects of the labour process.*<sup>105</sup>

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<sup>102</sup> (1996), 192 A.R. 190, 25 C.C.E.L. (2d) 97, 46 Alta. L.R. (3d) 220 (Alta. Q.B.) [*Lloyd*].

<sup>103</sup> *Ibid.* at paragraph 18.

<sup>104</sup> *Ibid.* at paragraph 16.

<sup>105</sup> *Ibid.* at paragraphs 40 through 41.

In this excerpt, then, Justice Sanderman expressly recognizes an implied duty upon the employer that looks very much like the duty to respect dignity, the breach of which will constitute constructive dismissal. *Lloyd*, though, is a pre-*Wallace* case. Accordingly, it might be argued that *Wallace*'s reasoning overruled *Lloyd*'s recognition of the duty to respect dignity. As noted previously, however, in *Wallace* Justice Iacobucci was primarily concerned about over-breadth and hindrance of efficiency, concerns which do not apply to the duty to respect dignity. As such, it is argued that *Lloyd* should continue to be considered to be good law, and the post-*Wallace* jurisprudence supports this proposition.<sup>106</sup>

For example, in *Piresferreira v. Ayotte*,<sup>107</sup> the underlying allegations were that the employee's manager would consistently yell and swear at the employee, often in the presence of other employees, a form of treatment that was "intimidating and hurtful" to the employee.<sup>108</sup> The manager also assaulted the employee in one case and then threatened the employee with probation and issued a harsh performance improvement plan, warning the employee that if she failed to improve, she could be subject to further disciplinary action including dismissal.<sup>109</sup> The employee ultimately brought an action claiming, *inter alia*, constructive dismissal.<sup>110</sup> Justice Aitken allowed the action, concluding that the employer "was not living up to the implied term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity."<sup>111</sup>

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<sup>106</sup> See, for example, *Piresferreira v. Ayotte* (2008), [2009] W.D.F.L. 954 (Ont. S.C.J.). [*Piresferreira*]; *Pawlett v. Dominion Protection Services Ltd.* (2007), 424 A.R. 107 (Alta. Q.B.) [*Pawlett*], rev'd in part (2008) 97 Alta. L.R. (4<sup>th</sup>) 50 (C.A.) but only reducing the punitive damages award; and *Nasser v. ABC Group Inc.*, 2007 CarswellOnt 8884 (Ont. S.C.J.) at paragraphs 32 through 33.

<sup>107</sup> *Piresferreira*, *ibid.*

<sup>108</sup> *Ibid.* at paragraph 217.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* at paragraphs 1 through 2.

<sup>111</sup> *Ibid.* at paragraph 219 (emphasis added). Citing *Lloyd*, *supra* note 102.

Similarly, in *Pawlett v. Dominion Protection Services Ltd.*,<sup>112</sup> the employee alleged that her supervisor had created a hostile and sexually demeaning working environment. As a consequence, Justice McDonald referenced *Lloyd* and based his finding of constructive dismissal on the fact that the employer, through the actions of the supervisor, “failed to treat [the employee] with the civility, decency, respect and dignity to which she was entitled.”<sup>113</sup>

Thus, in the course of protecting employees against control-based abuses of their social and psychological dependence on work, these cases express recognize an obligation upon employers that looks very much like the duty to respect dignity.

#### (ii) Hostile Working Environments II: Enforcing the Duty to Respect Dignity without Express Recognition

Unlike *Lloyd*, *Piresferreira* and *Pawlett*, though, some constructive dismissal cases that involve the employer’s creation of a hostile working environment do not expressly acknowledge a duty to respect dignity. Such cases, however, still often enforce the duty in practice.<sup>114</sup> As Davidov argues, work “shapes our personal identities, facilitating self development and self-realization” and “provides a means to dignity, self-respect, and self-esteem.”<sup>115</sup> It is not difficult to see that when the environment within which that work takes place is poisoned and hostile, the employee’s sense of personal identity, dignity and self-respect will suffer as well. In redressing this form of employee vulnerability through the doctrine of constructive dismissal, courts are again effectively policing a duty to respect dignity throughout the course of the employment relationship.

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<sup>112</sup> *Pawlett*, *supra* note 106.

<sup>113</sup> *Ibid.* at paragraph 61. Note that the punitive damages award of the Trial Judge was reduced on appeal in (2008), 97 Alta. L.R. (4<sup>th</sup>) 50, 440 A.R. 241 (Alta. C.A.).

<sup>114</sup> See Christie, *supra* note 4 at paragraphs 13.66 and 13.67.

<sup>115</sup> Davidov, *supra* note 7 at 388.

For example, in *Shah v. Xerox Canada Ltd.*,<sup>116</sup> the employee's supervisor handed down harsh performance reviews over a long period of time and roughly rejected the employee's request for a temporary reassignment when the employee's work suffered because of personal family and health problems.<sup>117</sup> At trial, in finding that the employee had been constructively dismissed, Justice Cullity held that where "the circumstances establish that the employer has repudiated the entire relationship without cause," it is not necessary to identify a particular fundamental term of the contract that has been breached.<sup>118</sup> Accordingly, Justice Cullity held that the supervisor's "failure to discharge his managerial responsibilities and his behaviour toward [the employee] made the latter's position intolerable and I find that he was constructively dismissed without cause."<sup>119</sup> The Court of Appeal affirmed this decision, citing the supervisor's increasingly "authoritarian, impatient and intolerant" treatment of the employee.<sup>120</sup>

Where the employer so poisons the working environment that the employee's work becomes "intolerable", the employer is obviously greatly diminishing the psychological and social benefits that the employee derives from the work. In these circumstances, *Shah* supports the view that such behaviour will constitute constructive dismissal, thereby providing the employee with some measure of protection and effectively enforcing a duty to respect dignity.

Other cases are consistent with this proposition. For example, constructive dismissal was found where the employee was harassed by his supervisor, who changed his work schedule, reducing his shifts and assigning him undesirable days off based on an unsubstantiated suspicion of

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<sup>116</sup> *Shah* – S.C.J., *supra* note 101.

<sup>117</sup> *Ibid.* at paragraphs 8 through 24.

<sup>118</sup> *Ibid.* at paragraph 37.

<sup>119</sup> *Ibid.* at paragraph 40.

