

‘WAGE’, ‘SALARY’ AND  
‘REMUNERATION’: A GENEALOGICAL  
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AND THEIR SIGNIFICANCE FOR THE  
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## **Abstract**

The Supreme Court in *Hartley v King Edwards VI College* (2017) has confirmed that an employee who refuses to work in accordance with his contract forfeits his right to be paid for the duration of the breach. The decision extends to professional employees paid a periodic salary the principle established in *Miles v Wakefield MDC* (1987). The present article sheds new light on these decisions by situating them within a broader debate concerning the function of the wage and the proper relationship between work and payment. Drawing on insights from economic theory, and engaging in a genealogical analysis of legal concepts, the article shows how this debate has, over time, conditioned the use of concepts such as the ‘wage’, ‘the salary’ and ‘remuneration’ in legislation and case law concerning deductions. It shows that the legal concept of the ‘wage’ is closely related to the economic idea of the wage as the price of a commodity, while the legal concepts of ‘salary’ and ‘remuneration’ are more closely analogous to the economic idea of the wage as the cost of subsistence. The courts’ tendency to confuse these concepts, and to analyse the employer’s power to deduct as a right to withhold wages for non-performance of the contract, tells us much about the implicit assumptions underpinning cases such as *Miles* and *Hartley*, and how they have shaped the path of the law.

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**Key words:** contract of employment, remuneration, wages, deductions, legal evolution, law and economics.

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## 1. Introduction

In *Hartley v King Edward VI College* the Supreme Court confirmed that an employer will not be in breach of contract if he withholds payment from a worker in response to his refusal to work. Building on the earlier House of Lords decision in *Miles v Wakefield*, it extended this principle to include not only workers paid wages, or a salary for pre-defined hours of work, but also professional employees paid a periodical salary in exchange for a relatively open-ended obligation to serve.<sup>1</sup>

The decision in *Miles* has been much discussed in the literature. This is unsurprising given its implications for contract law, for the relationship between contractual principles and the contract of employment, for the restitutionary claim for quantum meruit, the doctrine of equitable set-off, and for the analysis of the Apportionment Act 1870.<sup>2</sup> This article does not purport to revisit these debates directly, for its purpose is somewhat different, namely to explore a much-neglected aspect of these cases by situating them in the context of a broader debate over the function of the wage, and the relationship between work and payment. The contours of this debate can be seen from the way that it has conditioned over time the use of concepts such as ‘the wage’, ‘the salary’, and ‘remuneration’ in legislation and case law concerning deductions from workers’ pay.

Rather than engaging with a close examination of the common law, therefore, as other writers have done, this article undertakes a detailed analysis of juridical language in both its common law and statutory contexts. It explores a number of statutory definitions, examines their relationship with the common law, and also analyses the link between these juridical concepts and economic theories of the wage. This ‘genealogical analysis,’ tracing the evolution of legal concepts over time, can help to provide a new perspective on the law on deductions generally, and on cases such as *Miles* and *Hartley* in particular, revealing the pathways, and exposing the taken for granted assumptions, that continue to influence the path of the law.<sup>3</sup>

In light of these aims, this article will be divided into three sections. Section 2 lays the groundwork for the genealogical analysis by exploring the socio-economic function of the wage in more detail. Drawing on economic theory, develops a functional understanding of the wage in order to bring a new perspective to bear on the meaning and significance of the concepts of ‘the wage’, ‘the salary’ and ‘remuneration,’ and the implications of each for how the relationship between work and payment is conceived, which are explored in section 3. Section 4 draws

on this functional understanding to frame the genealogical analysis, tracing through the law on deductions from pay the evolution of these concepts over time. Section 5 builds on the insights from sections 2-4 to revisit, and critically re-evaluate, the decisions in *Miles* and *Hartley*. Section 6 concludes. In these ways, the article helps to shed new light on the significance of the doctrinal debate at the heart of these cases, while at the same time contributing to our understanding of legal evolution and the nature of the legal form.

## **2. The socio-economic function of the wage<sup>4</sup>**

### **2.1 The wage in economic theory**

In neoclassical economics ‘wages are the price of labour; and thus, in the absence of control, they are determined, like all prices, by supply and demand.’<sup>5</sup> This means that the wage’s principal function is to facilitate co-ordination, that is, to enable employers and workers to adjust their behaviour in a way that maximises their joint utility.

The basic premise underpinning this conception of the wage is that in conditions of free competition, wages for workers of comparable productivity will be more or less equal throughout the market. This implies that the wage is set entirely by the impersonal forces of supply and demand; no one can directly influence the wage-rate.<sup>6</sup> Employers will decide whether or not to hire an extra worker by comparing the potential value of the worker’s labour with the costs involved in the wage, and workers will determine whether it is worth providing an extra hour of labour by weighing up the potential gain from the wage against the opportunity costs of lost leisure time.<sup>7</sup> In this way, the wage facilitates co-ordination in the market.

In economic theory, efficiency requires that prices reflect the social costs of production. It is this that ensures that supply and demand remain in equilibrium.<sup>8</sup> It is implicit in the neoclassical theory of wages, therefore, that the market wage fully compensates workers for the ‘productive factor’ that they supply. It follows that the market or equilibrium wage is not, by definition, exploitative because in conditions of free competition, it will accurately express the full costs of production.<sup>9</sup>

Neoclassical economics implicitly excludes from consideration, however, the institutions and material processes by which labour is reproduced over time.<sup>10</sup> The supply of labour is determined entirely by a price-quantity relationship that is analysed exclusively within the framework of the market.<sup>11</sup> It thereby neglects the

processes by which commodities, including labour power, are formed. This is not the case, however, for classical and institutional economics. The classical economists recognised that the wage is a central factor in production, circulation, distribution *and* the reproduction of labour, such that the costs of social reproduction must be an *exogenous* factor that determines the wage rate.<sup>12</sup> There was a distinction, therefore, between the wage as a price determined by supply and demand, and the wage as the costs of social reproduction:

‘The natural price of labour is that price which is necessary to enable the labourers, one with another, to subsist and to perpetuate their race, without either increase or diminution...The market price for labour is the price, which is really paid for it, from the natural operation of the proportion of supply to the demand; labour is dear when it is scarce, and cheap when it is plenty. However much the market price of labour may deviate from its natural price... it is not to be understood that the natural price of labour, even estimated in food and necessaries, is absolutely fixed and constant.’<sup>13</sup>

The classical economists saw the natural or social wage as something that was socially, historically and politically conditioned. It was not, in other words, determined entirely by its relationship with demand. It was this recognition that enabled them to engage explicitly with the tension at the heart of the capitalist system, namely the limit that the process of capital accumulation poses on the market’s capacity to maintain an alignment between the ‘social’ and the ‘market’ wage.<sup>14</sup> Such a perspective raises the question of whether the wage’s market coordination function might be in tension with its social reproduction function. If so, this gives rise to the further question: if the two are to be reconciled, which institutions, and specifically which of the concepts through which the law tries to express the idea of the wage, is best suited to this end?

These questions became central to the institutional critique of the neoclassical theory of wages that developed in the 19<sup>th</sup> century where the distinction between the ‘social wage’ and the ‘market wage’ came to be placed at the centre of the analysis.<sup>15</sup> The Webbs, for example, criticised neoclassical economics on the basis that it ignored the institutional forces that lent structure to the labour market.<sup>16</sup> The existence of such forces is such, they argued, that the agreed wage will rarely reflect the full social cost of labour, notwithstanding that its capacity to do so is a precondition for the efficient and effective functioning of the system. The market *presupposes* some institutional mechanism, whether in the form of minimum wage

legislation, collective bargaining or a comprehensive ‘labour code’ that would ensure the payment by employers of a ‘social wage.’

‘For an industry to be economically self-supporting it must... maintain its full establishment of workers, unimpaired in numbers and vigour.... If the employers .... hire them [workers] for wages actually insufficient to provide enough food, clothing and shelter, .... or if they can subject them to conditions so dangerous or insanitary as positively shorten their lives, that trade is clearly obtaining a supply of labour-force which it does not pay for.... [This is] a vicious form of parasitism.’<sup>17</sup>

Like the classical economists, the Webbs emphasised that the wage performs not just an allocative or co-ordination function, but a vital social, or reproduction, function as well.<sup>18</sup> The argument was not simply that to be fair the wage should be one that is capable of providing workers with an acceptable standard of living. Instead, the ‘social wage’ (referred to by them as a ‘living wage’) was an analytical concept, expressing the idea that the economy cannot flourish without an adequate supply of labour, which can only be guaranteed if wages allow for the reproduction of the working class.<sup>19</sup> To exclude from empirical models of the labour market the spheres of reproduction and production, was thus to obscure, and fail to engage with, the tensions at the heart of the capitalist system and, by implication, to underplay and obscure the constitutive role of labour law.

