Does Labour Law Trust Workers? Questioning Underlying Assumptions Behind Managerial Prerogatives

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Does Labour Law Trust Workers? Questioning Underlying Assumptions Behind Managerial Prerogatives

VALERIO DE STEFANO*, ILDA DURRI**, CHARALAMPOS STYLOGIANNIS** AND MATHIAS WOUTERS***

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ABSTRACT

This article explores the relationship between modern labour law, trust-based management, and collective labour relations. It begins by examining the historical origins of labour law, which was established to give employers the means to govern their workforce, based on the assumption that workers were untrustworthy. We argue that this notion still persists, albeit in a refined form, and that advancements in technology can exacerbate the negative consequences of managerial prerogatives. The article highlights the need to re-examine the extent of managerial prerogatives and provides several examples of businesses that have adopted trust-based models of organization, leading to positive outcomes. However, the study cautions that trust-based models can be used as a guise for employers to retain greater control over their employees and emphasizes the critical role of collective labour relations in

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ensuring true trust. The article concludes by arguing that policymakers must challenge the hierarchy-centred model of the employment contract and promote practices that reinforce social dialogue and collective voice in order to reap the benefits of trust-based business practices. This study sheds light on the need to re-evaluate the current employment landscape and consider alternative models that prioritize trust, autonomy, and social dialogue in the workplace.

1. INTRODUCTION

It is common to perceive labour law as a field of law that distrusts employers. In this sense, it was put in place to limit, among other things, the often far-reaching managerial prerogatives of employers. The latter have the right to take and act upon unilateral decisions affecting the business or organization. The scope of managerial prerogatives is vast, and includes the right to allocate, supervise, and direct work, among others. However, it is often overlooked that labour law has historically been structured and organized in a manner that demonstrates a lack of trust towards employees.

Drawing on an interdisciplinary approach, this article contends that labour law is fundamentally underpinned by a lack of trust in workers.1 This historical orientation continues to shape contemporary labour law debates, giving employers a largely unchecked legal authority to monitor and control employees. The idea of a workplace without a powerful management presence is often perceived as inherently chaotic and untenable. Consequently, a sort of ‘Leviathan’ is deemed necessary to civilize and regulate the

1 In this article, the terms ‘Labour law’ or ‘Labour regulation’ are used to signify the regulatory framework governing work, encompassing both the individual work arrangements between employers and workers and collective labour relations. In this context, the term ‘Labour law’ serves as the English equivalent of expressions such as ‘Droit du travail’ in French, ‘Arbeitsrecht’ in German, or ‘Diritto del lavoro’ in Italian. It encompasses both the elements that, in North America, in modern times, would be categorized as ‘Employment law’ and ‘Labor law’. In our analysis, we rely on the legal and historical scholarship discussed in the text to maintain the argument that labour law is based on a fundamental distrust of employees. Furthermore, we refer to management literature to illustrate that despite this position, many businesses adopt trust-based mechanisms of management. As discussed below, however, the law has not sufficiently engaged with this tension between, on the one hand, a legal framework based on the idea that workers cannot be trusted, and, on the other hand, some selected examples of attempts to adopt trust-based management mechanisms.
workplace, a role that is typically fulfilled by the employer.\(^2\) Such reasoning is in part ‘attuned to the larger social, political, and economic setting’.\(^3\)

As the first part of this article—‘Employment as Deployment’ illustrates, many labour regulations have historically been crafted, to a certain extent, with the intention of enabling employers to direct, oversee, and regulate the behaviour of workers. This illiberal aspect of the regulation of work can significantly curtail the freedoms of workers within the workplace, as discussed in the first section of this part. The second section, then, delves into a comparative historical analysis of nations with regulations that grant employers extensive authority over their workers. These countries, drawn from both common law and civil law legal traditions, have been at the forefront of early labour regulations. While other studies, cited below, have addressed these issues separately among legal traditions, we deem important to juxtapose these approaches to highlight the parallelism among them more clearly. Subsequently, the third section of the first part highlights how these regulatory tendencies persist even today, reflecting a persistent distrust of workers. Whereas other recent analyses discussed in this first part, have argued that the illiberal nature of the contract of employment is still relevant today, our study more clearly traces back the origins of these regulatory tendencies to the vestiges of regulation that, although mostly repealed, still play a prominent role in the modern construction of the contract of employment. We find that this crucial aspect has not been adequately problematized in labour scholarship yet.

The second part of this article, entitled ‘Employment as Enjoyment (?)’, describes modern management practices that assume employers should trust employees more. Examples of such practices are given in Section A to acknowledge that sometimes employers unilaterally decide whether employees can be trusted or not, adjusting their practices on that basis, by determining to somewhat restraining their managerial prerogatives. As it will be illustrated, nonetheless, these trust-based practices may carry their

\(^2\)As Thomas Hobbes famously argued, without a *Leviathan*, life would be ‘nasty, brutish and short’ (T. Thomas Hobbes, *Leviathan* (first published 1651; Harmondsworth: Penguin Books, 2017)). In his recent work, T. Greco, *La legge della fiducia: Alle radici del diritto* (Bari-Roma: Laterza, 2021), argues that the law is generally wrongly constructed and applied as to assume that ‘humans are all evil, dedicated to oppression and self-interest’. Similar thinking, we argue, has also influenced how we perceive work relations. See also R. Bregman, *Humankind: A Hopeful History* (London: Bloomsbury Publishing, 2020) and the discussion below.

own risks, including the possibility of hidden forms of control disguised as trust and autonomy, which the article refers to as ‘trust-based mechanisms of control’. This is because, we argue, even well-intentioned practices are immersed within a broader framework predicated on distrust and underpinned by regulation that assumes the necessity of robust unilateral managerial powers to maintain control over workers. In light of these challenges, Section B concludes by emphasizing the importance of collective bargaining and workplace cooperation as essential means to operate a genuine paradigm shift and effect an authentic transition from control-based management to alternative approaches based on trust and collaboration.

2. PART ONE: EMPLOYMENT AS DEPLOYMENT: A MASTER AND A SERVANT

A. The Employment Relationship as a Private Governance Tool

The idea that human beings tend to act purely out of (economic) self-interest has become deeply ingrained into Western thinking. In management sciences, for example, Frederick W. Taylor’s book, recognized by the Academy of Management as the most influential management publication of the twentieth century, held a similar view of human beings. Sociologist Paul R. Lawrence noted: ‘one of Taylor’s relatively unexamined assumptions was that humans were rational self-interested beings’; this ‘translates into the assumption that, as economic beings, workers will only be responding to the pay element of their job design (drive to Acquire), an assumption Taylor shared with many managers and most economists’. One Lawrence’s critiques was that this assumption unduly neglects that when at work, humans also have internal motivations, like the drive to bond, learn etc. While the ‘drive to acquire’ is certainly relevant, it is possible to argue that its significance has been exaggerated by Taylor and his followers.