<sup>120</sup> *Shah* – C.A., *supra* note 101 at paragraphs 9 through 10.

theft.<sup>121</sup> Also, constructive dismissal was found where the employee was marginalized from his colleagues and was subjected to unjustified criticism, vague and unfounded accusations of wrongdoing, and an embarrassing and humiliating work atmosphere.<sup>122</sup> In *Dick v. Canadian Pacific Ltd.*,<sup>123</sup> as summarized by England, constructive dismissal was “grounded, in part, on the employer’s conduct of having made the plaintiff’s job progressively more ‘intolerable’ by reducing the number of his support staff and increasing his workload when the employer knew full well that the plaintiff was under medical treatment for stress.”<sup>124</sup> Further, there are many other similar cases where the courts invoke the doctrine of constructive dismissal in order to redress the negative social and psychological effects that an employee suffers when the employer has created a hostile workplace.<sup>125</sup>

### (iii) The Employer’s Obligation to Protect the Employee against Other Employees

Cases where the employer creates a hostile work environment are not, however, the only ones where the duty to respect dignity is expressly recognized or practically enforced through the doctrine of constructive dismissal. Just as the doctrine is applied in cases where the employer itself makes the workplace intolerable, it is also applied in situations where the employer fails to prevent one employee from poisoning the workplace for others.<sup>126</sup> In these cases, a duty to respect dignity is often expressly recognized. In *Morgan v. Chukal Enterprises Ltd.*,<sup>127</sup> for example, the employee quit after she alleged that regular conflicts with a fellow employee had

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<sup>121</sup> *Lindsay v. Toronto Transit Commission* (1996), 19 O.T.C. 216 (Ont. S.C.J.), aff’d (1998), 115 O.A.C. 319 (Ont. C.A.), leave to appeal refused (1999), 249 N.R. 200 (note) (S.C.C.).

<sup>122</sup> *Lavinskas v. Jaques Whitford & Associates Ltd.* (2005), 51 C.C.E.L. (3d) 112 (Ont. S.C.J.).

<sup>123</sup> *Dick*, *supra* note 101.

<sup>124</sup> England, “Old Story”, *supra* note 54 at 52.

<sup>125</sup> See, for example, *Whiting*, *supra* note 101; *Mercey v. Consolidated Recycling Inc.* (2007), 61 C.C.E.L. (3d) 69 (Ont. S.C.J.); and *Morland v. Kenmara Inc.* (2006), 48 C.C.E.L. (3d) 308 (Ont. S.C.J.).

<sup>126</sup> Christie, *supra* note 4 at paragraph 13.68.

<sup>127</sup> (2000), 2000 C.L.L.C. 210-036 (B.C. S.C.) [*Morgan*].

made her work intolerable.<sup>128</sup> Explicitly citing *Lloyd* for the implied duty to respect dignity,<sup>129</sup>

Justice Martinson found that:

The refusal of the owners to stop the abusive behaviour amounted to a fundamental breach of the implied term of her employment contract that she would be treated with civility, decency, respect and dignity. It makes no difference that the behaviour was that of another employee, not the employer, when, as here, the employer knows about it and does not take appropriate steps to stop it.<sup>130</sup>

Similar reasoning was applied in *Stamos v. Annuity Research & Marketing Service*.<sup>131</sup> In that case, an employer failed to take steps to protect an employee from abuse by her volatile co-worker. As a result, the female employee eventually resigned and sued for constructive dismissal. Justice Dambrot found in favour of the employee, expressly noting that in general, “an employer owes a duty to its employees to treat them fairly, with civility, decency, respect and dignity.”<sup>132</sup> Justice Dambrot went on to hold that:

Not only is an employer obliged not to treat an employee in a manner that renders competent work performance impossible or continued employment intolerable. An employer has a broader responsibility to ensure that the work environment does not otherwise become so hostile, embarrassing or forbidding as to have the same effect. [...] An employer’s failure to prevent the harassment of an employee by co-employees is an obvious breach of this duty, and has been held to be capable of amounting to constructive dismissal.<sup>133</sup>

Given that, in both *Morgan* and *Stamos*, the employer had not taken any positive action to create the hostile working environment, the real source of the employer’s “breach” appears to relate to the fact that the employer had control over the workplace, and so had the responsibility to take reasonable steps to ensure that the employee's dignity-based interest was protected within that

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<sup>128</sup> *Ibid.* at paragraphs 1 through 3.

<sup>129</sup> *Ibid.* at paragraph 10.

<sup>130</sup> *Ibid.* at paragraph 19.

<sup>131</sup> (2002), 18 C.C.E.L. (3d) 117 (Ont. S.C.J.) [*Stamos*].

<sup>132</sup> *Ibid.* at paragraph 60.

<sup>133</sup> *Ibid.* at paragraph 62.

environment. By using constructive dismissal to provide employees with protection in these cases, the courts both effectively and expressly recognize the duty to respect dignity.

(iv) Constructive Dismissal through the Loss of Status without Loss of Pay

The duty to respect dignity is also practically enforced where the employee loses status, but no express contractual rights such as pay. For example, in *Gilbert*, the Ontario Court of Appeal found that “the substantial reduction in managerial responsibility; the removal of the [employee] from his office and the perceived and actual loss of leadership in the company” constituted constructive dismissal.<sup>134</sup> Further, in *Murdock v. 497123 Ontario Ltd.*,<sup>135</sup> Justice Stinson cited the following statement of the law with approval:

Where a management-level employee loses all of his or her management functions and responsibilities, this will usually amount to a demotion going to the root of the employment contract. The loss of all management responsibilities may still constitute a fundamental breach where remuneration is maintained, though in many instances such a demotion is accompanied by a commensurate reduction in pay. Furthermore, the fundamental nature of the change is not overridden where an employee is demoted from a management to a non-management position, in furtherance of legitimate business objectives.<sup>136</sup>

In these cases, the employer’s control over the status of employees within its business can have significant psychological, emotional and social impacts upon those employees. By policing these effects, cases like *Gilbert* and *Murdock* further the argument that the doctrine of constructive dismissal is used by courts to effectively enforce a duty to respect dignity.

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<sup>134</sup> *Gilbert*, *supra* note 98 at paragraph 1.

<sup>135</sup> (2005), 138 A.C.W.S. (3d) 98 (Ont. S.C.J.) [*Murdock*].

<sup>136</sup> Randall Scott Echlin & Jennifer M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (Aurora: Canada Law Book, 2001) at 254. Cited in *Murdock*, *supra* note 135 at paragraph 44.