## 2.2 The wage in legal thought

This distinction, between the wage as price and the wage as the costs of subsistence is not unknown to legal discourse. Indeed, legal discourse frequently engages with the idea that the wage performs two vital, albeit contradictory, functions. Perhaps one of the clearest attempts to distinguish between market and social wages can be found in the Australian *Harvester* judgment. Here, the Court carefully distinguished between wages as determined by private bargaining, and the ‘fair and reasonable remuneration’ that the legislature might require employers to pay *as a condition* for their right to employ them:

‘The provision for fair and reasonable remuneration is obviously designed for the benefit for the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that the conditions shall be such as they can get by

individual bargaining - if it meant that those conditions are to be fair and reasonable, which employees will accept and employers will give in contracts of service, there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal contest, the “higgling of the market” for labour, with the pressure for bread on one side, and the pressure for profit on the other. The standard of “fair and reasonable” must, therefore be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilised community.’<sup>20</sup>

The judge argued that if labour is to be treated as a factor of production it follows that employers ought to pay both their fixed *and* variable costs, including the cost of maintaining their ‘capital’ value over time.<sup>21</sup>

These same ideas began to emerge in English law in the early-mid 20<sup>th</sup> century, around the same time that the concept of the contract of employment was beginning to be extended to manual wage-workers.<sup>22</sup> In 1930, for example, James Maxton MP, drawing on the Australian approach to the ‘living wage,’ introduced a Private Members’ Bill called the ‘Living Wage Bill’, the object of which was to ‘secure that the payment to every employed person of at least a minimum wage sufficient to meet the normal needs of the average worker... including the satisfaction of reasonable minimum requirements of health and efficiency and of cultural life and the provision of reasonable rest and recreation is a charge on industry.’<sup>23</sup> Maxton emphasised that this Bill was not to replace, but was to operate *alongside* the Trade Board Acts that were concerned with regulating the rate which wages were paid for ‘work’ done in specific trades.<sup>24</sup> The idea of the living wage was thus associated with a different function than legislation regulating the rate at which labour was sold for wages in the market.

During the early-mid 20<sup>th</sup> century, English law began to much more systematically distinguish between these ideas of the wage, and did so through the distinction between the concept of the ‘wage’, the price of labour, and ‘remuneration’, meaning the total sum due to the worker in connection with his employment:

‘The meaning of the word wages is direct payment related directly to work done...Remuneration is not mere payment for work done, but is what the doer expects to get as the result of what he does in so far as

what he expects to get is quantified in terms of money...it may be that it goes even wider than that.’<sup>25</sup>

That the juridical concept of the wage performs a function quite different from that of remuneration is immediately apparent from Lord Blanesburgh’s dissenting judgment in *France v James Coombes & Sons* (1948). Here, the majority had sought to circumscribe the minimum *wage* rate to time performing the work that was characteristic of the trade to which the rate applied. Lord Blanesburgh’s discomfort with this interpretation stemmed from his belief that the Trade Boards Act 1918 (in contrast with its predecessor, the Trade Board Act 1909) was designed to do more than guarantee a minimum price was paid for labour rendered, concerned instead with the worker’s right to earn a reasonable remuneration from employment:

‘These Acts do not require that ...the employer...find work for his workers in general... what is required of the employer is that the worker shall receive at least the minimum rate of remuneration for the work actually done, *or for the time spent in the statutory employment...* [nonetheless] ...during the periods when the employer is not bound either to employ or pay him he must be left at liberty either to obtain his minimum *wage* from another employer, or to exercise his skill for his own benefit. In no other way can the minimum or subsistence wage which for workers of his trade the Acts essay to provide be found for him. Accordingly, where an employer... binds a worker... to be in continuous attendance at his premises ready, if called upon, to undertake his boot repairing as and when required, and where by the same agreement the worker is required to do no boot repairing for anyone else...such an agreement...would be void under the Acts, *unless for the whole time of his service there was payable to the worker a wage at the minimum time-rate* [emphasis added].’<sup>26</sup>

Parliament seized on the distinction between wages, as the price of labour, and remuneration, as a cost that an employer *ought* to bear as a condition for purchasing it when it came to the drafting of the Wages Councils Act (1945):

‘Wages Councils will be given a general power to fix *remuneration*, and remuneration includes the fixing of a guaranteed weekly wage...[e.g.] if a man works only four days instead of 6 because they cannot have full employment.’... ‘The reference to remuneration is

wider than that to rates of wages because it has a different legal meaning and gives wider powers to the board'<sup>27</sup>

The significance of this was also explicitly acknowledged in the House of Lords in terms redolent of the arguments of the Webbs:

‘Ensuring that every low paid wage-earner will receive either a legal or moral guarantee of a reasonable weekly wage...[the Act] takes a step further towards the implicit obligation of the modern state to provide a minimum standard of welfare for all its citizens by means of social services or statutory regulation of terms and conditions of work.’<sup>28</sup>

The distinction between the legal concepts of ‘wage’ and ‘remuneration’, and the economic concepts of the market and social wage is not a direct one, for the legal concepts *themselves* say little about the *amount* that has to be paid. In the above examples, therefore, much will turn on how the minimum rate is set and how it is calculated at a given time. Nonetheless, the broader significance of these concepts and the distinction between them lies not in their capacity to provide workers with a specified amount of income, but in the function that they perform within legal discourse more generally. The ‘wage’ performs a function analogous to the concept of the market wage in that it reflects the contractually agreed sum that an employer pays for abstract labour time. ‘Remuneration’, by contrast, performs a function akin to the idea of the social wage, an obligation to pay workers that is decoupled from working time and so reflects more than simply the value of a commodity. It builds on the much older concept of the salary as a fixed and unconditional payment not for work, but for contractual service over time, but goes beyond it in that it includes any additional contractual entitlements and the various employment rights which are today implied into the contract of employment.<sup>29</sup> In this way, it operates to shift onto the employer some of the social costs that the concept of the ‘wage’, as something that expresses the value of commodified labour, is unable to reflect. In this way, the legal concept of remuneration helps to ensure that the functions of both the market and the social wage are performed.

Having established the multiple functions of the wage in the economy and shown how they map on to different legal categorisations, we are now in a position to take a closer look at these concepts and their role in the context of the law on deduction from wages.

### 3. Salaries, remuneration and wages

#### 3.1 Salaries

The term ‘salary’ was historically used to refer to periodical payments made to office-holders for tenure of an office. It was a regular and unconditional payment, set at a level that reflected the demands of the office and the office-holder’s position and status.<sup>30</sup> Paid most frequently to public-office-holders and army officials, it was payable irrespective of whether the individual’s services were actually required, because ‘it is fit that a public servant should retain the means of a decent subsistence without being exposed to the temptation of poverty.’<sup>31</sup>

It was the salary’s certain and unconditional nature that came to distinguish it from other payments made in relation to work. It was on this basis that the courts justified its extension to employees hired under a contract of employment during the 19<sup>th</sup> century. Here, the court argued, the contract supplied the certainty and stability characteristic of the salary which, for public office-holders, had been provided by their tenure.<sup>32</sup> In light of this, the courts excluded from the scope of the term payments to persons ‘carrying on a business or a profession,’ sums ‘which a man earns in exercise of his personal skill’ where he himself takes the economic risk.<sup>33</sup> Instead, the salary was confined to fixed payments made for service over time, whether in consequence of the occupation of a public office, or the occupation of a post pursuant to a contract of employment.<sup>34</sup>

By the end of the 19<sup>th</sup> century, the salary was expressly defined as a payment for services rendered under some contract or appointment, computed by time and payable at fixed intervals.<sup>35</sup> Here, the term ‘services rendered’ did not mean a person’s ‘actually being called upon to perform duties’ but his being ‘under an obligation to perform them.’<sup>36</sup> Recipients of salaries might include ‘medical advisers, members of theatrical establishments, and even ... some descriptions of household servants’ therefore, as persons hired to serve, and paid for the fact that they are under an ongoing legal obligation to perform the services required of them, irrespective of whether or not they actually work.<sup>37</sup>

In contrast with the wage, therefore, the salary was never seen as a price that was dictated by the market. Instead, it was seen as an unconditional payment set by reference to the employee’s skill and status and what was needed to sustain it. It was an individualised payment, therefore, rather than one based on the prevailing, or ‘going’ rate, and as such, differed qualitatively from the notion of the market wage.