In the realm of labour law, there has similarly been a tendency to simplify the complexity of employment relationships, reducing them to utilitarian

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7 Ibid., 416.
transactions. For instance, in many legal textbooks, the definition of an employment contract is often straightforward: an agreement in which work is performed in exchange for compensation and under the control or subordination of the other party. Traditionally, the wage-work bargain is considered the cornerstone of the employment relationship, where the employee agrees to work or be available for work and the employer agrees to pay for work or pay for the availability of the worker. The specifics of this arrangement vary depending on the legal jurisdiction.8

However, reality can be more nuanced. Notwithstanding its contractual underpinnings, ‘the employment relationship is by definition based on the social and legal power of one contractual party vis-à-vis the other’.9 Many early labour scholars recognized that job seekers often lack genuine bargaining or negotiation power with their employers. Kahn-Freund famously described the act of concluding an employment contract as an act of submission,10 while Hugo Sinzheimer referred to ‘the individual’s “free contract” of employment’ being ‘nothing other than a “voluntary” submission’ to conditions that cannot be changed by the worker’.11 This dynamic has remained largely unchanged since the early to mid-twentieth century. Research has shown that job offers are often presented on a ‘take it or leave it’ basis, even for contemporary job seekers,12 including recent graduates with little work-related competencies individuals seeking employment in their

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12 For example, in the USA, researchers inquired whether women are less likely to negotiate their salary than men, showing that they are. The findings furthermore revealed that in an overall sample of male and female job applicants, only 14.3% tried to negotiate for a higher wage, whereas 8.5% signalled their willingness to accept a lower wage. A. Leibbrandt and J. List, ‘Do Women Avoid Salary Negotiations? Evidence from a Large-Scale Natural Field Experiment’ (2015) 61(9) Management Science 2016–2024, 2019.
forties, and women who have had to interrupt their careers for family reasons. The socio-economic position of many job seekers often limits their bargaining power, forcing them to accept employment as it is presented to them.

Once an employment contract is entered into, the employee is structurally bound to work under a condition of subordination. Beyond their dependence on the wage-work bargain due to their socio-economic circumstances, the law imposes a subservient status upon the employee whereby, in principle, the employer has the discretion to make all work-related decisions unless otherwise specified by contractual agreements, statutes, or court rulings. As recently recalled by Hugh Collins, this notion of subordination implies the ongoing subjection of employees to the hierarchical control of their employer or manager. The latter holds the power to issue orders, monitor compliance with these orders, and correct employees when their work deviates from expectations. Although the law typically confers managerial prerogatives to the employer only in the workplace, this hierarchy often extends beyond the workplace in various ways. For instance, in the USA, employers may instruct employees to attend a political rally, and a refusal to do so may result in termination under an employment-at-will regime.

Every so often, there are also cases of workers being dismissed for their ‘personal’ social media activity.

For all these reasons, many scholars have characterized the nature of the employment contract as ‘illiberal’. Some have likened the authority of employers to that of a government in an undemocratic regime. Kahn-Freund, for example, compared the firm to an ‘absolute monarchy’ in which all power is effectively held by the employer. Collins similarly argues that: ‘the contract of employment embraces an authoritarian structure that appears to be at odds with the commitment in liberal societies to values such as liberty, equal respect, and respect for privacy’. Gali Racabi, reflecting on the workplace sovereignty of employers in the USA, likens their powers to those of kings, pointing out that managerial prerogatives, which constitute a default governing rule or ‘state of nature’ within the context of employment, give employers the ability to govern all aspects of employees’ work and the organizational structure of the workplace.

Elisabeth Anderson’s well-known analysis similarly conceptualizes workplaces as authoritarian private governments, in which the notion of managerial prerogatives can extend far beyond the state and public powers. Under this form of private government, workers, as subjects, are ‘unfree’, to a certain extent. The expansive powers possessed by employers, particularly but not exclusively under ‘employment at will’, enable them to dictate workers’ lives not only in the workplace but also in their private spheres. It can also be argued that these issues could be exacerbated by the proliferation of new technologies in the labour market. Some technological tools, for example, now enable employers to monitor workers’ moods and emotions through microphones and facial scanning and to track heartbeats, the tone of workers’ voices, and the length of their conversations. Emails, messages, and browsing activity are also persistently scrutinized, with the goal of monitoring work intensity, among other things. Building on the original architecture of labour regulation, which constructs employers as the Leviathan in the room, workers now ‘face a 360-degree monitoring of their behaviour, that extends control over their bodies and minds and their most private sphere, once again to an extent unheard of in the past’.

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22 G. Racabi, n.15.
23 E. Anderson, n.18.
25 V. De Stefano, n.16, 436.
B. At the Origins of Labour Regulation and the Contract of Employment

As outlined in Section A, the employment relationship can be viewed as a tool of private governance; labour laws equip the employer with the means to govern the workforce, while also channelling the interests of workers. It is argued that many of the laws that gave rise to this governance structure are based on the belief that workers cannot be trusted. This issue has not received adequate attention from scholars.

This Section first examines the historical roots of this perception. With regard to the origins of modern labour law, it is pertinent to note that the concept of an employment contract only ‘reached maturity’ throughout Western Europe at the beginning of the twentieth century.26 Prior to that period, the legal and intellectual basis for the later development of the employment contract was not yet in place.27 Only after a complex series of legal reforms, courts’ interventions, and changes in economic and business organization displaced medieval regulation did the legal notion of an employment contract become conceivable.28 Since then, lawmakers started adopting laws to govern ‘employment contracts’, as exemplified by the Belgian loi sur le contrat de travail of 1900 and the Dutch Act of 1907.29 A full-fledged employment contract embedded in statutory law also emerged in other neighbouring countries around the same time.30 As such, one could say that modern labour regulations, which are arguably a by-product of the industrial revolution, predate the contract of employment.

It should also be remembered that, at the outset of industrialization, many workers found factory work ‘distinctly unattractive’,31 in part due to the strict ‘factory discipline’ that significantly limited workers’ freedom.32 Economist Douglass North noted that: ‘[t]he discipline of the factory system is nothing more than a response to the control problem of shirking in team production. […] From the point of view of the worker, they were inhuman devices to foster

27Ibid., 33–44.
29Belgium: Loi sur le contrat de travail, 10 March 1900; Netherlands: Wet op de arbeidsovereenkomst, 13 July 1907.
30B. Veneziani, n.26, 64–65 and 68.
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speed up and exploitation'. Given that labour regulations developed alongside the imposition of ‘factory discipline’, which was perceived by the ruling classes as essential to ‘civilize the barbarians’, it is not surprising that this influenced the structure of this area of law. On the one hand, the early laws aimed to make factories safer, while on the other hand, they also ensured that employers could operate their factories as they pleased. In this respect, Simon Deakin and Frank Wilkinson, among other common law authors, have claimed that the master-servant model offered ‘the juridical origin of the duty of obedience’, a concept later associated with the employment contract. The early case of Turner v. Mason exemplifies this model. In 1845, a domestic servant feared for her mother’s life and requested leave from her master to visit her mother at night. The master forbade her from leaving the house, even for one night. According to the Court of Exchequer, since the master lawfully ordered the servant to stay, her departure justified her dismissal for disobedience. ‘Servants’ thus had to comply with their master’s lawful orders or face the consequences. This template would prove useful in managing factory workers in the decades to follow.

The Master and Servant Acts not only carried the risk of dismissal for insubordination but also authorized penal sanctions to ensure contract performance. One notable case from 1857 saw the Court of Exchequer challenge a ruling from the Queen’s Bench. A potter, who had left his job, was incarcerated for a month but still refused to fulfil his work contract. The Queen’s Bench sought to impose another month of hard labour, even if the Court of Exchequer eventually did not deem the sanction ‘suitable and proper’ and quashed the decision.