(v) The Duty to Respect Dignity Enforced through Limitations on the Employer's Right to Suspend with Pay

As discussed previously, in general the employer has no obligation to actually provide work for the employee.<sup>137</sup> Specifically, assuming that the express terms of the employment contract are fulfilled, in particular the provisions regarding remuneration, this would seem to imply a right on behalf of employers to suspend employees indefinitely as long as they continue to get paid. Given the employee's dignity-based interest in the actual process of working, however, the doctrine of constructive dismissal has placed limits on this right, thereby enforcing a duty to respect dignity.

In *Carscallen v. FRI Corp.*,<sup>138</sup> for example, Justice Echlin noted that “[i]f a suspension is made with pay, it is *more likely* that a court will not find that a constructive dismissal has occurred.”<sup>139</sup> By recognizing that such a suspension may *sometimes* amount to constructive dismissal, Justice Echlin was thus acknowledging that there are some limitations on the employer's right to suspend with pay. Justice Echlin justified such restrictions by asserting that “[a] suspension signals to the underlings that the company has less than complete faith in the individual to whom they report. It can also affect the esteem with which the disciplinee is held in the eyes of peers and superiors. The ramifications are potentially far reaching.”<sup>140</sup>

By recognizing the detrimental effects that suspension can have upon an employee's psychological and social well-being, and by asserting that the doctrine of constructive dismissal will accordingly place limits on the employer's right to suspend with pay, Justice Echlin's

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<sup>137</sup> Christie, *supra* note 4 at paragraph 10.57.

<sup>138</sup> *Carscallen* – S.C.J., *supra* note 30. Just Echlin's decision was briefly affirmed by the Court of Appeal: see *Carscallen* – C.A., *supra* note 30.

<sup>139</sup> *Carscallen* – S.C.J., *ibid.* at paragraph 35 (emphasis added).

<sup>140</sup> *Ibid.* at paragraph 46.

decision demonstrates another manner in which constructive dismissal will be used to enforce a duty to respect dignity during the course of the employment relationship.

This conclusion is strongly reinforced by the relatively recent Supreme Court of Canada decision in *Cabiakman*. Though decided in the civil law context, the case drew from common law authority and considered the employer's right to suspend an employee for administrative reasons. Justices LeBel and Fish held that this right is an implied part of every employment contract, subject to the following requirements:

(1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay.<sup>141</sup>

In explaining these limitations, Justices LeBel and Fish cited *Alberta Reference*, and noted that:

What must be done here is basically to balance the various interests in play. On the one hand, the employer's right to take preventive action to protect its business must be recognized. On the other hand, it must be recognized that '[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.'<sup>142</sup>

Accordingly, the approach adopted in *Cabiakman* provides a strong illustration of the harmonization process that is built into the duty to respect dignity. As a function of its inherent efficiency-based control right, the employer is given the power to suspend employees in the best interests of its business. However, recognizing the potential psychological harm that could arise from abuses of this power, several restrictions are placed upon the employer's right, all of which

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<sup>141</sup> *Cabiakman*, *supra* note 30 at paragraph 62.

<sup>142</sup> *Ibid.* at paragraph 63.

are geared towards preserving the “sense of identity, self-worth and emotional well-being” that employees derive from their work. A violation of any of these restrictions would constitute a breach of a fundamental term of the employment contract, thus grounding an action in constructive dismissal.<sup>143</sup>

There is, then, significant support for the argument that the doctrine of constructive dismissal is used by the courts to hold employers to a duty to respect dignity during the course of the employment relationship. There are a number of cases in which something very much like the duty is expressly recognized, but even where it is not explicitly acknowledged, courts will employ the doctrine of constructive dismissal to ensure that employers do not use their power of control to undermine the employee's dignity-based interest in her work.

### **3. A Final Note on Harmonization**

In the context of the employer's right to suspend, *Cabiakman* clearly illustrated the way in which the duty to respect dignity involves harmonizing the employer's efficiency-based interest with the employee's dignity-based interest. The argument could be made, then, that there was no indication of harmonization in relation to the other constructive dismissal contexts discussed, and so they do not truly represent illustrations of the duty to respect dignity.

The main point to be made here, however, is that in the vast majority of those cases, the actions of the employer were not supported by any interest in efficiency, and so there was nothing for the employee's dignity-based interest to be harmonized with. Thus, where the employer creates a hostile working environment, or allows one of its employees to create such an environment, it

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<sup>143</sup> See *ibid.* at paragraph 80.

would not seem tenable to argue that the employer's exercise, or non-exercise, of its control power was predicated upon an attempt to improve the operation of the business.

The argument is perhaps more persuasive, though, in the context of cases like *Gilbert* and *Murdock*, where the employee's loss of status is arguably driven by the employer's desire to increase the efficiency of the business. In finding constructive dismissal, then, it could be argued that the courts have failed to harmonize the employee's dignity-based interest in work with the employer's interest in efficiency. This point is supported by the excerpt cited in *Murdock*, which asserts that "the fundamental nature of the change is not overridden where an employee is demoted from a management to a non-management position, in furtherance of legitimate business objectives."<sup>144</sup>

Upon closer reflection, however, this argument is unpersuasive. While a substantial reduction in an employee's status will constitute constructive dismissal regardless of whether or not the employer has good business reasons for the change, this does not prevent the employer from pursuing efficiency. The employer can always dismiss the employee and offer re-employment on new terms. The employee then has the right to decide whether or not to accept the new offer, thereby ensuring that the employee has some say in whether or not the new terms are reconcilable with her sense of dignity, autonomy and identity. What constructive dismissal does prevent in these circumstances is the reduction of the employee's status without a remedy on the employee's part. As such, it prevents the employer from acquiring efficiency gains with no corresponding protection of the employee's dignity-based interest in the work. Viewed in this light, the doctrine of constructive dismissal is again seen to enforce a duty to respect dignity, including its implicit harmonization requirement, throughout the employment relationship.

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<sup>144</sup> Echlin & Fantini, *supra* note 136 at 254. Cited in *Murdock*, *supra* note 135 at paragraph 44.

## **C. PROTECTING DIGNITY UPON THE TERMINATION OF THE EMPLOYMENT RELATIONSHIP AND THEREAFTER**

In *Wallace*, Justice Iacobucci stated that “[t]he point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection.”<sup>145</sup> Accordingly, if the duty to protect dignity is to constitute any real safeguard for employees, in addition to being enforced at the threshold to and during the course of the employment relationship, it must also be enforced upon the termination of that relationship and thereafter. It is asserted that, in practice, by awarding damages for the manner of dismissal and by applying a reasonableness requirement under the duty to mitigate, the courts are effectively doing so.