### 3.2 Remuneration

Throughout the 18<sup>th</sup> and 19<sup>th</sup> centuries, the term ‘remuneration’, previously a generic term for anything paid as recompense for some benefit provided gradually developed a more technical meaning to refer to the various benefits payable to holders of higher status positions, such as crown-servants, public inspectors, judges or members of the military, in recompense for their service.<sup>38</sup> This would often include the salary, the definite monetary payment made for ongoing service, but also various non-monetary benefits and/or supplementary payments that might only be payable on the performance of specific tasks or duties.<sup>39</sup>

From the 19<sup>th</sup> century onwards, the term was increasingly being used to refer to the total contractual benefits due to a private sector employee in connection with their employment.<sup>40</sup> Many higher-status employees would receive a number of benefits in addition to their salary, such as commissions on profits, or benefits in kind, such as the right to occupy a farm house or some other property linked with the business. Such benefits were therefore deemed to form part of the overall contractual *remuneration* that such an employee could claim if they were wrongfully dismissed.<sup>41</sup> Remuneration was thus something that was paid under an ongoing contract of employment that envisaged mutual obligations of ongoing service provided in exchange for ongoing employment and payment. If the contract continued, therefore, the function of the concept of remuneration was to ensure that neither the salary nor any accrued benefits could be unilaterally withheld.

### 3.3 Wages

It is only in the early twentieth century that the courts began extending this relational model of the contract of service or employment to industrial workers paid wages.<sup>42</sup> Prior to this period, wage-workers would be hired by way of a contract that did not necessarily envisage any ongoing obligations between them and their employers beyond the immediate obligations of work and payment. That is not to say that each exchange did not translate in practice into implied obligations to perform work and to employ. The point, however, is that such obligations were deemed to be limited to single units, an hour or day, of labour and payment.<sup>43</sup> For this reason, the worker’s implied obligation to faithfully serve was not implied into an *ongoing* contractual relationship, an implied obligation to continue to offer labour service over time, but arose as an incident of servant status, a by-product of the annual hiring rule, and the penal provisions of the master and servant legislation. From the contractual perspective, therefore, beyond the immediate wage-work exchange, there was no ongoing obligation on the

employer to pay his worker, no ‘mutuality of obligation’ beyond the obligation to pay wages for labour. In the terms used in Mark Freedland’s work, there was no *relational* contract, no arrangement giving rise to a contractually protected interest in ongoing employment and payment.<sup>44</sup>

## 4. Deductions

### 4.1 The ‘wage-work bargain’

From the medieval period, the principal action for enforcing informal agreements such as the work contract was the action in debt. Debt differed from covenant in that rather than being based on an underlying promise, the obligation to pay was said to derive from the underlying transaction, that is, from the fact that a benefit had been provided pursuant to some form of reciprocal exchange.<sup>45</sup> In order to claim wages, therefore, a worker would have to prove that he had provided the full year’s service for which the wage was paid. If the employer could show he had not enjoyed exclusive control over his servant for the entire period, therefore, or that the servant had departed from service or been wilfully disobedient, he was under no obligation to pay.<sup>46</sup> He was not, in other words, in breach of any contractual obligation if he unilaterally withheld ‘unearned’ wages.<sup>47</sup>

The essence of the work contract was not mutual promises, therefore, but *exchange*: in the context of an annual hiring, a full year’s service for a full year’s wages, and in 18<sup>th</sup> and 19<sup>th</sup> century industry, a day or hour’s work, or a finished good, in exchange for a time or piece wage. If a manual worker could not prove that he had produced the good or performed the hour or day’s work, therefore, he was not entitled to be paid.

It was this premise that came to be embodied in the Truck Act 1831. The Truck Act established a right for all those within its scope to be paid in full and in coin all wages earned and payable at the date of the claim. It rendered void any agreement providing otherwise, and any deduction made whether or not it had been consented to in writing.<sup>48</sup> The Act referred only to the worker’s right to wages, which the courts interpreted as including only those payments made in exchange for personal labour. They thus excluded charges for machinery, bonus payments, and anything above and beyond the marketable value of the labour that was actually provided.<sup>49</sup> If deductions were made for poor workmanship, therefore, this was not a deduction from *wages*, but a reduction that reflected the fact that the labour provided was of a different quality or quantity than that envisaged in the contractually agreed rate.<sup>50</sup>

The Truck Acts' protection extended to manual workers, and attached to the 'doing of labour' within a trade. It did not, therefore, presuppose a particular form of contract. Thus while the wage was defined as anything '*contracted* to be paid, delivered, or given as a recompense, reward, or remuneration for *any Labour done or to be done*' the Act provided that 'any Agreement, Understanding, Device, Contrivance, Collusion, or Arrangement whatsoever on the Subject of Wages, whether written or oral, whether direct or indirect, to which the Employer and Artificer are Parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an Obligation on the other of them, shall be and be deemed a 'contract.'<sup>51</sup> The form of the contract was irrelevant, and therefore, so too was the existence or not of any ongoing mutual obligations between the parties. Instead, the emphasis was entirely upon the value of the labour that the worker had provided pursuant to some form of reciprocal exchange.

According to this logic it is not difficult to see why the House of Lords in *Miles* might have assumed that an employer is entitled to withhold wages from a worker who refuses to work in breach of contract. In this approach, the employer's right to withhold is not the result of an implied condition in a bilateral contract of employment, however, but is a right inherent in the legal form of the pre-20<sup>th</sup> century labour contract as a simple exchange of commodities. Employers are not liable in damages for refusing to pay a worker who has not worked because their *only* obligation under the contract is to pay for labour rendered. But the distinctive feature of the relational contract of employment is that there are mutual obligations of ongoing performance. These early 'wage-work' bargain cases should not be relied upon, therefore, as authority for the cases arising today where the contract in question is a bilateral contract of employment.

## **4.2 The relational contract of employment**

By the early 20<sup>th</sup> century the courts were regularly applying the relational model of the contract to higher status professionals and managers, but only gradually did they begin to do in the case of hourly paid manual workers in industry and agriculture paid wages. The extension of the contractual model to wage-workers was a slow process that was initiated in part by the social welfare legislation being enacted during this period, and in part by the move towards vertical integration and more stable and regular employment to which this was related.<sup>52</sup> Throughout the late 19<sup>th</sup> and early 20<sup>th</sup> century, therefore, we see the courts implying from the fact that work was being provided on a regular basis to a single employer, certain mutual obligations like those previously confined to higher-status contractual

employees. Most significantly for the purposes of this article, the courts began relatively early on in this process to imply an obligation to serve in exchange for the employer's obligation to employ and, in this way, extended to wage-workers the right to be paid remuneration for time in contractual employment.

The first step in this direction came with the Workmen's Compensation Acts of 1897 and 1906. These Acts provided for compensation in the event of industrial injury, calculated by reference to 'earnings in the employment of the same employer.'<sup>53</sup> They were protective statutes designed to provide workers with compensation for the loss relating not only to the physical injury itself, but to the loss of future employment. They seemed to presuppose, therefore, a stable and continuous contractual relationship like that previously confined to higher-status salaried employees. To the courts, this implied that the Acts' reference to 'earnings' ought not be confused with the concept of the wage. Instead it was to be interpreted in line with the concept of *remuneration*, substantially increasing the amount of compensation that could be claimed.

Discussing the scope of the Act, the courts rejected the argument that earnings ought to be equated with the term 'wage' as used in the Truck Acts where the term had been defined as the 'price of personal labour.'<sup>54</sup> The Workmen's Compensation Act, 'was passed for a different purpose, and [thus] it uses expressions different from those found in the [Truck Act.]' The term earnings was used 'not in the sense in which economical writers use it, but in a popular sense...the full sum for which the man is engaged to work.'<sup>55</sup> Earnings, it was argued, corresponded with the legal concept of remuneration, the total sum payable to the worker in connection with his employment.

In practical terms, this meant that the worker's 'earnings' included sums that had historically been excluded from the concept of the wage, such as charges for machinery, lighting and other equipment necessary for the job,<sup>56</sup> expenses paid for accommodation when work was done away from home,<sup>57</sup> and tips or gratuities earned from third parties during the course of employment.<sup>58</sup> This was because all these sums formed part of the worker's overall 'remuneration for his services.' To calculate a *wage*-worker's remuneration, therefore, one could not deduct 'the expenses he had to incur for the purpose of putting himself into a condition to earn that remuneration'<sup>59</sup> nor the costs involved in guaranteeing that he 'comes to [his work] properly equipped according to the general understanding and practice in that particular trade'<sup>60</sup> - costs that fell outside the legal definition of the wage as a payment for work. Here, therefore, by invoking the concept of remuneration the

courts had implied into the contract a right to be paid a sum reflecting some of the social costs not reflected in the wage.