34 See the nineteenth century texts collected by J. Le Goff, Du silence à la parole · Une histoire du droit du travail des années 1830 à nos jours (Rennes: PUR, 2019), 47.
37 Turner v. Mason Court of Exchequer 1 January 1845, Case No. (1845) 14 M. and W. 112.
38 D. Hay, ‘England, 1562–1875: The Law and its Uses’ in D. Hay and P. Craven (eds.), Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955 (Chapel Hill: University of North Carolina Press, 2004), 59–116, 60. In another example from 1866, described as ‘common’, a 20-year-old apprentice refused the offer of Hull’s stipendiary magistrate to go back to work. The magistrate, ‘after observing that the prosecutor [ie, his master] had no business to strike the lad, and that if he did so again he might expect to have the blow returned, said to the prisoner that he was a very obstinate fellow, and he must go to prison for 40 days’. M. Steinberg, ‘Unfree Labor, Apprenticeship and the Rise of the Victorian Hull Fishing Industry: An Example of the Importance of Law and the Local State in British Economic Change’ (2006) 51(2) International Review of Social History 243–276, 243–244.
It should be noted that similar practices occurred in various other common law jurisdictions. As legal historian Robert Steinfeld notes, ‘[d]uring the early nineteenth century, as freer markets based on personal agreements were brought into being, the law made a broad range of contract remedies available to employers to enforce labor agreements as part of this first blossoming of freedom of contract’. The techniques and remedies varied based on local customs and sensitivities. For instance, in the USA, ‘contracts policies of northern states […] limited the legal remedies that would be available to employers to enforce labor agreements, primarily on the ground that nonpecuniary contractual compulsion produced a kind of slavery’, prompting the use of pecuniary remedies instead. In contrast, ‘black codes’ were enacted in the South after the Civil War to oppressively regulate the work of African Americans through annual contracts and vagrancy crimes punished with penal labour. Similar severe punishments existed elsewhere in the world.

Although these sanctions have since disappeared, ‘the master-servant model continued to influence the development of employment law in various ways, and this influence has only recently begun to wane’. As Douglas Hay and Paul Craven argue, the laws intersected with the belief that those without property were criminally inclined and needed to be controlled. In the views of their makers, these laws, therefore, served to keep people in their place, subordinated. Commentaries on other early labour laws, such

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40 Ibid., 319.
41 C. Anderson, White rage, The Unspoken Truth of Our Racial Divide (London: Bloomsbury, 2016). See, for instance, Mississippi Black Code, Laws of the State of Mississippi, Passed at a Regular Session of the Mississippi Legislature, Held in Jackson, October, November, and December, 1865 (Jackson, 1866), 82–93. The law provided, among other things, that: ‘Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or mulatto [sic] who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause; and said officer and person shall be entitled to receive for arresting and carrying back every deserted employee aforesaid the sum of five dollars, and ten cents per mile from the place of arrest to the place of delivery; and the same shall be paid by the employer, and held as a set-off for so much against the wages of said deserted employee’.
42 In their comparative research on these issues, Douglas Hay and Paul Craven observe that nonpecuniary penalties in Britain were ‘exemplary’. Compared to Britain, the level of prosecution in the British colonies was ‘of another order entirely’. Regularly, these laws ‘would remain on the statute books until independence, and beyond’. D. Hay and P. Craven, ‘Introduction’ in D. Hay and P. Craven, n.38, 1–58, 38 and 43–44.
43 S. Deakin and F. Wilkinson, n.28, 42–43.
44 D. Hay and P. Craven, n.42, 35–36.
as the Factory Acts, provide insight into this view. For example, in Amy Harrison’s and B. Leigh Hutchins’s 1926 commentary on factory legislation, the authors highlight ‘the singular assumption that—not idleness but—leisure is the root of all evil, and that the people were entirely incapable of employing sensibly even an hour for themselves. This idea recurs over and over again, with reference not only to adults but even to children, who, it was urged, would take to bad courses if allowed any interval between work and sleep’. In other words, not only master and servant laws viewed servants as untrustworthy; this, arguably, characterized ‘protective’ factory legislation as well.

In the realm of civil law jurisdictions, various forms of control and coercion were also observed. As an example, the workmen’s booklets, or *livrets d’ouvriers*, in Belgium originally served to discipline workers and detailed their employment history. The law mandated certain employers to keep these booklets, and they could refuse to return them to the workers until all contractual obligations were fulfilled. Other employers would not hire the worker without the booklet, as they would then be liable to compensate the employer in possession of the booklet. In addition to these booklets, whose importance as a sanctioning tool has somewhat been called into question for the period after the French Revolution, employers also started issuing ‘workplace regulations’ which contained a variety of restrictions such as prohibitions on smoking, drinking, singing,

47 ‘According to Van den Eeckhout, in some sectors and in some places, the livret also developed into written evidence of the employment relationship rather than serving as a disciplinary instrument. It is precisely because the obligations concerning the livret no longer had widespread application in the nineteenth century that its optional character was confirmed by the law of 10 July 1883; Personal translation from: K. Nevens, ‘De rol van de arbeidsovereenkomst toen, nu en dan’ in B. Debaenst (ed.), *Van status tot contract: De arbeidsovereenkomst in Belgïe vanuit rechtshistorisch perspectief* (Bruges: die Keure, 2013), 7–41, 20. Also, Alain Cottereau points to this ‘evidence’ function of the *livret* in France in the period after the French Revolution, in contrast to the more marked disciplinary function of the *livret* during the Ancien Régime. After the Revolution, in fact, the legislation and its quasi-judicial application prohibited employers from recording their personal considerations about the good or bad conduct of the workers in the *livret*. A. Cottereau, ‘Sens du juste et usages du droit du travail: une évolution contrastée entre la France et la Grande-Bretagne au xixe siècle’ (2006) 33 (2) *Revue d’histoire du XIXe siècle* 101–120, 107 ff.
and chatting, each accompanied by a fine or the threat of dismissal or legal action. In 1896, a law was passed in Belgium formalizing the practice of issuing such regulations and obliging many employers to publish them at the company level.

While the law aimed to reduce arbitrary employer behaviour and increase ‘legal certainty’ by informing workers of the start and end of the workday and rest breaks, in practice, these regulations primarily served the interests of the employers. The 1896 Act provided employers with a binding legal instrument to govern the workplace, but it only allowed workers and their representatives to make comments on the regulations, which were submitted to the person in charge of the enterprise without actually restricting the employer (Article 7). For this reason, too, the consultations with workers before introducing the workplace regulations largely remained a dead letter. As a consequence, overall, the 1896 Act simply and effectively authorized and urged employers to establish the rules governing their workplace, sanctioning what they already did in practice, unilaterally. Four years later, an Act from 1900 regulated the ‘employment contract’ for blue-collar workers in industry, commerce and agriculture.

49 Loi sur les règlements d’ateliers, 15 June 1896.
50 For instance, these workplace regulations would prescribe what workers were not allowed to do. If a work accident occurred, the employer could refer to the workplace regulations to blame the worker who did not obey. Courts considered such instructions when determining whether the employer bore any responsibility for the work accident. See B. Debaenst, Een proces van bloed, zweet en tranen! Juridisering van arbeidsongevallen in de negentiende eeuw in België (PhD Thesis, Universiteit Gent, 2010), 336–337.
51 Before the Act of 1896, there remained some ambiguity regarding the degree to which workplace regulations held binding authority. This uncertainty stemmed from these regulations not being established through a contractual agreement to which workers explicitly consented. However, since the enactment of the 1896 Act, the binding nature of these regulations became more evident as they were now clearly mandated by the law. Lucien François ‘La nature juridique du règlement d’atelier: étude de droit allemand, belge et français’ (1961) Annales de Faculté de Droit de Liège 563–664, 597.
52 P. Van den Eeckhout, n.46, 178.
54 Loi sur le contrat de travail, 10 March 1900.
contrast to the notion of a contract between ‘equals’ as previously stated in the Civil Code.  