### **1. A Brief Note on Economic Dependence in the Dismissal Context: Reasonable Notice**

Before discussing damages for the manner of dismissal and the duty to mitigate, it is relevant to note that one of the main protections afforded to employees at the time of termination is the reasonable notice requirement. This is an implied term read into the majority of employment contracts that requires the employer to provide the employee with reasonable notice of termination or pay in lieu of such notice. The most common indicia of what is reasonable in such circumstances come from *Bardal v. Globe & Mail Ltd.*:<sup>146</sup> a court must consider “the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.”<sup>147</sup> These *Bardal* factors indicate that the length of the notice period will be dependent upon how difficult it will be for the employee, given her special circumstances, to find

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<sup>145</sup> *Wallace*, *supra* note 14 at paragraph 95.

<sup>146</sup> (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*].

<sup>147</sup> *Ibid.* at paragraph 21. These factors were approved of by the Supreme Court of Canada in *Machtiger*, *supra* note 8.

new employment. In this way, the doctrine of reasonable notice provides a financial cushion to employees.<sup>148</sup> In so doing, it provides some protection against the fact that employees are unable to spread their financial risks in the same way that an independent contractor might. As such, the doctrine is geared towards addressing the economic dependence of employees, rather than the forms of vulnerability that the duty to respect dignity seeks to remedy.

This also explains why the reasonable notice period can largely be contracted out of, but, as previously argued, the same is not true of the duty to respect dignity. The reasonable notice provision is not implied into all employment contracts because, where the employment contract expressly lays out a specific notice period that conflicts with the implied term, the express term will trump.<sup>149</sup> While there are important exceptions to this rule,<sup>150</sup> the point is that it is possible for the employee to contractually relinquish the economic safety net provided by the reasonable notice period. This capacity can be reconciled with the purposive approach to employment law because, when the specific notice provision is express and properly bargained for, the employee will be aware that she is not as financially secure as she would normally be. As such, she can in a sense prepare for the possibility of being terminated with little notice.

By contrast, the same reasoning does not hold true for the duty to respect dignity. One cannot plan for a future violation of dignity in the same way that one can plan for future financial difficulties. As a result, it would not ever seem appropriate to allow a person to contract away their right to be treated with dignity and respect. Accordingly, the differing vulnerabilities to

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<sup>148</sup> See, for example, England, “Rights and Efficiency”, *supra* note 37 at 593; and Christie, *supra* note 4 at paragraph 10.19.

<sup>149</sup> England, “Rights and Efficiency”, *ibid.* at 600.

<sup>150</sup> See, for example, *Machtiger*, *supra* note 8; and *Ceccol*, *supra* note 53 (express notice provisions must be explicit and precise). See also *Wronko v. Western Inventory Service Ltd.* (2008), 65 C.C.E.L. (3d) 185, 292 D.L.R. (4<sup>th</sup>) 58, 90 O.R. (3d) 547 (Ont. C.A.) [*Wronko*] (express notice provisions must actually be agreed to by the employee). Finally, see also *Braiden*, *supra* note 79 (the employer must provide proper consideration for the employee's surrender of the right to reasonable notice).

which the doctrine of reasonable notice and the duty to respect dignity respond explain why the former is subject to the express terms of the contract and the latter is not.

One final note should, however, be made with regard to the capacity of the parties to contract out of the reasonable notice period. As discussed in the previous section, the doctrine of constructive dismissal enforces the duty to respect dignity, and one main consequence of a finding of constructive dismissal is that the employee is entitled to notice of the termination, either reasonable notice or notice as provided for under the express terms of the agreement. As a consequence, it could be argued that by contracting out of reasonable notice, the employer is effectively able to contract out of the protections provided by constructive dismissal.

This argument fails, however, for three reasons. To begin with, there are legislated minimum notice periods.<sup>151</sup> As such, an employee will always receive more notice if she is found to have been constructively dismissed than if she is found to have resigned, where she would receive no notice. Further, as discussed in the next section, an employee who is constructively dismissed can also receive damages for the manner of dismissal, providing added protection for the employee's dignity-based interest in work. Finally, as will be argued, a breach of the duty to respect dignity should constitute an independently actionable wrong, such that the courts will have a basis to award punitive damages in certain circumstances. In summary, then, even if the employer is able to contract for the minimum allowable notice periods, this will not prevent courts from using the doctrine of constructive dismissal in conjunction with other legal principles to effectively enforce the duty to respect dignity.

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<sup>151</sup> See, for example, the Ontario *Employment Standards Act*, S.O. 2000, c. 41 at ss. 54 and 57.

## **2. Enforcing the Duty to Respect Dignity upon Termination: Damages for the Manner of Dismissal**

While the implied term of reasonable notice primarily responds to the employee's economic vulnerability, it does not follow that the employee's social and psychological dependence on work receives no protection upon termination. Instead, by allowing the employer to terminate the employment relationship at will, but also by assessing damages based on the manner of dismissal, courts are able to harmonize the employer's interest in efficiency with the employee's dignity-based interest in work. In doing so, they are effectively enforcing the duty to respect dignity. It is asserted, however, that by taking one small step forward, and by treating the implied duty to respect dignity as an independently actionable wrong, the purposive ambitions of the common law of employment would be better served.

### **(i) Take One: *Wallace* and Extensions of the Reasonable Notice Period**

With regard to the search for a principled foundation for damages based on the manner of dismissal, a crucial turning point in the jurisprudence is represented by the Supreme Court of Canada decision in *Wallace*. In that case, as previously discussed, Justice Iacobucci rejected a "just cause" requirement for termination because of an efficiency-based concern that, though applicable to overly-broad implied duties of fairness and good faith, does not apply to the duty to respect dignity.<sup>152</sup> This did not, however, prevent Justice Iacobucci from policing the manner in which employees are terminated.

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<sup>152</sup> *Wallace*, *supra* note 14 at paragraphs 75 through 76.

Instead, while considering the appropriate period of reasonable notice, he emphasized that the employment relationship is fundamentally characterized by the employee's subordination,<sup>153</sup> that this weakness is exacerbated by the employee's dignity-based interest in work,<sup>154</sup> and that the employee is most in need of protection from this vulnerability at the time when the employment relationship ends.<sup>155</sup> While this is the exact problem that the duty to respect dignity is specifically designed to address, Justice Iacobucci adopted a different remedial mechanism: he held that "to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."<sup>156</sup> There are five key points that should be made with regard to this approach. The first two highlight the degree to which Justice Iacobucci's formulation is reconcilable with the duty to respect dignity, but to the extent that they differ, the latter three support the preferability of adopting the duty to respect dignity because of its ability to avoid the criticisms that have plagued *Wallace*.