In a similar vein, in the early 20<sup>th</sup> century, the courts began extending to wage-workers the right to claim damages in the event of wrongful dismissal.<sup>61</sup> This presupposed a right to be paid that was decoupled from labour already rendered, and as such, also presupposed that there was an ongoing obligation to pay and to employ.<sup>62</sup> The courts took this step following a series of decisions in which the courts recognised that wage-workers might be hired indefinitely, notwithstanding that they were paid wages on a weekly, or fortnightly basis. The contractual notice period need not correspond, in other words, with the interval at which wages were paid. The wage-work bargain had in this sense been severed from the broader contractual framework which governed the parties' obligations in the event of a breach. If a worker left his employment in breach of contract, therefore, the employer could not refuse to pay him his accrued wages; instead, he would have to bring a separate claim in damages to recover any loss caused.<sup>63</sup>

The effect of this was to narrow the gap between the rights of wage-workers and salaried employees, because the courts no longer assumed from the payment of an hourly or weekly wage that there were no *ongoing* obligations to retain and employ. In effect, they provided wage workers with an implied right to be paid for ongoing service that was decoupled from the right to be paid wages for time working. In practical terms this meant that even if the contract stipulated for the payment of a wage, employers could not unilaterally withhold payment insofar as the contract was continuing, even in respect of a period during which the worker had not worked:

‘Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract.’<sup>64</sup>

The high point of this process came in the period during and following the second world war. In 1940, the government enacted the Essential Work Order with a view to guaranteeing continuous production during the war period. This effectively made labour compulsory for all, restricting employers' rights of dismissal, and

helping to erode status distinctions between workers and across occupations. The effect of these measures was to provide workers of all types with a guaranteed minimum income and a regular working week, while lending trade unions a much more significant role in governing the economy.<sup>65</sup> In this context, the wages these workers received no longer appeared as the price of a tangible good, for they were payable for war-service, attaching to employment, rather than the provision of commodified labour. The idea behind the Order was that:

‘The Minister will be able to prescribe the terms of *remuneration*, the hours of labour, and conditions of service. Remuneration will be on the basis of the remuneration for the job. If an engineer is asked to do engineering work, he will get engineer’s pay. If somebody else is asked to do a particular job, he will get the pay of that job. If a professional man is asked to do his professional work, he will get his professional pay. If he is asked to do manual work he will get a manual worker’s pay. The general principle will be that of remuneration for the *job*.’<sup>66</sup>

During this period all workers received remuneration for their contribution to the war-effort; their on-going service to the country.<sup>67</sup> They did not receive wages in the traditional sense, therefore, because ‘wages and profits were under the government’s control’ and their pay was determined out-with the context of the market.<sup>68</sup> This experience had a long-lasting impact on the way in which the worker’s right to be paid was conceived. Following the war, Parliament decisively rejected the idea that minimum wage legislation ought to provide a right to be paid a minimum rate for work, in favour of the view that:

‘...after the passage of 35 years, our whole idea of labour legislation, with ideas of a guaranteed minimum week’s *earnings* and longer periods of holiday with pay...necessitates that the old legislation be brought up to date.’<sup>69</sup>

This meant that ‘if a man works only 4 days instead of 6 because he cannot have full employment’ he will not receive less by way of remuneration.<sup>70</sup>

By these means, the idea that an employee is paid remuneration for *employment* rather than *solely* a wage for time working had been firmly established. The significance of these developments lay not in the fact that the minimum wage had been pegged to the costs of living, but in the fact that the *structure* of the

employment contract was seen to be something that *ought* to shift the social costs of employment on the employer, the person bound to pay wages for labour.

The significance of the concept of remuneration, therefore, was that it helped extend to wage-workers a contractual model of employment that had previously been the preserve of the salaried employee. The rules applicable to the contract of employment, at least insofar as the questions of breach and payment were concerned, were no different from the rules applicable to bilateral contracts generally. However, the significance of the unitary model of the contract of employment was that it brought the labour contract within the mainstream development of contract law from which it had long been excluded. Through the legal concept of remuneration, however, the contractual wage could be elevated into something more closely resembling a right to subsistence. It provided a platform, in other words, through which to shift onto the employer some of the social costs of employment so that the functions of both the social and market wage could be performed.

There remained an important distinction between the salary and the wage, however, when it came to the principles applicable in the context of the common law debt claim. Claims in debt for unpaid wages would fail in relation to time when the worker was not working. Claims in debt for unpaid salary, by contrast, would succeed provided that the employee could show that the contract continued during the payment period in question. The benefit of the contractual right to remuneration, therefore, is that it is only if the contract has been terminated in light of the employee's prior breach that the debt claim will have to be brought; otherwise, the burden is on the employer to bring a claim in damages to recover any loss caused.

If instead of affirming the contract the employer terminates the contract in response to the employee's prior breach, however, the only common law remedy available to the employee will be a claim in debt for any unpaid sums. In this context, wage-workers will only be prevented from claiming any unpaid wages that correspond with time not-working, whereas the situation for salaried employees is more complex. This is because the salary is an indivisible payment for an entire obligation. Thus, at common law, the period between pay dates being treated as an entire contract, if the employee is dismissed between payments, they will be unable to claim anything in respect of the period in question unless they can prove that they have substantially performed.<sup>71</sup>

By the end of the 19<sup>th</sup> century, it was widely felt that this rule, the entire contract rule, operated unfairly vis-a-vis employees, particularly where the interval between payments was particularly long.<sup>72</sup> In order to mitigate the effects of this rule the courts sought to extend the Apportionment Act 1870 to salaries payable under a contract of employment.<sup>73</sup>

The purpose of the Apportionment Act was to render divisible periodical payments such as rents and annuities so that they could be apportioned between successors in title.<sup>74</sup> The problem that the Act responded to arose where an office-holder or landlord died mid-way through a payment period, and it was necessary to apportion payments between the deceased's estate and his successor.<sup>75</sup> To this end, and in order to include payments made to public-office holders, the Act included within the definition of annuities 'salaries and any other periodical payments' made in respect of tenure of the office.<sup>76</sup> The Act presupposed that the payee had a proprietary interest in the payment, that the payment would continue to be payable irrespective of who had the right to claim it. For this reason, it did not extend to salaries payable as between an employer and employee under a contract of employment. It extended only to 'offices of a public nature,' therefore, and the rents or payments issuing or being derived in respect of them.<sup>77</sup> Given that the premise behind the Apportionment Act was to render apportionable payments payable to successors in title, moreover, it only came into operation on death or if the payee otherwise ceased to be entitled.<sup>78</sup> It therefore only applied to payments '...as will still be made to someone, though the payment to a particular individual has ceased'<sup>79</sup> and so had no application if the individual's right to be paid continued.<sup>80</sup>

The extension of the Act to private employment was not uncontroversial, therefore, for despite the courts' growing use of the term salary to denote the periodical payments made to contractual employees, in the late 19<sup>th</sup> century Parliament continued to interpret the salary much more narrowly, confining it to the payment due to holders of a public office.<sup>81</sup> Nonetheless, the problem that the Act addressed, the question of how to apportion payments between two parties, was structurally similar to that which faced a salaried employee following termination of the contract. Here too there was a dispute as to how much the employee, who had continued to serve, but for less than the stipulated period, could claim, and how much the employer who had benefitted from the employee's services, but to a lesser extent than envisaged, could retain.<sup>82</sup> These issues only arose, however, if the contract had been terminated. Otherwise, the payment would still be payable on the same basis as before the breach. For this reason, despite its extension to private

employment, it remained the case that it only applied if the contract had been terminated: <sup>83</sup>

‘The effect of s.2 of the apportionment Act 1870 is that, unless the parties otherwise stipulated, the salary of an employee *whose employment terminates during a pay period* shall be apportioned and paid in respect of the period actually worked.’<sup>84</sup>

Prior to the enactment of the Wages Act 1986, the nature and scope of workers’ rights to be paid were relatively clear. The wage was seen as a divisible payment for divisible obligations to work, such that for the purposes of a debt claim, a worker would have to prove that he had provided work in order to be entitled to be paid. The salary, by contrast, was seen as an indivisible periodic payment for an entire obligation, one that accrued per month of employment, irrespective of whether, and how much, the employee worked. If the contract was terminated, the right to be paid would depend on questions of substantial performance and the position under the Apportionment Act. For those hired under a contract of employment, however, irrespective of whether the contract provided for a wage or a salary, the employer could not unilaterally withhold even ‘unearned sums’ without placing himself in breach of contract.

The Wages Act 1986 brought about a number of changes to the law relating to the worker’s right to be paid.<sup>85</sup> It not only replaced the Truck Acts with a new statutory right for all workers not to be subject to unauthorised deductions from ‘wages’ but introduced a new definition of the ‘wage’ that was to challenge the way in which the wage had long been conceived in the common law.