Similar developments to those observed in Belgium can also be seen in France, where, despite the formal abolition of the workmen’s booklets in 1890, court cases have been recorded up until the early twentieth century in which workers demanded their return from former employers. Similarly to Belgium, in any case, workplace regulations proved to be a more effective means of disciplining workers. Alain Cottereau notes that under the jurisdiction of the French *Cour de cassation*, employers gradually became the ‘sole judge’ of their workplace regulations in the latter decades of the nineteenth century.

Workplace regulations, in fact, initially applied differently to workers (‘ouvriers’) and labourers in industries (‘journaliers’). Workers were engaged to provide for a certain work or product (‘opus’ in Latin), while ‘the employment of labourers in the industry [...] can be equated with “domestic work” or “service” relationships precisely insofar as these entail being at the disposal of the master’s will, without the possibility of discussing and assessing the tasks to be carried out’. Originally, only labourers were considered to be ‘subordinated’ to their masters as domestic workers were to theirs. During the first part of the nineteenth century, contrary to labourers, workers were subject to workplace regulations only if it could be proven that they knew and had not rejected them. According to Cottereau, ‘it was only later, from the 1860s to the 1880s, that a change in case law occurred,

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55 In this regard, labour historian Patricia Van den Eeckhout suggests that this formalization of employees’ legal subordination to employers in 1900 may have been the price to pay in return for employees’ enhanced protection through the 1903 Act on industrial accidents. In turn, legal scholar Patrick Humblet observes that, when read together with the 1896 Act on workplace regulations and considering the limited protections provided in the 1900 Act, this initial Employment Contracts Act clearly reflected the ideology of the ruling class. Loi sur la réparation des dommages résultant des accidents du travail, 24 décembre 1903; P. Van den Eeckhout, n.46, 179–180; see also P. Humblet, ‘De arbeidsovereenkomstenwet: de prequels’ in B. Debaenst (ed.), *Van status tot contract: De arbeidsovereenkomst in België vanuit rechtshistorisch perspectief* (Bruges: die Keure, 2013), 101–120, 108 and 119.


59 It should be recalled that—even at the zenith of the French Revolution—the French Constitution of 1791 excluded from ‘active citizenship’, ie, the right to vote, all the persons in a status of ‘domesticité, c’est-à-dire de serviteur à gage’.
accompanied by a change in legal scholarship. The judicial hierarchy, and then some of the employers and their organisations, went on the offensive to consider any work engagement as a commitment to submit oneself to the orders of the employers. [...] The idea that any engagement as an “ouvrier” was an engagement of “industrial service” soon took hold in scholarship. An equivalence was established between “industrial service” and the new term “contract of employment” (contrat de travail). As a consequence, ‘the French worker once again became a sort of “servant” [in English in the text]’.

These developments gave employers complete dominance in their factories and made workplaces zones in which, according to Michel Foucault, ‘power is most concentrated and intense’. Foucault viewed institutions like workplaces as ‘at a certain level [...] only simple relays of the power exercised by one class on another’. But, looking more closely, ‘we see that they establish a real break, and that, in the space and sphere of influence of these institutions, a sort of concentrated and quasi autonomous power with a new force reigns: the power of the boss in the factory, of the foreman in the workshop’. These developments were not dissimilar to those in other civil law countries, such as Germany.

Overall, both in France and Belgium but arguably also in other countries, it seems that a sort of symbiosis took place at the start of the twentieth century when the legal concept of an employment contract reached ‘maturity’. The formalization of employees’ legal subordination to employers gave rise to labour and social security protections. Such protections gradually increased. However, none of these added protections overturns the premise

60 All the citations are our own translation from A. Cottereau, n.47, 116.
61 A. Melucci, ‘Action patronale, pouvoir, organisation. Règlements d’usine et contrôle de la main-d’œuvre au XIXe siècle’ (1976) 97 Le mouvement social 139–159. Regarding this matter, Francis Hordern notes that following a lengthy period of political debates in the French Parliament spanning 19 years, an initial legislative proposal in 1890 aimed at restricting employers’ authority to enforce workplace regulations but ultimately evolved into a law focussing on wage protection. Consequently, the legislation did not impede employers’ ability to regulate workplace behaviours. Francis Hordern ‘Le règlement d’atelier au XIXème siècle’ (1991) cahier n°3 de l’Institut régional du travail de l’Université d’Aix-Marseille II.
64 K. Nevens, De arbeidsrelatie, de zelfstandig en de ondernemer (Bruges: die Keure, 2011), 102.
that the employment contract and labour law, more in general, were originally conceived around the idea that workers cannot be trusted and hierarchy is essential to control them.

Subsequently, lawmakers and the pressure of trade unions would progressively ‘rationalise’ employers’ power through the adoption of laws and collective regulations throughout the twentieth century. For instance, the Belgian Act from 1900 on blue-collar workers’ employment contracts, contrary to the Dutch Act from 1907, did not confer any notice period to employees in case of dismissal. Only in 1954 did the Belgian lawmakers feel that the time had come to bring more employment stability to the relationship. In some European countries, legislation limited the employer’s ability to unilaterally change the terms and conditions of employment, and laws started to mandate valid causes to ground dismissals, while, at the same time, limiting the employer prerogatives and the power to unilaterally govern their workforces by issuing workplace regulations. General principles of law, such as the principle of good faith, also became used to protect workers. For instance, in the UK, employers have a duty to take reasonable care to

65 A. Supiot, n.16, 124.
67 For example, under s 7:613 of the Dutch Civil Code, an employer can invoke a unilateral change clause only when their interest in doing so is deemed ‘so compelling’ that it reasonably outweighs the employee’s interest in avoiding any loss or harm that might arise as a consequence.
68 For instance, in France, since 1973, the law requires a ‘real and serious cause’ to issue a dismissal.
69 This is the case, for instance, in the 1970 Italian Statuto dei Lavoratori, which, among other things, limits the extent to which employers can unilaterally change the workers’ job duties, monitor them through technological devices or use surveillants, and protects trade union rights as well as workers’ freedom of speech at work.
70 See the so-called 1982 lois Auroux in France and, in particular, the Loi n° 82–689 du 4 août 1982.
71 This impact should not be overstated, however. For instance, during the 2007 banking crisis in The Netherlands, a bank applied for state aid and was asked to change its dismissal policy in return. In 2009, redundancies took place, and employees invoked the older, more protective policy. However, the employer invoked the limiting effect of reasonableness and fairness and the ‘principle of good employee behaviour’ to apply the new scheme, claiming that its employees, as good employees, should accept the new policy in light of the credit crisis, among other things. One Tribunal in Utrecht deemed it impossible to impose the new dismissal policy while the Tribunal in Amsterdam sided with the employer’s arguments. N. Gundt and A. Van Bever, ‘De evolutie van het basisbeginsel van de goede trouw uit het contractenrecht in het Franse, Belgische en Nederlandse arbeidsovereenkomstenrecht. Toegesneden op de wijziging van arbeidsvoorwaarden’ in I. Samoy, Evolutie van de basisbeginselen van het contractenrecht (Antwerp, Intersentia, 2010), 59–119.
protect employees, most notably but not solely, from health and safety risks (a duty of care). Employers are, for example, also bound by a duty of care when drafting a reference letter for an ex-employee.72 Another common law concept ‘implied into the contract’ in the UK is the duty of cooperation, which has become associated with an obligation on the parties to observe ‘mutual trust and confidence’.73 This obligation was imposed on employers, and it implies that the employer should not behave ‘without reasonable and proper cause’ in a way that would harm the trust and confidence between him/her and the worker.74 Examples of a breach of mutual trust and confidence have been identified by courts in cases where an employer: allowed a worker to be a victim of sexual harassment75; ‘failed to investigate a legitimate complaint about H&S’76; or ‘arbitrarily, capriciously and inequitably’ imposed a lower pay rise in comparison to colleague’s.77 Moreover, in the case of Malik, Lord Steyn proceeded with a broad interpretation of such duty by pointing out that a breach can occur even in situations where the employer’s behaviour does not target the worker as an individual or where employees are unaware of the breach.78 However, these principles are not without limits. For example, an employer does not breach the duty of cooperation by not informing workers of fraudulent activities by the management.79 Additionally, both employers’ and employees’ obligations from the duty of cooperation may be restricted by the express terms of the contract.80 According to the editors of Deakin and Morris, such a limitation can ‘make it difficult to rely on the duty of co-operation as a general guarantor of employee protection: its content is not fixed, but will differ from one case to the next depending on how the express terms are framed’.81 The ambiguity of protective standards can also be observed in other legal systems.