*(a) Reconciling Wallace with the Duty to Respect Dignity in 2 Points*

To begin with, the first point is that Justice Iacobucci recognized that the employee will not be entitled to dignity-based damages based upon the mere fact of dismissal itself.<sup>157</sup> Instead, such damages will only be recoverable where the employer "engaged in bad faith conduct or unfair dealing in the course of dismissal."<sup>158</sup> This reasoning is entirely reconcilable with the duty to respect dignity, and in fact illustrates another facet of its harmonization function. Specifically, the employer's right to terminate at will allows it to respond flexibly to changes in the business,

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<sup>153</sup> *Ibid.* at paragraph 92. Citing *Slaight*, *supra* note 11 at paragraph 16.

<sup>154</sup> *Wallace*, *ibid.* at paragraph 93. Citing *Alberta Reference*, *supra* note 18 at paragraph 95.

<sup>155</sup> *Wallace*, *ibid.* at paragraph 95.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* at paragraph 103. Citing *Addis v. Gramophone Co.*, [1909] A.C. 488 (Eng. H.L.) [*Addis*].

<sup>158</sup> *Wallace*, *ibid.*

and the reasonable notice protection provided to dismissed employees does not overly impinge upon the efficiency of the employer because its costs are limited and predictable.<sup>159</sup> By contrast, if every terminated employee were entitled to dignity-based damages arising from the mere fact of dismissal, employers would be faced with unlimited and unpredictable liability. This would swing the harmonization pendulum too far in favour of dignity protection.

It is another story entirely, however, where the employer's bad faith behaviour during the process of termination causes the employee added psychological and social damage. In such cases, requiring the employer to reimburse the employee for the added harm caused does not undermine the employer's ability to cost-effectively operate the business because the employer can avoid such liabilities, without significantly impairing efficiency, simply by treating the employee with dignity, civility and respect. In this way, the harmonization mechanism implicit in the duty to respect dignity is strongly reconcilable with *Wallace's* holding that while there will not be dignity-based compensation for dismissal itself, there will be compensation for the manner of dismissal in some circumstances.

Turning to the second point, for the most part, in applying *Wallace* damages courts are effectively enforcing the duty to respect dignity. Thus, Justice Iacobucci notes that *Wallace* damages may be appropriate where unfair accusations of theft accompany the dismissal;<sup>160</sup> where the employer misleads the employee as to her job security;<sup>161</sup> or where the employee only learns of the dismissal through a third-party source.<sup>162</sup> In each of these cases, and in many of the

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<sup>159</sup> England, "Rights and Efficiency", *supra* note 37 at 602.

<sup>160</sup> *Wallace*, *supra* note 14 at paragraph 99. Citing *Trask v. Terra Nova Motors Ltd.* (1995), 9 C.C.E.L. (2d) 157, 396 A.P.R. 310 (Nfld. C.A.) [*Trask*].

<sup>161</sup> *Wallace*, *ibid.* Citing *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (Ont. Gen. Div.) [*Dunning*].

<sup>162</sup> *Wallace*, *ibid.* Citing *MacDonald v. Royal Canadian Legion* (1995) 12 C.C.E.L. (2d) 211, 407 A.P.R. 174 (N.S. S.C.) [*MacDonald*].

cases that have applied *Wallace* damages since,<sup>163</sup> the employer is using its power, in particular its right to terminate at will, in a way that demeans the employee and which disregards the dignity-based benefits that the employee derives from the work. By asserting that these types of employer abuse are deserving of condemnation through *Wallace* damages, Justice Iacobucci was effectively allowing courts to enforce a duty to respect dignity.

*(b) Beyond Wallace in 3 Points: Why the Duty to Respect Dignity May be Preferable*

Notwithstanding these two ways in which Justice Iacobucci's approach overlaps with the duty to respect dignity, there are three further points that demonstrate the latter's ability to respond to important criticisms of the former. It is therefore asserted that the duty to respect dignity is the preferable approach.

Thus, the third point to be made in relation to Justice Iacobucci's approach is that it involves a remedy that is largely disconnected from the problem to which it is a response.<sup>164</sup> If the basis for protection is that the employer's power within the termination context gives it a unique capacity to affect the psychological and social well-being of the employee, then the remedial solution should directly address that vulnerability. Specifically, it should entitle the employee to compensation for emotional damages that arise from abuses of the employer's power. This is precisely the form of protection afforded by the duty to respect dignity. Justice Iacobucci's approach, by contrast, compensates employees "by adding to the length of the notice period,"<sup>165</sup> which, as discussed above, is primarily concerned with addressing the employee's economic dependence.

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<sup>163</sup> See Shafik Bhalloo, "Bad Faith Damages in Wrongful Dismissal Cases: Post-Wallace Jurisprudence" (May 2006) 64 *Advocate* (Van.) 337, for an good summary of numerous post-*Wallace* cases where damages were awarded for demeaning and psychologically damaging employer behaviour during the termination process.

<sup>164</sup> See Fudge, *supra* note 21 at 553 for a similar argument.

<sup>165</sup> *Wallace*, *supra* note 14 at paragraph 95.

The consequences of this disconnect are significant. By tying compensation for abuses of dignity to the reasonable notice period, that compensation is limited in the same way that the notice period is. In particular, a finding of bad faith discharge cannot increase the notice period beyond the maximum allowed under reasonable notice, and so the damages caused by such a discharge can go uncompensated.<sup>166</sup> Further, some cases have found that express notice provisions limit the employee's right to claim for *Wallace* damages.<sup>167</sup> The mere possibility of these restrictions suffices to show the dangers of disconnecting the remedy from the vulnerability that it seeks to protect. Compensating dignity-based harm through the reasonable notice period is unjustifiable from a principled perspective, and worse, it creates the possibility that the employee's psychological and social well-being will be left to the mercy of the employer.