The objective of the Act was to ‘...achieve an efficient labour market, where there are the minimum of constraints on the rights of employers and employees to agree to offer and accept jobs on contractual terms that suit them both.’<sup>86</sup> It followed from this aim that there were no longer to be any limits on the parties’ freedom to contract out of any statutory prohibition on deductions from wages.<sup>87</sup> Provided the Act’s pre-notification requirements were met, therefore, there was no obstacle to an employer making deductions from wages. The right enshrined in what is now s.13(1) ERA is a right not to be subject to *unauthorised* deductions to wages ‘properly payable’ at the date of the claim. This statutory protection against deductions is thus little more than a right to bring proceedings in an employment tribunal to hold employers to the terms of their contract. There is no equivalent, therefore, to the provision in the Truck Act that had provided an absolute right to be paid wages earned in full, one that could not be varied by agreement.<sup>88</sup>

The regime now governing deductions is, like its predecessor in the Truck Acts, a regime that applies to wages rather than remuneration. For the purposes of the Truck Acts, this meant that whenever labour was provided pursuant to some form of reciprocal transaction, the Act would apply. Under the Wages Act 1986 however, the attention was to be shifted away from the question of whether labour, as opposed to some contracted for result, had been provided, onto the form of the contract. It is not enough that labour has been provided, therefore, for it must have been provided pursuant to a contract of employment or to personally do work; a bilateral contract envisaging certain mutual obligations. Consistently with this, the wage is no longer defined as a sum contracted to be paid for labour ‘done or to be done’ but instead as a payment ‘by an employer to his worker in connection with his employment’.<sup>89</sup> The diverse payments included within this definition are such, moreover, that it is clear that this definition of the ‘wage’ is in fact a definition of remuneration: it presupposes an executory contract of employment or to personally do work, and encompasses a number of contractual and/or statutory payments that cannot be said to attach to the doing of work.

Section 14 ERA lists a set of exceptions, a number of ‘trigger’ events in response to which any deduction made will be excluded from the scope of section 13. One such trigger event is industrial action; section 13 will not apply to deductions made in response to a refusal to ‘work.’ It is important to recognise that the effect of section 14(5) is not to establish an independent right for the employer to deduct pay following a strike. In principle, its only effect is to exempt such deductions from the procedural requirements in section 13. In a given case, therefore, the overall legality of a deduction will depend on the contractual or other common law propriety of making it. If the contract does not expressly provide for such a deduction, therefore, the employee should be able to sue for it in the ordinary way. If the employer attempts to withhold such sums, therefore, this would, subject to an express term in the contract, give rise to a claim in damages for breach of contract.<sup>90</sup>

The decisions in *Miles v Wakefield* and *Hartley* cannot be seen as the *direct* result of changes brought about by the Wages Act. The so-called ‘right’ to withhold unearned sums is entirely a creature of the common law, even if the principles underpinning it are consistent with the ideas embedded in the Wages Act and now the ERA. Both the House of Lords’ decision in *Miles*, and the changes brought about by the Act, have nevertheless given rise to a number of tensions in the common law because they each fail to engage with the distinctiveness of the concepts of the wage, the salary and remuneration.<sup>91</sup> The cumulative effect of this can be clearly seen from the contradictions that underpin the decision in *Hartley*.

In order to engage more fully with this case, it is necessary to revisit the House of Lords' decision in *Miles* and show how our understanding of this case and the cases following it can be furthered by carefully engaging with the concepts of the wage, the salary and remuneration.

## **5. Recent case law**

Miles was an officer of the Crown, appointed under the Registration of Services Act and assigned to serve as a registrar of deaths, births and marriages for Wakefield Council 37 hours a week in exchange for a salary fixed by the statutory scheme. Miles refused, as part of a union-backed plan to place pressure on employers to improve registrars' financial status, to carry out marriage ceremonies on Saturday mornings in accordance with the scheme, although he continued to provide 37 hours work per week as required. In response, the Council withheld 3/37 of his salary, after having told Miles he would not be paid for the Saturday mornings in question. Miles initially argued that he was entitled under the scheme to organise his own working time, but went on to argue that, even so, his salary was an unconditional payment for his occupation of the office, and so could not be unilaterally withheld even if he was found to be in breach.

Miles was an office-holder, and so because he had no contract with the Council, he fell outside the scope of the Wages Act and the provisions on deductions from wages. Thus, while the House suggested that Miles could be treated as an employee for the purposes of the claim, to successfully defend Miles' claim for unpaid salary, the Council had to find a common law basis for unilaterally withholding 3/37ths of his pay.

The first issue that the House had to address concerned the distinction between salaries and wages, and the implications of each for the scope of an employee's right to be paid. In this respect, the central question was whether a 'salary' payable to an 'employee' was, as counsel for Miles suggested, a contractual payment for contractual service, presupposing only the continuation of the contract, or whether the 'salary' was payable only in respect of *work* or services actually rendered. The second issue turned on the relationship between salaries and wages on the one hand, and remuneration on the other, and so on the distinction between the claim in *debt* for unpaid wages and the claim for breach of the employer's contractual obligation to pay.

## 5.1 The common law debt claim

It was clear from the terms of the statutory scheme that Miles was to be paid a *weekly* salary for a pre-defined period of work (37 hours per week). The House of Lords concluded from this that his position was no different from that of a ‘wage’-worker hired at a weekly wage. The obligations to work and to pay were, they argued, interdependent, for ‘the employer pays for work and the worker works for his ‘wages.’ This is so, it seems, irrespective of whether or not the ‘wage’ is expressed as a *weekly* ‘salary’ or weekly wage for pre-defined hours of work.<sup>92</sup>

It seems from this that the House of Lords saw no meaningful distinction between a salary and a wage, at least when it comes to the conditions that must be satisfied for the purposes of the debt claim. It is arguable, however, that this was due to the specific nature of Miles’ salary, the fact that their Lordships interpreted the scheme as creating a right to be paid for a pre-defined period of work. Lord Templeman expressly recognised, for example, that there is a difference between salaried office-holders whose obligations might require that they provide service on Sundays, or Christmas, as and when required, and those with pre-defined hours of work like Miles, a distinction that would equally apply to private employees. He did not explain, however, whether different principles might apply to each when it comes to the question of what earns the right to be paid.<sup>93</sup>

In Miles, the House of Lords had concluded that a salary, or at least a salary that envisages pre-determined hours of work, is *not* an unconditional payment payable for (contractual) service over time. Instead, it is a payment for work done, where the obligation to pay is only triggered when that work has been duly performed. This meant providing work in accordance with the express and implied terms of the contract of employment, including the implied obligation to faithfully and obediently serve.<sup>94</sup> It thus implied that employees could not, by definition, be said to be working during a period of industrial action, because ‘an employee who works with an intention to harm his employer is no different from a worker who refuses to work at all.’<sup>95</sup>

This interpretation was confirmed in *Wiluszynski* where the Court of Appeal argued that ‘an employee is not entitled to remuneration under the contract of employment if he is not ready and willing to perform that contract.’<sup>96</sup> Here, the employee’s refusal to perform a small part of his contractual duties per day amounted to a failure to ‘work’ that permitted the employer to reject the work and withhold each day’s payment without placing itself in breach of contract.<sup>97</sup>

The High Court adopted a similar approach in *Cooper*.<sup>98</sup> This case concerned a full day's strike among support staff at a sixth form college, to which the employer responded by withholding not only a full day's 'salary' but also the holiday pay referable to the strike day in question. The court confirmed that an employer has two choices (short of dismissal) when it comes to responding to a strike, to deduct unearned sums (the '*Miles*' basis of deduction), or to claim damages by way of breach of contract (the '*Sim*' basis). For policy reasons, however, if the employer elected for the former, he was limited to deducting that which the employees could not sue for in a claim in debt. This meant the employer could not circumvent the working time regulations by withholding an apportioned part of holiday pay.<sup>99</sup> This was not 'wages' in the sense of the value of labour to the employer, but part of the 'total consideration under the contract.'<sup>100</sup> Only the *former*, the court found, could unilaterally be withheld.