74 Ibid, 364.
80 These express terms of the contract can also be limited by the concept of good faith.
81 Deakin and Morris, n.73, [3.78].
In 1970, Italian lawmakers enacted the Statuto dei Lavoratori, which is still considered the pinnacle of protective legislation in Italy and introduced fundamental collective and individual safeguards in the workplace. Article 6, for instance, lays out conditions and procedural requirements for when and how employers can search workers and their belongings. While this provided essential protection, this Article, and several others enshrining similar safeguards, still sanctioned the power of employer to subject workers to sweeping limitations of their freedom, such as searches, provided that they followed a certain procedure. This is a prominent example of how even advanced protective legislation, passed in the latter half of the twentieth century, may still reflect a deep-seated distrust of workers.

In the light of this discussion, it can be argued that, indeed, laws and legal principles have been evolved over time to curb employers’ prerogatives. Nevertheless, such legal advancements hardly confront the fundamental authority underlying the employment contract. In other words, the ‘external’ regulation of the relationship between workers and employers can be considered as smaller or larger islands in an ocean of private authority. Even the protective labour and employment legislation enacted during the twentieth century did not fundamentally challenge the employer’s managerial powers or the employee’s overall subordination; they remain the default aspect of ‘private government’, accompanied by the hierarchical and, to a great extent, authoritarian structure of the employment contract they imply.

C. The Continuing Relevance of Labour Law’s Pedigree in Contemporary Times

The discussion presented here is of great relevance to the current state of work. As demonstrated in the previous section, the employment contract constitutes a legal instrument that has, since its inception, entrenched the employer’s power to command and control the employee. Although some legal systems have imposed restrictions on the actions of employers, such as with the introduction of unfair dismissal laws, still, as Deakin and Wilkinson note, even in those systems, ‘hierarchical notions of the employee’s duties of “obedience” and “loyalty” remain highly relevant to judicial interpretations, notwithstanding the repeal over a hundred years ago of the restrictive legislation in which they originated’82

82 S. Deakin and F. Wilkinson, n.28, 108.
In common law jurisdictions, once employees enter into an employment contract, the law implies their duties of obedience, loyalty, and cooperation. These duties can still be manifested in various ways, such as in the context of non-compete agreements. While there may be valid reasons to impose and enforce non-compete clauses for executives or highly skilled workers, this practice appears to be less justifiable when it comes to low-wage workers. For example, in a 2006 case in Delaware, a cleaning company attempted to enforce a non-compete agreement with a janitor after the janitor agreed to work elsewhere as a custodian. The Court of Chancery did not object to the restriction on principle, but rather found that the two-year duration was excessive and unreasonable in light of the janitor’s job profile. Similarly, Amazon faced public scrutiny for having some of its warehouse workers sign non-compete clauses that were so broad that, considering the company’s size, they threatened to significantly limit the workers’ future job prospects. Given that there are few compelling economic arguments for imposing such restrictions on these workers, one may question whether these practices are not simply an attempt to extend the duties of obedience and loyalty beyond the bounds of the respective work arrangements.

Even in the contemporary world of work, the lasting impact of a master–servant mentality, which assumes that workers cannot be trusted and must be actively supervised and ‘policed’, continues to shape labour law issues. For example, Evelyn Atkinson’s analysis of insurance records from 1887 to 1911 sheds light on the ways in which some employers would assist in compensating submissive and ‘grateful’ employees while hindering those who felt entitled to compensation and rated their requests negatively in the context of workplace accidents. In the present day, workers may still be subject to the employer’s personal assessment when it comes to workplace accidents, an assessment that might start from the assumption that, if

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84 Elite Cleaning Co., Inc. v. Capel, Court of Chancery of Delaware 2 June 2006, Case No. Civ.A. 690-N.
86 Only in 2023, the US Federal Trade Commission proposed a rule aimed at limiting non-compete clauses, recognizing that their prevalence and effect on working conditions have become untenable. See https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking Date last accessed 31 July 2023.
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possible, employees will act opportunistically. Based on more recent qualitative interviews from Québec, Katherine Lippel highlights the stigma that comes with the status of being an injured worker. Workers feel they are being stereotyped as dishonest frauds, especially if their work injury is not visibly apparent, such as in the case of back pain.88 Employers, in turn, admit to having a certain degree of mistrust of injured workers, which may stem from their ‘legal and dispute focus’, ‘poor pre-injury relationship with the employer’, or ‘resentment as a result of the lack of control in their lives’.89 In other words, even though one would expect these insurance claims to be evaluated on their merits, some of Atkinson’s findings may still ring true today. Not all employees are equally assured of their employer’s interest in their safety. Alan Hall, for instance, describes how some contingent workers refuse to report hazards and injuries out of fear of losing their temporary job. He notes, in particular, the case of one woman who ‘worried why her employer was not making her job permanent and, in that context, could not bring herself to trust how the employer would respond to safety concerns or an injury’.90

Non-competes and work accident claims are only two examples of how master-servant thinking can resurface, revealing a certain underlying mistrust towards workers. Other examples undoubtedly exist, as, for instance, the COVID-19 pandemic has provided us. Some employers have felt undeniably threatened by the prospect of employees working from home instead of under close ‘physical’ watch. Consequently, even though experts highlight the importance of worker autonomy for successful telework,91 researchers could observe that a sharp increase in the demand for online workplace surveillance tools accompanied the forced shift towards remote work.92 In other words, instead of embracing a transition to hybrid- and telework as an

opportunity to build more trust between management and employees, a traditional distrustful take on labour relations has re-emerged. The employer’s managerial prerogatives were thus rolled out into the living room.

In this context, governments may arguably fuel the perception that employees require tight supervision, cannot be trusted to do what is ‘right’ on their own, or try to profit from the employer or the ‘system’ whenever possible. As Paul Smith argues, British governments would never reintroduce any penal sanctions such as the ones prescribed under the Master and Servant Acts. Nonetheless, in his view, legal reforms since the 1970s did attempt ‘to control workers’ collective organizations and enhance the managerial prerogative in order to consolidate employers’ capacity to determine the terms of the contract of employment or for services and the content of the pay–effort bargain, that is, the real subordination of labour.’