This third point leads into the fourth: instead of policing the manner of dismissal by extending the notice period, it is far more justifiable to acknowledge the duty to respect dignity, and to treat it as an independently actionable wrong. By so doing, the duty to respect dignity will avoid one of the other major criticisms that has been attached to *Wallace*. Under the *Wallace* approach, where courts are uncomfortable with the behaviour of the employer, they have the capacity to arbitrarily extend the notice period without actually ensuring that the employee has suffered quantifiable emotional damage, and without ensuring that the damage resulted from the employer's improper behaviour.<sup>168</sup> In contrast, by recognizing the duty to respect dignity, and by treating it as an independently actionable wrong, the courts will be forced to tie the employee's award to a clear breach of the employer's duty and to the damages which result.

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<sup>166</sup> *Noseworthy v. Riverside Pontiac-Buick Ltd.* (1998), 168 D.L.R. (4<sup>th</sup>) 629 (Ont. C.A.) [*Noseworthy*] at paragraph 29. See also Fudge, *supra* note 21 at 564.

<sup>167</sup> See *Barnard v. Testori Americas Corp.* (2001), 11 C.C.E.L. (3d) 42 (P.E.I. C.A.) [*Barnard*]. But see *MacKenzie v. Rau* (2002), 22 C.C.E.L. (3d) 238 (Ont. S.C.J.) [*MacKenzie*]; and *Smith v. Casino Rama Services Inc.*, [2004] O.J. No. 3098 (Ont. S.C.J.) [*Smith*]. See also Fudge, *ibid.* at 565.

<sup>168</sup> Bhalloo, *supra* note 163.

This is a more principled and justifiable means of policing the manner in which employers dismiss their employees.

The fifth and final point to be made relates to the fact that *Wallace* damages are not limited in scope to the termination itself, but can be based on employer conduct that occurred before and after the termination, as long as it is connected to the manner of dismissal.<sup>169</sup> This point was recognized in *Gismondi v. Toronto (City)*.<sup>170</sup> However, as argued by Fudge, “[t]here simply is no easy way to draw the line between the manner of dismissal and the performance of the contract, since there is no principled basis for holding that differences in the timing of the employer’s bad faith conduct should lead to differences in the damages awarded.”<sup>171</sup> Put simply, why should the employee's ability to recover for dignity-based harm depend upon whether that harm was sufficiently connected to the manner of dismissal? If that well-being is worthy of protection at the time of dismissal, it should also be worthy of protection throughout the course of the employment relationship. The general implied duty to respect dignity accomplishes this function and so, it is again preferable to the approach adopted by Justice Iacobucci in *Wallace*.

As a result, while the availability of *Wallace* damages goes a long way towards protecting the employee’s social and psychological well-being upon the termination of the employment relationship, an objective that is in-line with the function of the duty to respect dignity, by actually recognizing and enforcing the duty itself courts would be able to avoid several of the problems that have been associated with Justice Iacobucci’s approach.

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<sup>169</sup> See Bhalloo, *ibid.*

<sup>170</sup> (2003), 24 C.C.E.L. (3d) 1, 226 D.L.R. (4<sup>th</sup>) 334, 64 O.R. (3d) 688 (Ont. C.A.) [*Gismondi*] at paragraph 23. See also *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 215 D.L.R. (4<sup>th</sup>) 31 (Ont. C.A.) [*Prinzo*].

<sup>171</sup> Fudge, *supra* note 21 at 563.

(ii) Take Two: *Keays* and a Return to the Foreseeability Principle from *Hadley*

In the recent case of *Keays v. Honda Canada Inc.*,<sup>172</sup> the Supreme Court of Canada reviewed the principles adopted in *Wallace*. In doing so, and without recognizing an independent obligation akin to the duty to respect dignity, the Court charted an approach that in many ways was able to respond to the difficulties with Justice Iacobucci's formulation. This approach, however, still suffers from several criticisms, and so it is argued that the adoption of an implied duty to respect dignity is still the preferable option.

In reconsidering *Wallace* in *Keays*, Justice Bastarache, representing a majority of seven of the nine Justices, returned to the fundamental contractual principle, recognized in *Hadley v. Baxendale*,<sup>173</sup> that damages for breach of contract will be compensated where they are “such as may fairly and reasonably be considered either arising naturally ... from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.”<sup>174</sup> As a consequence of the *Hadley* principle, if the parties to a contract contemplate at the time of formation that a breach in certain circumstances will cause one party mental distress, and that does in fact happen, the injured party will be entitled to compensation.<sup>175</sup>

Applying this logic in the context of termination of employment, Justice Bastarache asserted that at least since *Wallace*, “there has been an expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages.”<sup>176</sup> As a result, this approach “makes it unnecessary to

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<sup>172</sup> (2008), 66 C.C.E.L. (3d) 159, 376 N.R. 196 (S.C.C.) [*Keays*].

<sup>173</sup> (1854), 9 Exch. 341, 156 E.R. 145 (Eng. Ex. Div.) [*Hadley*].

<sup>174</sup> *Ibid.* at 151.

<sup>175</sup> *Keays*, *supra* note 172 at paragraph 55. Citing *Fidler v. Sun Life Assurance Co. of Canada* (2006), 53 C.C.E.L. (3d) 1, 271 D.L.R. (4<sup>th</sup>) 1, [2006] 2 S.C.R. 3 [*Fidler*] at paragraphs 42 and 54; and *Vorvis*, *supra* note 58.

<sup>176</sup> *Keays*, *ibid.* at paragraph 58.

pursue an extended analysis of the scope of any implied duty of good faith in an employment contract.”<sup>177</sup>

*(a) Reconciling Keays with the Duty to Respect Dignity in 2 Points*

In analyzing the progress that this approach makes towards answering the problems associated with *Wallace* damages, it is helpful to return to the five points made in relation to *Wallace*. To begin with, both *Wallace* and *Keays* agree that while damages can be awarded for mental distress caused by the *manner* of dismissal, there can be no such damages related to the dismissal itself. In *Keays*, Justice Bastarache reconciles this conclusion with the *Hadley* principle by explaining that:

The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.<sup>178</sup>

As noted above in the discussion of *Wallace*, these principles are entirely in line with the harmonization requirement implicit in the duty to respect dignity.