The employees in *Cooper*, *Wiluszynski* and *Miles* were all hired to provide a set amount of work per week.<sup>101</sup> In each case, therefore, although their contracts provided for a 'salary,' the term does not seem to have been used in the narrow legal sense to refer to a fixed periodic payment for contractual service over time. Instead it is used in a more generic sense to refer to the annualized total of that which is paid in exchange for a set amount of work throughout the year. The position in both *Sim v Rotherham*, decided while *Miles* was on appeal, and *Hartley* was different. Both these cases concerned industrial action by teachers who were paid a salary in the sense of a periodical payment for professional service over time. Rather than prescribing set working hours, therefore, the contracts envisaged that the employees 'provide a particular service to proper professional standards' such that their right to be paid could not be confined to any pre-determined working hours or time spent at the workplace.<sup>102</sup>

For Scott J in *Sim*, the salary was something that vested in the teacher per month of employment. For this reason, even a breach of contract committed with an intention to harm the employer could not be equated with an absence from, or failure, to work.<sup>103</sup> Industrial action was not, in other words, to be equated with a total failure of consideration capable of excusing the employer's failure to pay, whether this took the form of a work-to-rule, as was the case in *Sim*, or a full day's strike.<sup>104</sup> In *Sim*, therefore, where the teachers had refused to perform cover-work in breach of an implied term of their contracts, the teachers had a good claim in debt for their salaries and, if the employer refused to pay them, for breach of contract. This was so even in respect of the salary due for the month during which the industrial action took place; since the contract was continuing, the employer continued to be bound by its contractual obligation to pay them. Scott J put this as

follows: 'each month a contractual right to a salary payment vests in the teacher...if in the course of a month there has been a breach of contract...if the breach of contract has not given rise to any recoverable loss...there is no deduction that can be properly made.'<sup>105</sup>

By the time *Hartley* was decided, however, the status of this argument was unclear. In *Miles*, Lord Oliver had referred to *Sim*, but had argued that for the purposes of a claim in debt for unpaid salary, the employee would have to prove he *had been* ready and willing to perform his contract of employment during the period in question.<sup>106</sup> Neither he, nor the courts in *Cooper* or *Wiluszynski* drew any express distinction between a salary in the generic sense of an annualised payment for 'work' and a salary in the technical sense of a fixed periodical payment for contractual service over time. It seemed, therefore, that the principle in *Miles* would apply irrespective of the nature of the employee's contractual pay.

The dispute in *Hartley* arose when, following a day's strike by teachers at a sixth form college, the college sought to withhold 1/260<sup>th</sup> of their annual pay. Both the Court of Appeal and the Supreme Court accepted with little discussion the argument that the *Miles* basis for deduction applied, that 'pay for a strike day is never earned and cannot be claimed.'<sup>107</sup> The only question remaining was thus whether the college was entitled to deduct 1/260<sup>th</sup> of the salary, reflecting the number of weekdays in the year, or were limited to 1/365<sup>th</sup> to reflect the number of calendar days in the year. The answer to this depended on whether the salary was conceived as a payment for contractual service over time, apportionable by reference to calendar days, or, as in *Miles*, a payment for core working hours, apportionable by reference to time spent teaching at the workplace.

The court had assumed, therefore, that it was necessary to find some basis for apportioning the salary. This followed from the idea that a single day's strike might amount to a total failure of consideration justifying the employer's refusal to pay. The problem, however, was that as in *Sim*, the teachers' salary was defined as a 'sum payable per annum, to be paid in monthly instalments.' Their contractual duties included working a minimum number of working days per year, referred to as 'directed time,' and 'undirected time', 'such additional hours as may be needed to enable you to discharge your duties effectively including, in particular, the marking of students' work, the writing of reports on students and the preparation of lessons, teaching material and teaching programmes' including various 'professional duties' neither limited to teaching hours, nor confined to tasks performed at the workplace. In light of this, the Supreme Court recognised that the teachers' obligations extended beyond an obligation to provide a minimum amount

of ‘directed time’ at the workplace. Their salaries could not be seen, therefore, as divisible payments for a divisible obligation to work. Instead, they were fixed periodic payments for ongoing service such that, prima facie, the entire contract rule applied.<sup>108</sup>

In order to reconcile this with the decision in *Miles*, therefore, the Supreme Court had little choice but to find a basis upon which to apportion both the entire obligation to serve, and the indivisible obligation to pay. For this purpose, it invoked the Apportionment Act and its equal daily rate of accrual. In so doing, however, the Supreme Court not only applied the Act in a context to which it was ill-suited, where the contract, and the entitlement to payment, continued, but in doing so also fundamentally subverted the basic rationale that justified its extension to contracts of employment in the first place. Rather than being used to provide protection for the employee’s accrued salary in the event of wrongful dismissal, the Act had been relied upon to deprive employees of an apportioned part of the salary that they should never have been refused. True, the Court upheld the teacher’s argument that only 1/365 and not 1/260 could be withheld, but in so doing it reinforced the underlying premise that an employer is entitled to withhold part of an annual salary in response to a breach.

## **5.2 The employer’s contractual obligation to pay remuneration**

In principle, the question as to what the employee must prove to make out a claim in debt for unpaid salary/wages is separate from the question as to whether the employer is under a contractual obligation to pay.<sup>109</sup> The benefit of the contractual right to remuneration, as noted above, is that it prevents the employer from unilaterally withholding payment and placing the burden on the worker to establish his right to be paid. In *Miles*, however, the House rejected the premise of this argument, and the basic contractual principles on which it is based.<sup>110</sup> If a non-breaching party affirms the contract, he is entitled to refuse payment if the other party’s breach is an implied condition for the obligation to perform.

*Miles* was not an employee; he did not actually have a contract of employment with the Council so there was nothing to ground an action by the Council for damages, or a claim by *Miles* in respect of the Council’s failure to pay. The case was quite different from an ordinary employment case, therefore, for the *sole* issue was if *Miles*, treated as an employee for the purposes of a debt claim, could make out his entitlement to the sums claimed. Thus, while Lord Oliver saw ‘much force in [the] argument’ that the only route available to an employer would be a claim in damages for any loss flowing from the breach’ he concluded that these principles

were irrelevant on the facts because this was ‘an action in which the plaintiff claimed certain sums as due to him by way of salary and in which, therefore, he assumed the burden of pleading and proving each essential allegation necessary to establish his entitlement.’<sup>111</sup>

If this is so, it could be argued that the case provides no real authority for the contractual aspects of the claim, that is, the question as to whether the refusal to pay would amount to a breach of contract. It is clear from the judgments, however, that their Lordships decided the case *as if* there was a contract of employment between the parties that continued following the breach.<sup>112</sup> The decision can only be explained, therefore, by reference to the particular view of the contract of employment that their Lordships adopted: a contract that binds an employee to provide faithful service over time, but does not give rise to any binding and enforceable obligations on the employer to provide work and/or pay on an ongoing basis. The form of the contract is thus exchange, but the obligation to work is conceived in a form redolent of the relation of master and servant.

The cases that their Lordships relied upon to defend this position do not actually support the arguments made. First, most of the cases relied on are Scottish cases where ‘there [is] nothing particularly novel’ in the idea that ‘all the conditions of a mutual contract are dependent upon their counterparts.’<sup>113</sup> English law does not recognise the ‘mutual contract’ as a distinct contract type, however, nor does it endorse the premise that a non-breaching party can withhold performance in response to another party’s breach.<sup>114</sup> It is not entirely clear, therefore, why these principles are being relied upon to justify a decision in relation to the English law of the contract of employment. Second, of the two English cases relied on, one, *Henthorn*, arguably supports the contrary argument, while the other, *Creswell*, rests on a similar misconception as that which underpins the decision in *Miles*.

*Henthorn* was a dispute over the burden of proof in a claim for unpaid wages in respect of a period of ‘work to rule.’ The sole question for the court was whether it was for the employers or the employees to prove that the workers had (or had not) satisfied the condition for claiming wages. Lawton J suggested that ‘when a plaintiff claims he is entitled to be paid money under a contract which he alleges the defendant has broken, he must prove that he was ready and willing to perform that contract.’ It does not seem that he was saying, however, that the consideration for wages is performance of, or readiness and willingness to perform the contract.<sup>115</sup> Instead, he was reiterating the point that the plaintiff must be so willing at the time he seeks to compel the defendant to perform. That is, when he brings a claim for breach of the contractual obligation to pay. It is exactly this, the workers’

*ongoing* readiness and willingness to perform, rather than their willingness at the time of the breach, that the employers were disputing in this case.<sup>116</sup> Lawton J's remarks do not contradict the idea that in order to claim in debt wages for a prior period, the workers need only show that they worked, or were ready and willing to work, throughout the period in question. In fact, the implication of *Henthorn* for Miles would have been that because Miles was, at the time of the *claim*, ready and willing to perform his duties, (i.e. he was no longer in breach), he would have been entitled to bring an action for breach of contract in respect of the Council's failure to pay.<sup>117</sup>

In *Cresswell v Board of Inland Revenue* the court asserted the principle 'no work (or, at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so) - no pay.' In *Creswell*, however, the court had conceded that 'direct authority [for this point] is slight.' The only (English) authority identified was *Secretary of State for Employment v ASLEF (no.2)* but, as Sedley QC for Miles noted, this case was concerned only with whether a work to rule *was* a repudiatory breach, and so said little on the effects of affirming the contract on the employer's obligation to pay.<sup>118</sup> The other cases relied upon were, once again, Scottish cases where the principle, in contrast to English law, is well-established.<sup>119</sup>