Compared to Smith, Mary Gardiner is even more decided. She contends that the Howard Government in Australia (1996–2007) drew on master–servant reasoning when issuing the Work Choices Act in 2005. In her view, the Act was not directed towards a ‘partnership model’ between employees and employers; rather, it ‘advocated an old model of work which encouraged employers to act unilaterally and coercively.’

Legislative developments that either reinforce employers’ managerial prerogatives or reflect distrust in workers carry significance, especially in modern workplaces where ICT technology enables strict monitoring of worker performance. From UPS drivers to Amazon warehouse workers, the decline of trade unions and their ability to curtail the employer’s ‘power to manage’ has real consequences for many occupations. Businesses, be they in blue- or white-collar sectors, retail or the platform economy, seem to focus on increasing productivity through more effective surveillance. Contemporary methods of ‘digital Taylorism’ are far more advanced than their ‘analogical’ predecessors. Employers now have the capability to systematically direct, track, and compare employee performance through

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digital devices, far exceeding the capacity of the masters of old who chiefly relied on human supervisors’ eyes, ears, and brains.98 While the law can limit these practices through strengthened worker privacy rights,99 or enhanced collective rights,100 as long as work relations remain rooted in distrust, with the employer as a Leviathan keeping order, the limits of what is permissible will continue to be precarious. The recent trend towards the use of monitoring software to supervise remote workers, with the assumption that employees would otherwise ‘slack’, is particularly telling in this regard, particularly because, until now, policymakers and courts have arguably indulged these surveillance practices.101

3. PART 2. EMPLOYMENT AS ENJOYMENT(?)?: THE IMPLICATIONS OF THE MUTUAL TRUST BETWEEN EMPLOYERS AND WORKERS

A. Modern Management Practices Characterized by Trust in Employees

Thus far, this article has highlighted examples of how employers’ prerogatives can be utilized to restrict workers’ autonomy, driven by a mistrust of workers. However, as this section highlights, managerial prerogatives can also be exercised in a way that affords workers with considerable autonomy and self-determination. Employers can choose to exercise restraint in their powers, such as through human resources practices, although it is crucial to stress—this is still typically a unilateral decision.

The following examples illustrate that trust-based models of cooperation can prove successful. These examples of companies and public bodies are not made to promote them or endorse their broader organizational conduct. They serve merely to demonstrate how high-trust relationships between workers and management can result in positive outcomes when exercised genuinely. Such observations, we posit, raise fundamental questions about the need for laws to be designed around an employment model

98 Valerio De Stefano, n.16.
that sanctions the employers’ power to unilaterally decide how work is conducted to the extent that the discussion above has shown.

Indeed, managerial studies have demonstrated that ‘it is in the best interest of managers to trust their subordinates and to behave accordingly’. Research also suggests that it is advantageous for businesses to pursue policies that make employees trust their managers as well. Demonstrating trust in employees increases the likelihood that employees will trust management in return. Trust, therefore, is viewed as an essential component of organizational success, stability, and employee well-being.

In light of these positive outcomes, some businesses have adopted alternative management techniques aimed at creating an environment of trust for employees. This often involves reducing the extent of control exerted by employers over workers. For instance, many companies worldwide have opted for a less hierarchical structure and rely instead on small, self-managing teams. Proponents of this work organization attribute its success to lean management practices and the support provided by a leader or coach. The latter can provide assistance if the teams encounter difficulties. Two organizations that have adopted this management method are Buurtzorg and Favi. Buurtzorg, a healthcare organization in the Netherlands, has replaced managers with self-directed teams (a ‘nurse-led model’) and offers maximum autonomy to


workers, such as the ability to choose their schedules and co-workers. A regional coach is available for support if needed. Buurtzorg has been recognized as the best employer in The Netherlands multiple times, and the company has reported significant financial savings and increased productivity.\[109\] Pilot tests in the UK replicating the ‘Buurtzorg model’ have shown promise, albeit according to relevant studies, there remain important challenges to overcome.\[110\]

Favi, a French company specializing in the supply of various car parts, is another example of an innovative business model based largely on trust, replacing a traditional hierarchical approach. The company is structured around ‘mini-factories’, each containing 20–35 operators, a leader, and a salesperson, operating autonomously and dedicated to a specific client, such as Volvo or Audi. These mini-factories have the autonomy to make significant decisions, from working hours and pay to hiring and firing employees, with the assumption that employees only seek management assistance when encountering difficulties. A case study reports: ‘[a]ll forms of monitoring have been abandoned, because the company believes that trust is more productive than monitoring. Everyone is encouraged to monitor the quality of their own work’.\[111\] The same study also indicates that the founder of Favi, Jean-François Zobrist, was inspired by the ideas of Douglas McGregor,\[112\] a management scholar whose writings are ‘based on the assumption that people are innately good and that they like working. Consequently, the

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112 McGregor contrasts Theory X to Theory Y. In case of Theory X, managers assume ‘that people dislike work and must be coerced, controlled, and directed toward organizational goals’. In contrast, Theory Y ‘emphasizes the average person’s intrinsic interest in his work, his desire to be self-directing and to seek responsibility, and his capacity to be creative in solving business problems’. McGregor believed Theory Y was more desirable for managers to follow. See J. Morse and J. Lorsch, ‘Beyond Theory Y’ (1970) 48 (3) Harvard Business Review 61–66, 61.
autonomy of individuals and trust between operators and managers are essential.'113

In their book *Corporate rebels: Make work more fun*, researchers Joost Minnaar and Pim De Morree provide other examples of alternative management practices, mentioning large companies in particular. The authors, for instance, refer to Haier, a Chinese electronics manufacturer, which functions through autonomous networks of workers.114 The company is convinced that creating these teams encourages workers’ creativity, as they can propose new products and services. Similar business models with self-determining teams have been adopted by other big companies.115 US-based food-sector company Morning Star, for instance, operates without managers; as management consultant Gary Hamel observed, ‘no one has the authority to force a decision’.116 New employees receive a seminar on self-management. In a case study, Hamel argues that Morning Star would prove that ‘we don’t have to be starry-eyed romantics to dream of organizations where managing is no longer the right of a vaunted few but the responsibility of all’.117

Another development that challenges the unilateral control of employers is the increase in working time sovereignty for employees. Research has shown that such policies can be beneficial for both employers and workers.118 In Germany, for instance, studies indicate that ‘trust-based working hours’ can lead to increased creativity among employees and foster innovation within the company.119 Some public bodies have embraced this viewpoint, such as the town council in Hollands Kroon, The Netherlands, which has opted for a non-formal working environment, with employees not restricted by fixed working hours and with significant discretion in taking leave.120 The Belgian Ministry of Social Security has also implemented a culture of

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113 P. Gilbert, N. Raulet Crozet and A.C. Teglborg, n.111, 3.
115 J. Minnaar and P. de Morree, n.114.
117 Ibid., 60.
120 J. Minnaar and P. de Morree, n.114, 43.
flexibility, with employees deciding where, when, and how long to work. The Ministry’s director observed that in the past, ‘employees were spending their time at the office for the sake of it’. To counter this tendency, employees started working around six hours a day, on average. Despite this decrease in working time, workers demonstrated a higher level of productivity.