The second issue discussed in relation to *Wallace*, when applied to *Keays*, furthers this notion of reconcilability. As with Justice’s Iacobucci’s formulation, Justice Bastarache’s approach is geared towards protecting employees from the same form of vulnerability that the duty to respect dignity addresses, though Justice Bastarache’s approach is cloaked in the language of traditional contractual principles. For example, Justice Bastarache asserts that “[e]xamples of conduct in dismissal resulting in compensable damages are attacking the employee’s reputation by

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<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.* at paragraph 56.

declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.”<sup>179</sup> As a result, the principles laid out in *Keays* effectively allow courts to police the duty to respect dignity during the termination process.<sup>180</sup>

(b) *Keays and the 3 Criticisms of Wallace: Good, but Not Good Enough*

The duty to respect dignity, then, remains reconcilable with *Keays* in the same ways that it was reconcilable with *Wallace*. The question, then, is whether Justice Bastarache’s approach is able to overcome the three criticisms of *Wallace* that make the duty to respect dignity preferable in comparison.

Beginning with the third point, and the first criticism of *Wallace*, in one sense *Keays* resolves the disconnect between problem and remedy that was created by Justice Iacobucci’s approach:

Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages.<sup>181</sup>

By providing employees with compensation for their actual damages, rather than with an arbitrary notice increase, Justice Bastarache’s remedy responds directly to the ailment that it seeks to resolve.

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<sup>179</sup> *Ibid.* at paragraph 59. Further citing the previously discussed examples from *Wallace*, *supra* note 14 at paragraphs 99 through 100.

<sup>180</sup> For other cases where *Keays* is applied to protect the employee’s dignity-based interests in work, see, for example, *Simmons v. Webb* (2008), 2008 CarswellOnt 7874 (Ont. S.C.J.) [*Simmons*]; *Bru v. AGM Enterprises Inc.* (2008), 2009 C.L.L.C. 210-011 (B.C. S.C.) [*Bru*]; and *Dawson v. FAG Bearings Ltd.* (2008), 2008 CarswellOnt 6386 (Ont. S.C.J.) [*Dawson*].

<sup>181</sup> *Keays*, *supra* note 172 at paragraph 59.

There is, however, another sense in which Justice Bastarache's approach suffers from a disconnect. Justice Bastarache states that damages for bad faith dismissal are only foreseeable, and therefore compensable, because *Wallace* created an expectation of good faith as to the manner of dismissal.<sup>182</sup> The problem with this reasoning is that employees do not simply receive protection from such employer behaviour because they *expect* to be treated better. Rather, they receive protection because, as *Wallace* recognized, employment law seeks to protect the dignity-based vulnerability of employees, which is created by the employer's power. Essentially, Justice Bastarache's reasoning is circular, requiring the employee to expect protection in order to receive it, but also requiring the employee to receive protection before she can expect it.

Moreover, if *Wallace* is the primary source of the employer's obligation to act in good faith during the termination process, as Justice Bastarache suggests it might be, then employers would only expect to be bound by this obligation if they entered the relevant contract subsequent to *Wallace*. Employees who signed their contracts prior to the decision in *Wallace* would have no expectation of being treated with dignity during the termination process, and so no right to claim damages arising from abusive employer behaviour during that process. Such a result would be entirely unjustifiable and in conflict with the jurisprudence following *Keays*.<sup>183</sup> The duty to respect dignity does not suffer from this disconnect, and is therefore preferable.

Turning then to the fourth point, *Keays* clearly does away with the arbitrariness of notice extensions under *Wallace*, forcing courts to tie awards to real damages caused by real employer abuse. The subsequent case law supports the view that *Keays* has required courts to be more

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<sup>182</sup> *Ibid.* at paragraph 58.

<sup>183</sup> See, for example, *Simmons*, *supra* note 180, where a 20-year employee was entitled to "moral" damages under *Keays*; and *Dawson*, *supra* note 180, where a 14-year employee was entitled to emotional damages under *Keays*.

rigorous and principled in awarding damages for mental distress.<sup>184</sup> With regard to this issue, then, there seems to be no basis for preferring an independently actionable duty to respect dignity over Justice Bastarache's approach in *Keays*.

Still, there is one further benefit involved in recognizing the duty and in holding that it is independently actionable. Where an employer acts in bad faith during the dismissal, but the employee suffers no actual damages, though a court could not award compensatory damages, it may well want to impose punitive damages in order to accomplish the objectives of "retribution, deterrence and denunciation."<sup>185</sup> However, in order to attract punitive damages, *Fidler v. Sun Life Assurance Co. of Canada* held that the underlying conduct must be "independently actionable."<sup>186</sup>

Under *Keays*, no such independent ground would generally exist without stretching other legal doctrines. In contrast, if recognized, the duty to respect dignity would likely constitute a sufficient grounding for punitive damages. Any concern with exposing employers to overly broad liability is minimized by the fact that the conduct underlying such damages must also be "malicious, oppressive or high-handed."<sup>187</sup> This is a high bar. Accordingly, by increasing the ability of the courts to protect vulnerable employees during the termination process, while at the same time limiting the scope of the employer's potential liability in a reasonable manner, the

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<sup>184</sup> See *Saulnier v. Stitch It Canada's Taylor Inc.* (2008), 338 N.B.R. (2d) 73 (N.B. Q.B.) [*Saulnier*] at paragraph 14 for an express statement to this effect. See also *Bru*, *supra* note 180; *Dawson*, *supra* note 180; and *Fox v. Silver Sage Housing Corp.* (2008), 70 C.C.E.L. (3d) 99 (Sask. Q.B.) [*Fox*], for examples of cases where courts have tied awards to actual emotional damages suffered by the employee or where the courts have refused to grant awards because the employee failed to prove that the emotional damages were actually caused by the employer's bad behaviour.

<sup>185</sup> *Fidler*, *supra* note 175 at paragraph 61. Citing *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4<sup>th</sup>) 257, [2002] 1 S.C.R. 595 [*Whiten*] at paragraph 43.

<sup>186</sup> *Fidler*, *ibid.* at paragraph 63. Citing *Whiten*, *ibid.*

<sup>187</sup> *Fidler*, *ibid.* at paragraph 62. Citing *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4<sup>h</sup>) 129, [1995] 2 S.C.R. 1130 [*Hill*] at paragraph 196; and *Whiten*, *ibid.* at paragraph 36.

independently actionable duty to respect dignity is preferable to the *Keays* approach in a very important sense.

Finally, the fifth point, and the third criticism of *Wallace*, can be dealt with simply by noting that *Keays* provides no solution to the problem. Assuming that *Gismondi* applies to *Keays* in the same way that it did to *Wallace*, the protection afforded by Justice Bastarache's approach will to some extent extend pre and post-termination, but delineating its scope clearly is very difficult to do in a principled and justifiable manner. Again, if the employee's social and psychological interest in work is worthy of protection during the termination process, there does not seem to be a reasonable explanation for why that protection should not apply throughout the entirety of the employment relationship.