Neither the teachers nor the Court in *Hartley* questioned the premise that, after *Miles*, an employer is entitled to unilaterally withhold a portion of a worker's wages and/or salary in response to a strike. However, because the court had recognised that the salary was an indivisible payment for an entire obligation - something emphatically denied by the House of Lords in *Miles* - the effect of applying the 'Miles' basis for deductions was to create a situation in which one side of *an entire* contract appeared to have been suspended. Thus, while the teachers remained bound to continue to perform their ongoing obligation to serve, the employer was able to unilaterally suspend his *ongoing* obligation to pay. The situation was not dissimilar, therefore, from that which obtains following termination of the contract. This might explain why the Supreme Court determined the question of apportionment by invoking principles applicable to contracts that have been terminated. Its argument that at common law a salaried employee is not entitled to be paid for a payment period of a strike only holds, for example, where the contract has come to an end; otherwise, the obligation to pay continues as before. Similarly, the Apportionment Act need not even be considered where the contract is continuing, because it is only following termination that questions of substantial performance and apportionment arise.<sup>120</sup>

## 6. Conclusion

This article has explored a much-neglected aspect of the law on deductions, shedding light on some of the assumptions shaping the path of the law. It started by developing a functional understanding of the wage, drawing on economic theory, and using this as a frame through which to undertake a genealogical analysis of legal concepts. In so doing, it has helped clarify the distinction between concepts such as ‘the wage’, the ‘salary’ and ‘remuneration’, demonstrating their significance to a much broader debate about the relationship between work and payment in the context of the contract of employment. In the process, the article has contributed to our understanding of the process of legal evolution and the nature of the juridical form, showing how statutory definitions interact with the common law, and how they relate to economic theories of the wage.

The article began by highlighting a distinction drawn in the economic literature between the wage as the market price of a commodity, and the wage as the costs of subsistence. It went on to show that there is an important link between these economic ‘functions’ of the wage and the legal concepts of the ‘wage’, the ‘salary’, and ‘remuneration’. By restoring our understanding of the importance of these legal distinctions, it has shown why the choice of concept in legislation and case law matters when it comes to how the law is interpreted and applied. The choices made between these concepts often conceal implicit assumptions about the nature of the wage, and the proper relationship between work and payment, that can have a significant impact on the protection afforded to the worker’s right to be paid. Studying how these concepts are used in cases like *Miles* and *Hartley* can thus tell us much about the premises that are driving the path of the law.

The legal concept of the ‘wage’ carries connotations of the economic idea of the wage as a market price, and so implicitly ties the right to be paid to time spent actually working. It is this idea of the wage that we find in *Miles*, and which in subsequent cases has obscured the important protective function performed by the concepts of the ‘salary’ and ‘remuneration.’ In contrast with the legal concept of the wage, these concepts are closely aligned with the idea of the wage as the cost of subsistence, and can be used to help shift some of the social costs of employment onto employers. These concepts may be better suited to labour law legislation, such as statutory protection against deductions, where they can help to underpin a form of ‘social wage’.

The article is not suggesting that the problem of low pay can be addressed through the law on deductions from wages alone. The concepts used in this context will not in and of themselves determine the amount that the worker receives by way of compensation for employment. Nonetheless, the effectiveness of any minimum wage legislation or any regulation of the employer's obligation to pay will itself turn on whether the concepts used are suited to the protective aims of the statute. In this respect, to the extent that labour law ties the right to be paid to the obligation to work, little can be achieved in terms of bridging the gap between the idea of the wage as price, and the idea of the wage as the cost of subsistence. If labour law is to provide for more than a right to be paid the market price of a commodity, therefore, a reconsideration of how these concepts are used is sorely needed. By providing clarity as to the meaning of these concepts, and locating them within the broader normative debate over the wage's socio-economic function, this article has gone some way towards equipping the courts with the conceptual tools they will need to do this.

## Notes

1 *Hartley v King Edward IV College*, [2015] ICR 143 (CA) [2017] UKSC 39 (SC); *Miles v Wakefield MBC* [1987] 1 AC 539.

2 BW Napier, 'Aspects of the Wage Work Bargain' (1984) 43 *Cambridge Law Journal* 337; H McLean, 'Contract of Employment. Negative Covenants and No Work, No Pay' (1990) 49 *The Cambridge Law Journal* 28; P Sales, 'Contract and Restitution in the Employment Relationship: No Work, No Pay' (1988) 8 *Oxford Journal of Legal Studies* 301; R Havelock, 'A Taxonomic Approach to Quantum Meruit' <<https://researchspace.auckland.ac.nz/handle/2292/30442>> accessed 6 March 2017.

3 Labour law scholars employing this genealogical approach include: S Deakin, 'The Contract of Employment: A Study in Legal Evolution' [2001] *Historical Studies in Industrial Relations* 1; J Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 29 *Comp. Lab. L. & Pol'y J.* 29; N Fraser and L Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the US Welfare State' (1994) 19 *Signs: Journal of Women in Culture and Society* 309. For examples outside this field, see: H Mussell, 'The Nature of Social Responsibility: Exploring Emancipatory Ends' [2016] *Journal for the Theory of Social Behaviour*; T Lawson, 'Social Positioning and the Nature of Money' (2016) 40 *Cambridge Journal of Economics* 961.

4 In this article, when the term 'wage' is used in the economic sense it is used to refer to any payment for labour or labour power, but when used in the juridical sense, 'wage' is a subset of the wider economic category, and is to be contrasted with 'salary' and 'remuneration'.

5 J Hicks, *The Theory of Wages* (Toronto: Springer 1963) 1.

6 Hicks (n 5).

7 J Addison and S Siebert, *The Market for Labor: An Analytical Treatment* (Goodyear Pub Co 1979).

8 R Coase, 'The Institutional Structure of Production' (1992) 82 *The American Economic Review* 713.

9 BE Kaufman, 'Sidney and Beatrice Webb's Institutional Theory of Labor Markets and Wage Determination' (2013) 52 *Industrial Relations: A Journal of Economy and Society* 765, 8–9.

10 A Picchio del Mercato, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge University Press 1992) 4

11 *ibid.*

12 Picchio (n 10). See: K Marx, *Capital, Volume I* (Harmondsworth: Penguin/New Left Review 1867) chapter 7.

13 D Ricardo, *On the Principles of Political Economy, and Taxation* (John Murray 1821) 93,99. See also: Adam Smith, *The Wealth of Nations* (1776) 85; TR Malthus and J Pullen, *TR Malthus: Principles of Political Economy*, vol 1 (Cambridge University Press 1989) 240.

14 Picchio del Mercato (n 10).

15 For recent contributions see: GM Hodgson, *Economics and institutions: a manifesto for a modern institutional economics*. Polity Press, 1988; WJ Samuels, 1988 'Introduction' in W.J Samuels ed., *Institutional Economics*, Cheltenham, Edward Elgar.

16 S and B Webb, *Industrial Democracy*, vol 2 (Longmans, green, and Company 1897) 671.

17 *ibid* 751.

18 *ibid* 751-2; S Webb, 'The Economic Theory of a Legal Minimum Wage' (1912) 20 *Journal of Political Economy* 973.

19 Picchio (n 10).

20 *Ex parte HV McKay (Harvester Case)* (1907) 2 CAR 1, 3.

21 *Harvester*, 4.

22 S Deakin and F Wilkinson, *The Law of the Labour Market Industrialization, Employment, and Legal Evolution* (Oxford University Press 2005)

23 Bill to establish a living wage for all wage earners (Living Wage) <https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1930-030608?accountid=9851>.

24 HC Deb 06 February 1931 vol 247 cc2269-354, 2285.

25 *S & U Stores v Lee* [1969] 1 WLR 626, (Blain J), 629.

26 [1929] A.C. 496, 506-7.

27 HC Deb 16 Jan 1945 vol407 cc66-116, at 77 and 75.

28 HL Deb 13 Feb 1945 vol 134 cc981-5.

29 On the distinction between ‘basic wage’ and remuneration, see: *Weevsmay Ltd v Kings* [1977] ICR 244, (EAT).

30 *Wells v Foster* (1841) 8 M & W 149, 152. Similar views are expressed in *Liverpool Corporation v Wright* (1859) 28 LJ 868 referring to the fees paid in place of a salary. For a discussion of the types of payments and types of office which are deemed to be unconditional and unassignable, see *Davis v Duke of Marlborough* [1894] 36 E.R. 303.

31 *Wells* 152. See also in relation to emoluments: *Flarty v Odlum* [1950] 100 ER 801.

32 *Re Shine* [1892] 1 QB 522, 527.