In addition to self-managing workers and increased working time sovereignty, some employers have come up with methods that imply high levels of trust, such as leaving the determination of wages or pay increases largely to the workers’ discretion. Companies like Favi and Morning Star, among others, have followed this approach to some extent. Recently, the software company 10Pines in Buenos Aires made headlines on BBC News for leaving some crucial managerial prerogatives to the workers, who determine salaries and pay rises in open meetings.

Arguably, these less hierarchical practices, which deviate from the traditional paradigm of labour law, have the potential to shape a new approach to work organization. This, again, inevitably prompts urgent questions about the necessity and authority to impose strict work regulations and company policies unilaterally and the legitimacy of legal norms that entrench these powers in democratic societies—an analysis that, in our opinion, is still missing in literature. An increasing body of evidence shows that workers tend to adopt work behaviours that are beneficial for both themselves and their employers when given proper guidance and explanation, without the need for the authoritarian, top-down supervision that labour law affords to employers and embeds into workplaces, rooted in historical and anachronistic distrust towards working people. For instance, despite long-standing managerial concerns about the potential for workers to slack off, there is no evidence to suggest that increased working time sovereignty negatively impacts business performance. Some of the innovative approaches to management discussed in this section appear promising. However, as the

121 Ibid., 120.
122 Ibid., 122.
125 According to the ILO Global Commission on the Future of Work, Work for a brighter future (Geneva: ILO, 2019), 40, ‘Workers need greater time sovereignty. The capacity to exercise greater choice and control over their working hours will improve their health and well-being, as well as individual and firm performance’.
following section explains, they also come with certain shortcomings. One significant risk is that trust-based management could become a ‘Trojan horse’ concealing disguised forms of control.

B. The Use of Trust as a ‘Trojan Horse’: the Role of Collective Labour Relations

In the previous section, we argued that there are benefits to employers who offer more autonomy and trust to their employees. This can lead to improved business performance and job satisfaction, reducing middle management and bureaucracy, as well as attracting job applicants and favourable media coverage, among other things. However, trust-based practices also carry their own risks, such as the possibility of disguised forms of control operating under the guise of trust and autonomy. This paradoxical phenomenon could be referred to as ‘trust-based mechanisms of control’.

Katinka Bijlsma and Paul Koopman have pointed out that: ‘[m]any authors conceive of trust as a substitute of control because it reduces transaction costs. The higher the level of trust in a relationship, the lower the costs of monitoring and other control mechanisms will be’. However, at the time of their writing in 2003, there was disagreement in the literature on whether trust truly substitutes control or if trust and control are ‘complementary phenomena’.

Subsequent research on the relationship between trust and control in management suggests that while it may be challenging to reconcile trust-based management practices with overt forms of surveillance due to the mixed signals it sends to employees, it does not necessarily rule out the possibility of other forms of monitoring. For instance, employees may remain convinced of their trust, even when their performance is monitored.


127 K. Bijlsma and P. Koopman, n.126.

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through less apparent electronic systems. Similarly, tools that are intended for monitoring customers’ satisfaction or ensuring worker safety may also be used to indirectly control workers. Some scholars argue that well-implemented control systems can actually foster trust within an organization by protecting employees from arbitrary decision-making and reassuring them of the organization’s reliability and predictability. They dispute the notion that trust will simply replace control. ‘Rather, [they] find that, particularly in the aftermath of the recent financial crisis, control systems remain firmly in place as a central way of influencing employee behavior and trust continues to be viewed as an important organisational resource.’

Furthermore, other scholars present an argument that trust and control are complementary rather than substitutes. They contend that trust can actually reinforce control. For instance, one study suggests that when employees have more control over their work, they may be more amenable to strict surveillance. In this context, surveillance would prompt fewer negative reactions. This combination of intrusive monitoring and ‘HR practices designed to develop trust and high commitment relationships’ could form a ‘deadly’ mixture. The interplay between high-trust relationships and control might open the door to various forms of ‘trust-based mechanisms of control’. This could also lead to an increased number of burnouts.

133 J. Moss, ‘Beyond Burned Out’ (2021) Harvard Business Review 1–17. As observed by certain scholars, attaining greater autonomy in the workplace is generally perceived as a positive experience. Nonetheless, when such autonomy leads to escalated workloads, for instance, due to the replacement of middle management with self-evaluations and reduced support from managers, it can impose a significant mental burden on workers. These challenges are not only exacerbated when employees are burdened with additional responsibilities and tasks under the pretext of being trusted with more autonomy, but they can also be intensified in scenarios where employees are subjected to performance indicators and rigorous quantitative assessments. A. Supiot, n.95, 176–177 and 255–256; see also D. Linhart, ‘Les formes modernes de l’emprise manageriale’ (2019) 40 Educação & sociedade 9–14.
We want to contribute to this debate by stressing that these challenges are strictly linked to the underpinning legal ‘distrustful’ structure of the contract of employment.

We posit that there are instances when the shift to trust-based management does not resolve the problematic aspects of employment relations. Although employees may feel more trusted, in fact, they still remain legally subordinated to their employers’ managerial prerogatives. When employers merely implement new, ‘trust-washed’ methods to ensure their employees work towards the company’s goals, the illiberal nature of the employment contract remains largely unchallenged. Even if employees may generally feel more trusted at work, for instance, it does not necessarily mean they will spend any less time checking their emails from home—they are still aware their supervisors generally retain sweeping managerial powers over their jobs. The question arises, then, as to how increased autonomy and trust can actually benefit workers and not be used to more effectively conceal the employers’ powers.134

In our view, a crucial way to mitigate the risks for employees is to involve trade unions and other workers’ representatives in the workplace management process by bolstering their collective labour rights, such as the right to collective bargaining. This right, as an essential element of the freedom of association, has been proclaimed to be ‘the most effective way to achieve a “countervailing power” to the employer and re-establish a balance of forces in the employment relationship’.135 Furthermore, collective bargaining constitutes a ‘cornerstone institution for democracy’ due to its functions and objectives.136 As Guy Davidov explains, one of its primary functions is to rectify the democratic deficit that is prevalent in employment relationships.

134 For example, Danièle Linhart argues that some enterprises that aim on ‘liberating’ may remain largely in line with traditional business practices. In many instances, the business presents itself as possessing a certain ‘vision’, and employees are expected to internalize that vision, striving to achieve goals set by management. Those who align with the company’s vision may be asked to self-manage, self-motivate, self-monitor, and self-discipline, while those who do not may choose to leave. D. Linhart, Le modèle managérial moderne: un taylorisme et une subordination personnalisés’ (2018) 24(3–4) Psychotropes 21–36, 33–34.


