

RESEARCH ARTICLE

# Informing a sociological jurisprudence of mutual trust and confidence

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## Abstract

The aim of this paper is to inform a sociological jurisprudence of the implied duty in the contract of employment of mutual trust and confidence. Present analyses of the emerging term have been doctrinal in nature. Such scholarship contributes a normative internal perspective to what can be understood as the jurisprudential project of guarding and maintaining law as a practice of regulation. This paper seeks to generate knowledge that will allow for an extension of the jurisprudential analysis to take into account how mutual trust and confidence may manifest in contemporary conditions of work. This is achieved by, first, presenting original sociological data of the employment relation in a work context likely to demonstrate practices that resonate with features of mutual trust and confidence – that of early-stage digital technology startups – and, secondly, contrasting this empirical account with doctrinal conceptions of the term. Findings unsettle the dominant jurisprudential account of mutual trust and confidence as positively contributing to the social goal of labour law as operating to counter the power of capital.

**Keywords:** labour law; socio-legal; mutual trust and confidence

## Introduction

The implied term of mutual trust and confidence has been heralded by many scholars as one of the most important recent developments in the law governing the contract of employment.<sup>1</sup> It imbues employers with a positive duty of cooperation<sup>2</sup> that gives rise to an obligation to operate in good faith in their interaction with employees.<sup>3</sup> Appraisals of its significance seemed to reach a zenith around the year 2000. Then, mutual trust and confidence was described as in the vanguard of broader shifts in the common law,<sup>4</sup> and reflective of a ‘fundamental change in legal culture’<sup>5</sup> amounting to

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<sup>1</sup>M Freedland *The Personal Employment Contract* (Oxford: Oxford University Press, 2003); D Brodie ‘Mutual trust and the values of the employment contract’ (2001) 30 *Industrial Law Journal* 84.

<sup>2</sup>BA Hepple *Employment Law* (London: Sweet and Maxwell, 1981); see also Lord Steyn in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 621E, recognising cooperation as its likely origin.

<sup>3</sup>Lord Nicholls in *Eastwood v Magnox Electric Plc* [2005] 1 AC 503 at 523F–G.

<sup>4</sup>D Brodie ‘Legal coherence and the employment revolution’ (2001) 117 *Law Quarterly Review* 604.

<sup>5</sup>Lord Steyn in *Johnson v Unisys Ltd* [2003] 1 AC 518 at 531F, reiterating his sentiments in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 621G where he talks of the change in legal culture making possible the evolution of the implied duty of mutual trust and confidence.

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nothing less than an ‘employment revolution’<sup>6</sup> in how judges conceive of the employment relationship.<sup>7</sup> Brodie, a leading scholar on the implied duty, concluded that ‘The emergence of mutual trust and confidence is a development to be welcomed unreservedly in employment law. It serves to challenge abuse of power, and promotes the dignity of the employee.’<sup>8</sup> While still viewed positively,<sup>9</sup> more recent analysis has observed some of its limitations.<sup>10</sup>

Analyses to date of mutual trust and confidence have been doctrinal in nature.<sup>11</sup> Such scholarship can be understood as contributing to the jurisprudential project of guarding and maintaining law as a practice of regulation.<sup>12</sup> This project involves the intellectual organisation and classification of the techniques of law, its rationalisation and justification as a coherent system of knowledge, and critical analysis of its flaws and proposal for appropriate modification. Doctrinal writing on mutual trust and confidence has indeed sought to understand the nature of this emerging implied duty and assess its development in terms of the wider coherency of the common law regulation of the contract of employment. Critically, the doctrinal analysis has also sought to assess and link mutual trust and confidence with the ultimate values of labour law, that is, its goal or social purpose as a body of law – a task also viewed as vital to a sound jurisprudence.<sup>13</sup>

What might be the socially valuable goal of labour law to which mutual trust and confidence contributes? The mainstream perspective is that mutual trust and confidence contributes to the task of labour law to operate as a countervailing force to the power held by employers in the employment relationship.<sup>14</sup> This ideal is generally considered to be the core purpose of labour law as a critical discipline.<sup>15</sup> Such a view is influenced by Marxist thought, which emphasises the human quality of labour and identifies its exploitation in capitalist market relations.<sup>16</sup> In this framing, the interests of labour are in opposition to those of capital. What is needed is to ensure that there is some form of balance between employers and employees in order to produce a degree of fairness between them.<sup>17</sup>

However, this is not the only way to interpret the goal of labour law. There have been efforts by past governments, notably that of the Blair Labour Government from 1997 to 2005, to reframe the norms of labour law so as to align the interests of employers with those of employees. In its bid to increase the UK’s competitiveness in the global knowledge economy, the Blair Government introduced and adjusted various statutory employment rights to achieve the goal of redefining the employment relation away from conflict and towards partnership and cooperation.<sup>18</sup> It recognised that knowledge work, which involves the application of employee explicit knowledge, tacit knowledge, creativity,

<sup>6</sup>Lord Hoffmann in *Johnson v Unisys Ltd* [2003] 1 AC 518 at 539C–D.