Thus, *Keays* allows courts to effectively police a duty to respect dignity and goes some way to answering the criticisms of *Wallace*. Nevertheless, it has been argued that by taking a further step forward, and by recognizing an implied and independently actionable duty to respect dignity, the common law of employment would be far better equipped to ensure the emotional well-being of the employee during the termination process.

### **3. Beyond Termination: Respect for Dignity through the Duty to Mitigate**

The duty to respect dignity, then, is effectively enforced in one form or another at the threshold to, during the course of, and upon the termination of the employment relationship. It does not, however, stop there. The dismissed employee is obligated to make reasonable efforts to mitigate her damages, and in the application of that reasonableness standard, the courts again recognize the importance of protecting the employee's dignity-based vulnerability from abuses of the employer's control power.

In the Supreme Court of Canada decision in *Evans*, Justice Bastarache, with a majority of six of seven Justices, held that for both wrongful and constructive dismissals, “in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer.”<sup>188</sup> Justice Bastarache justified this requirement by asserting that the duty to mitigate is functionally equivalent to terminating an employee with working notice.<sup>189</sup> In both cases, the economic dependence of the employee is compensated, but by giving employers a choice regarding the form of compensation, the duty to mitigate serves the employer’s interest in flexibility and efficiency.<sup>190</sup>

However, by obligating the employee to accept re-employment with the employer, the duty to mitigate forces the employee back into her subordinate role within the employment relationship. Further, the circumstances created by the employer may be such that a return to this position would cause substantial harm to the employee’s social and psychological well-being. Such situations are addressed through the concept of “reasonableness”. While a number of factors are relevant to this analysis,<sup>191</sup> in *Evans* Justice Bastarache asserted that the “critical element is that an employee ‘not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation’ [...] and *it is that factor which must be at the forefront of the inquiry into what is reasonable.*”<sup>192</sup> Thus, where an employee's sense of dignity and self-worth would suffer, the employee will not be obligated to mitigate her damages by going back to work

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<sup>188</sup> *Evans*, *supra* note 13 at paragraph 28.

<sup>189</sup> *Ibid.* at paragraph 29.

<sup>190</sup> See England, “Rights and Efficiency”, *supra* note 37 at 584.

<sup>191</sup> See, for example, *Misfud v. MacMillan Bathurst Inc.* (1989), 28 C.C.E.L. 228, 63 D.L.R. (4<sup>th</sup>) 714, 70 O.R. (2d) 701 (Ont. C.A.) [*Misfud*]; and *Cox v. Robertson* (1999), 69 B.C.L.R. (3d) 65, 181 D.L.R. (4<sup>th</sup>) 214 (B.C. C.A.) [*Cox*] at paragraphs 12 through 18.

<sup>192</sup> *Evans*, *supra* note 13 at paragraph 30 (emphasis added). Citing *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (B.C. C.A.) [*Farquhar*] at 94.

for a former employer.<sup>193</sup> This protection is reinforced by that fact that under the duty to mitigate, it is the employer who bears the onus of showing that the employee failed to make reasonable efforts to mitigate.<sup>194</sup>

Within the post-termination context, then, the employer's flexibility to choose working notice or pay in lieu supports its interest in efficiency, and the employee's right to refuse unreasonable offers of mitigation protects her dignity-based interest in work. In essence, this harmonization amounts to the enforcement of the duty to respect dignity.

#### **IV. CONCLUSION**

Bertrand Russell wrote that “[w]ork is of two kinds: first, altering the position of matter at or near the earth’s surface relatively to other such matter; second, telling other people to do so. The first kind is unpleasant and ill paid; the second is pleasant and highly paid.”<sup>195</sup> While this is clearly an intended over-simplification, Russell’s point highlights an essential aspect of the employment relationship: employers give orders, and for the most part employees must obey them. This control right gives the employer the power to make the employee’s working conditions very unpleasant, and because of the worker’s immense social and psychological interest in the work, the employee ends up in a position of considerable vulnerability.

There is, however, a very obvious solution to the depressing picture painted by Russell. If employment law is serious about providing employees with protection against the inherent

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<sup>193</sup> See, for example, *Murdock*, *supra* note 135, where the constructively dismissed employee was not obligated to return to work as a day care teacher because she had originally been demoted from supervisor to teacher in the presence of other staff, parents and children in a busy hallway. See also *Carscallen – S.C.J.*, *supra* note 30 at paragraph 107, where Justice Echlin stated that, under the duty to mitigate, the “employee is not forced to work in a humiliating or demeaning atmosphere.” Citing *Farquhar*, *supra* note 192; and *Armstrong v. CFPL Broadcasting Ltd.* (1991), 1991 CarswellOnt 1886 (Ont. Gen. Div.) [*Armstrong*].

<sup>194</sup> *Michaels v. Red Deer College* (1975), 57 D.L.R. (3d) 386, [1976] 2 S.C.R. 324 [*Michaels*].

<sup>195</sup> Bertrand Russell, *In Praise of Idleness: and Other Essays*, 1<sup>st</sup> ed. (New York: W.W. Norton, 1935).

susceptibilities that they suffer from within the employment relationship, then the cure must directly address the disease. The simplest solution, therefore, would be to prevent the employer from abusing its control right to the detriment of the employee's dignity-based interest in work. This restriction, however, would have to be harmonized with the employer's interest in pursuing efficiency, which is the very justification for the control right to begin with. It has been argued that this is the exact function of the implied and independently actionable duty to respect dignity.

Further, this paper has attempted to show that the recognition of such a duty would only be an incremental move forward in the common law of employment. At the threshold to, during the course of, upon termination of, and even subsequent to the employment relationship, courts will use various common law doctrines to enforce what effectively amounts to a duty to respect dignity. By taking the next step, and by treating all of these various doctrines as evidence of the underlying and general duty, the common law of employment will be able to accomplish its purposive goals more coherently and directly.

In the end, the duty to respect dignity is simply a recognition that the employment relationship is about more than just an exchange of labour for money. The employer has power over the employee's working life, and the employee has interests in that life that go far beyond a pay check, interests which are inherently worthy of protection. As Albert Camus said, "[w]ithout work all life goes rotten. But when work is soulless, life stifles and dies."<sup>196</sup>

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<sup>196</sup> Quoted in the prologue to E.F. Schumacher, *Good Work* (London: Jonathan Cape, 1979).