Davidov also highlights that the collective voice of workers enables them to voice their concerns and demands in the workplace and, to a certain extent, participate actively in the organization of the workplace.\textsuperscript{137}

It is worth noting that trust-based management and increased employee voice can coexist harmoniously. Research has shown, for example, that workers’ unionization can have a positive impact on labour productivity by enhancing employee motivation and morale.\textsuperscript{138} Surveys also suggest that direct employee voice arrangements increase workers’ trust in management, while perceived managerial opposition to unions negatively impacts trust.\textsuperscript{139} Elaine Farndale et al. also observe that employees who can voice their opinions and feel they can influence decision-making—which is particularly strengthened by unionization—‘show higher commitment to the organisation’\textsuperscript{140} In light of this, it is not surprising that both the Organisation for Economic Co-operation and Development (OECD) and International Labour Organization (ILO) place a strong emphasis on workplace cooperation in developing genuine ‘high-trust models of employment relations’\textsuperscript{141} while concurrently emphasizing the advantages of collective bargaining.\textsuperscript{142}

The interplay between strong collective labour relations and trust-based management has already been observed in some countries, such as Denmark and Sweden. Anna Ilsøe highlights, based on her qualitative interviews with metal industry employers in Denmark, that these employers ‘often trusted the employees to adjust their working time both to the


\textsuperscript{142}Crucially, workplace cooperation is not envisioned as a substitute for collective bargaining. In fact, as OECD and ILO researchers note, studies ‘show that the combination of bargaining and workplace cooperation can lead to productivity outcomes that are significantly better than those where there is only bargaining or only cooperation’. ILO and OECD, n.141, 31.
needs of the company and to the needs of their private lives, and they were happy with the results.'143 The strong commitment within Danish firms and the cooperative spirit between unions and management enabled the implementation of flexible work practices, such as flexitime, more effectively.144 Similarly, Peter Berg and colleagues emphasize that the high level of trust between social partners in Sweden, along with the country’s solid institutions, enables collective bargaining to lead to innovations in working hours and increased worker control over scheduling.145 It is worth noting that some authors also stress that the trust and ongoing cooperation in Scandinavian workplaces ‘has (to a varying extent) contributed to the evolution of a Nordic “style of management” based on broader employee involvement, smaller social distances, and fewer hierarchical tiers than in most other countries.’146

It can be argued that, in some instance, the business approaches discussed above might only adopt a single aspect of the Nordic style of management, such as granting greater autonomy and responsibility to employees. However, it is vital to recognize that this alone may not be sufficient to safeguard workers’ well-being and must be accompanied by other elements of this leadership style. As observed in the Nordic context, companies that aim to implement trust-based management must actively involve workers in decision-making and give due weight to their opinions.147 Furthermore, as exemplified by the ‘mini-factories’ in firms such as Favi, workers can even play a role in how disciplinary powers are exercised in cases where their colleagues abuse the trust placed in them. Collective voice, we posit, is an essential element to achieve genuine trust and autonomy at work, challenging the long-standing authoritarian character of employment relations. Fostering collective rights, therefore, is a necessary step towards weeding out the vestiges of outmoded classist notions of polities and labour relations still present in labour regulation.

143 A. Ilsøe, ‘Between trust and control: company-level bargaining on flexible working hours in the Danish and German metal industries’ (2010) 41 (1) Industrial Relations Journal 34-51, 46.
144 Ibid., 48-49.
In fact, without active participation in the decision-making processes of the employer, workers may become disillusioned with the transition to trust-based management. As Gallup points out, unfair treatment at the workplace, an overwhelming workload, a lack of clear expectations, a lack of support from managers, and unreasonable time pressure are among the leading causes of burnout.\textsuperscript{148} The transition to trust-based management without adequate opportunities for social dialogue may exacerbate these issues. While the idea of having the right to flexitime or the right to take leave as desired sounds appealing, these ‘rights’ are meaningless if the workers who exercise them are the first to miss out on promotions or are the first to lose their jobs in case of restructuring.\textsuperscript{149} It is for this reason that these innovative management practices are best implemented within the framework of robust collective ‘checks and balances’ and social dialogue.\textsuperscript{150}

Moreover, robust social dialogue also appears to be advantageous in other areas of labour governance. Since the outbreak of the pandemic, many countries have instituted job retention schemes, such as furloughs and short-time arrangements. Some have involved social partners in the negotiation and implementation of these measures, while others have not. According to the European Trade Union Confederation, the extent to which trade unions are involved in these processes has a significant impact on the scope and intensity of the job retention measures.\textsuperscript{151} For example, bipartite and tripartite declarations and agreements have resulted in increased subsidies, streamlined procedures, lower eligibility requirements, and a broadening of the scope of job retention schemes.\textsuperscript{152} Among other things, it has been noted by the ILO and OECD that, due to the social partners’ ability to sense the needs on the ground, ‘[t]he involvement of social partners in organising short-time work makes it possible to go beyond the simple act of paying benefits or subsidies to reduce working time. Social dialogue complements the latter and allows for negotiating agreements on


\textsuperscript{149}See, for example, E. Munch, ‘Social Norms on Working Hours and Peak Times in Public Transport’ (2020) 29 (3) \textit{Time \& Society} 836–865.


\textsuperscript{151}ETUC, \textit{Covid-19 Watch: ETUC briefing note on measures undertaken in the second wave of the pandemic to preserve jobs and incomes} (Brussels: ETUC, 2020).

access to training, flexibility in working time, use of leave arrangements and working time accounts or (temporary) wage moderation to sustain jobs.\textsuperscript{153} Acknowledging these benefits, in multiple European countries, social dialogue has been a pillar of the response to COVID-19 since the beginning. In other EU Member States, although the first government measures were supposedly taken without sufficient consultation, ‘in most cases the consultation processes have improved along the way and social partners tend to be mostly satisfied with the quality of their involvement’.\textsuperscript{154} Drawing on such observations, Eurofound advocates for this common and participatory approach to continue,\textsuperscript{155} given that it may be crucial in the years to come. For example, as the ILO recalls, ‘[i]nternational experience demonstrates that governments tend to shift policy priorities from economic stimulus towards fiscal consolidation and debt reduction to respond to national budget deficits and public debt increase.’\textsuperscript{156} In this regard, the organization calls on trade unions to offer alternative policy proposals.

4. CONCLUSION

Modern labour law developed in the wake of the Industrial Revolution. Arguably, at the time when the employment contract originated, people of the working classes tended to be considered untrustworthy by those in a position of power, such as lawmakers, government officials, judges and masters. As a result, labour regulations were also established to ensure that employers had the means to govern their workforce strictly. To this day, this notion still persists, albeit in more refined forms. Even the progressive modernization of labour law has not erased the illiberal tendencies that are inherent in the employment contract and its related legislation. Additionally, advancements in technology can exacerbate the negative consequences of


\textsuperscript{154} Eurofound, \textit{Involvement of social partners in policymaking during the COVID-19 outbreak} (Luxembourg: Publications Office of the European Union, 2021), 12 and 37.

\textsuperscript{155} Ibid., 39.

managerial prerogatives, making the issue even more pressing in recent times.

Against this backdrop, this article has highlighted the need to re-examine the foundations and extent of managerial prerogatives, which are closely linked to the assumption that workers cannot be trusted. In contrast to this assumption, this research provides several examples that demonstrate the contrary. As seen, some businesses have voluntarily shifted to models of organization that grant employees more trust and autonomy, reducing the level of control. The adoption of such models can lead to positive outcomes.

However, one must exercise caution. As we note, there is a danger of trust becoming a guise for employers to retain a greater degree of control over their employees. The use of new technological tools, such as tracking keystrokes and login attempts from home, exacerbates this issue in contemporary workplaces. This article has, thus, emphasized the critical role of collective labour relations in the transition to a work environment in which workers are truly trusted. In particular, collective bargaining can empower workers to participate actively in the workplace and enable more democratic governance at work. To truly respect the autonomy of workers and citizens, it is essential to democratize the enterprise through enhanced collective voice.157

More broadly, if policymakers aspire to reap the enhanced social and economic well-being that authentic trust-based business practices portend, they ought to respond accordingly by commencing to challenge the hierarchy-centred model of the employment contract and promoting practices that can actively counteract it, such as reinforcing mechanisms of social dialogue and collective labour rights.