33 *Re Hutton* (1844) 14 QB 301 (Lindley J) 309.

34 In its earlier sense: ‘Salarie..signifies a recompence or consideration given unto any man for his paines bestowed upon another mans’ J and W Rastell, *Les Termes de La Ley: Or, Certain Difficult and Obscure Words and Terms of the Common and Statute Laws of England, Now in Use, Expounded and Explained* (J Johnson Watson & Bangs, printers, Boston 1812, 1641).

35 *Re Shine* (Lord Fry).

36 *Emmens v Elderton* (1853) 13 CB 495 at 668.

37 *ibid.*

38 Petty Sessions (Ireland) Act 1827 c. 67, s.9; Militia Pay Act 1827 c. 50, schedule Clerk of Crown in Chancery Act 1835 c. 47, preamble; Superannuation Act 1834 c. 24, s.18.

39 For an example of how this operated in practice, see: *Skailes v Blue Anchor Line* [1911] 1 KB 360, 365.

40 Such as the right to occupy a house: *In re English Joint Stock Bank v Yelland's Case* (1867) LR. 4 Eq. 350.

41 *Saunders v Jones* (1877) 7 Ch 435; *Rushton v Grissell* (1877) LR 10 393.

42 Deakin and Wilkinson (n 22).

43 M Freedland, *The Personal Employment Contract* (OUP 2005) 90 .

44 *ibid* 91.

45 D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2001), 34.

46 *ibid.*

47 *Spain v. Arnott* (1817) 2 Stark 256; *Turner v. Robinson* (1833) 5 B & A 789; *Ridgway v. Hungerford Market Co*, (1835) 3 A & E 171; *Saunders v. Whittle* (1876) 33 LT 816.

48 Truck Act 1831, s.4.

49 *Chawner v Cummings* (1846) 8 QB. 311; *Archer v James* [1859] 121 ER 998.

50 See the discussion in: *Hart v Riversdale Mill* [1927] 1 KB 624; *Sagar v H Radelhaigh & Son* [1931] 1 Ch 310.

51 Truck Act 1831, s.25.

52 Deakin and Wilkinson (n 22).

53 Workmen's Compensation Act, 1897, Schedule 1 (1); Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), Sched. I., s. 1 (a) (i.); s. 2.

54 *Riley v Warden*, (1848) 154 ER 405, at [69]; *Archer*.

55 *Abraham Coal Company v Southern* [1903] AC 306, 307-8.

56 *ibid.*

57 *Midland Railway Company v Sharpe* [1904] AC 349.

58 *Great Western Railway v. Helps* [1918] AC 141, (Lord Dunedin) 145; *Penn v Spiers & Pond, Ltd* [1908] 1 KB 766 (CA)

59 *Midland* 352.

60 *Abraham Coal Company* 308-9.

61 This process was linked with the introduction of the right to notice in the Contracts of Employment Act 1963.

62 Early cases include: *Parkin v South Hetton Coal Co* [1907] 98 LT 162, 164; *George v Davis* [1911] 2 KB 445 and *Hanley v. Pease & Partners* [1915] 1 KB 698. See similarly the earlier case of *Devonald v Rosser & Sons* [1906] 2 KB 728.

63 *Parkin* 164; *George*.

64 *Hanley* 705.

65 H Gospel, *Markets, Firms and the Management of Labour in Modern Britain* (Cambridge University Press 1992) 155.

66 HC Deb 22 May 1940 vol 361 cc154-85 (Mr Atlee), 155.

67 Emergency Powers Act 1940.

68 HC Deb 22 May 1940 vol 361 cc154-85, at 156.

69 HC Deb 16 Jan 1945 vol.407, cc69-116, 97.

70 HC Deb 16 Jan 1945 vol.407, cc69-116, 75.

71 *Taylor v Laird* (1856) 25 LJ Ex 329; *Saunders v Whittle* (1876) 33 LT 816, *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch 339.

72 See the discussion in *Hartley* (CA)

73 P Matthews, ‘Salaries’ in the Apportionment Act 1870’ (1982) 2 Legal Studies 302.

74 *ibid.*

75 *ibid.*

76 Section 5.

77 *Lowndes v Stamford* (1852) 18 QB 425 at 434, 118 ER 160 at 164-5. (in respect of the 1834 Act). See similarly *Treacy v Corcoron* (1874) IR 8 CL 40

78 Matthews (n 72).

79 *Lowndes* 164-5.

80 See the detailed discussion in *Sim*.

81 For example, in the Income Tax Act 1842 Schedule D referred to all private professions (the self-employed) and referred to ‘Profits, Gains, and Emoluments of such Professions, Employments or Vocations’ while in Schedule E, applicable to the public sector, it referred to ‘Salaries, Fees, Wages, Perquisites, or Profits’ and ‘Annuities, Pensions or Stipends . ‘(Schedule D, case 2, rule 2; Schedule E, rule 1)

82 *Moriarty v Regent’s Garage Co., Ltd* [1921] 1 KB 423 (Lush J) 429.

83 *Moriarty; Item Software (UK) Ltd v Fassih* [2005] ICR.450; *Re Central de Kaap Goldmines* (1899) LJ Ch 18; *Re London & Northern Bank; McConnell’s Claim* [1901] Ch 728 and *Healey v SA Francais Rubastic* [1917] 1 KB 947.

84 See, for example, *Item Software* at [117]

85 See detailed discussions in: S Fredman, 'Deregulating Pay: The Wages Act 1986' [1986] Public Law 551; J McMullen, 'The Wages Act 1986' (1986) 15 Industrial Law Journal 266; R Lucas, 'The Wages Act 1986: Some Reflections with Particular Reference to the Licensed Residential Establishment and Licensed Restaurant Wages Council' (1990) 10 The Service Industries Journal 320.

86 HC Deb 11 February 1986 vol 91 cc796-881, 796.

87 Other than those in Part II affecting retail workers.

88 Truck Act 1831, s.3.

89 Wages Act 1986, s.7(1); Employment Rights Act 1996, s.27(1).

90 [1993] I.C.R. 392. See also *Gill v Ford Motor Co.* [2004] IRL. 840.

91 See in particular: *Delaney v Staples* [1992] 1 AC 687.

92 *Miles* 557.

93 *Miles* 566.

94 *Miles* (Lord Templeman) 559.

95 *Miles* (Lord Templeman) 561; (Lord Bridge) 551.

96 *Wiluszynski v Tower Hamlets LBC* [1989] ICR. 493, (Fox LJ) 499.

97 G Mead, 'Employer's Right to Withhold Wages'(1990)' 106 LQR 192; H McLean, 'Contract of Employment. Negative Covenants and No Work, No Pay' (1990) 49 CLJ 28.

98 *Cooper v Isle of Wight College* [2007] EWHC 2831 (QB)

99 *Cooper* at [32].

100 *Cooper* at [8].

101 The case report does not give details of Wiluszynski's contract, but this can be inferred from the trial judge's discussion of the hypothetical possibility of reducing the salary 'by 2-3 hours' for the five-week period in question: *Wiluszynski* 156.

102 *Sim* 255.

103 *Sim* 263.

104 On the facts, however, the Burgundy Book, the collective agreement applicable to local authority schools, made express provision for deductions in response to absences without permission, and it was accepted that a full strike would suffice for the purpose of this provision. *Sim* 263.

105 *Sim* 255.

106 *Miles* 567.

107 *Hartley* (SC) at [11].

108 *ibid* and at [25].

109 *Napier* (n 2).

110 *Miles* (Lord Templeman) 565.

111 *Miles* (Lord Oliver) 567.

112 *Miles* (Lord Templeman) 565.

113 *Laurie v. British Steel Corporation*, 23 February 1978 unreported; *Turnbull v. McLean & Co.* (1874) 1R 730; *Alexander Graham & Co. v. United Turkey Red Co. Ltd.* [1922] SC 533.

114 Discussed in H Collins, 'Constructive Dismissal and the West Lothian Question: *Aberdeen City Council v McNeill*' (2011)' 40 ILJ 439.

115 For a similar interpretation, see: *Napier* (n 2).

116 *Henthorn and Taylor v Central Electricity Generating Board* [1980] IRLR 361, 362-363. See: *ANAC v. Robinson* [1977] V.R. 87 where the employee was unsuccessful having failed to establish readiness and willingness to perform, the claim was for *damages for breach of contract*, not in debt. A claim in debt succeeded in *Welbourn v. Australian Postal Commission* [1984] V.R. 256.

117 *Henthorn*. See: *Napier* (n 2).

118 [1972] 2 All ER 949. But see Lord Denning's remark 967.

119 [1984] 1 CR 508 at 522.

120 See the discussion in *Sim* 253-4 and *Button v. Thompson* (1869) LR. 4 CP 330, 339 and 343.

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