<sup>7</sup>Judicial attitudes have traditionally been viewed as favouring the needs of capital by following the traditional liberal values of individualism, party autonomy, and respect for freedom of contract. See ACL Davies ‘Judicial self-restraint in labour law’ (2009) 38 *Industrial Law Journal* 278, especially at 287–288.

<sup>8</sup>D Brodie ‘Beyond exchange: the new contract of employment’ (1998) 27 *Industrial Law Journal* 79.

<sup>9</sup>P Elias ‘Changes and challenges to the contract of employment’ (2018) 38 *Oxford Journal of Legal Studies* 869.

<sup>10</sup>D Cabrelli ‘Receding confidence in trust and confidence’ (2019) 23 *Edinburgh Law Review* 411.

<sup>11</sup>For example, D Brodie ‘The heart of the matter: mutual trust and confidence’ (1996) 25 *Industrial Law Journal* 121; Freedland, above n 1; D Cabrelli ‘The implied duty of mutual trust and confidence: an emerging overarching principle?’ (2005) 34 *Industrial Law Journal* 284.

<sup>12</sup>R Cotterrell ‘A socio-legal quest: from jurisprudence to sociology of law and back again’ (2023) 50 *Journal of Law and Society* 3; R Cotterrell *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Abingdon: Routledge, 2018).

<sup>13</sup>Cotterrell (2023), above n 12; Cotterrell (2018), above n 12.

<sup>14</sup>It is noted that another vital way in which to counter the power of capital is through the collectivisation of workers. Rights to do so have been diminished in recent years.

<sup>15</sup>P Davies and M Freedland (eds) *Kahn-Freund’s Labour and the Law* (London, Stevens & Sons, 1983); R Dukes ‘Critical labour law: then and now’ in E Christodoulidis et al (eds) *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019).

<sup>16</sup>Dukes, above n 15.

<sup>17</sup>E Tucker ‘Renorming labour law: can we escape labour law’s recurring regulatory dilemmas?’ (2010) 39 *Industrial Law Journal* 99.

<sup>18</sup>White Papers: *Fairness at Work*, Cm 3968 (London: TSO, May 1998); *Our Competitive Future: Building the Knowledge Driven Economy*, Cm 4176 (London: TSO, December 1998).

and interactive and communication skills, requires employees to have autonomy and use it in the interests of employers, and be flexible to changing demands.<sup>19</sup> Government policy pronouncements claimed: ‘A culture of flexibility, underpinned by principles of fairness and trust, creates the right conditions for a creative workforce and for business success.’<sup>20</sup> Critical labour law scholars typically are not convinced by the supposed ability to align the interests of capital and labour.<sup>21</sup> They argue that accepting such an alignment of interests fails to question the basis upon which labour may have shared goals with capital – which is due to its dependence on capital, as the owners of the means of production, in order to survive – and assumes capitalist work relations to be neutral or perhaps the best way to achieve efficient and competitive production.<sup>22</sup>

Linked to this critical perspective is a questioning of the role of labour law in supporting capitalist work relations. Adams points out that labour law’s mediation of the struggle between employer interests and those of employees, via the placing of limits on the exploitation of employees, actually operates in support of capitalism as opposed to against it.<sup>23</sup> Labour laws that seek to limit the degree of exploitation of workers, for example by providing minimum wage provisions or health and safety protections, in effect facilitate the sustenance of labour and its continued ability to be productive as required by capital. Adams argues that framing doctrinal debate solely in terms of the struggle between capital and labour to be resolved by limiting exploitation constrains critique to that within the structures of capitalism and fails to challenge those same structures, including law, that support capitalist work relations.<sup>24</sup>

This paper provides a fresh perspective on mutual trust and confidence. It seeks to contribute to a *sociological* jurisprudence of labour law,<sup>25</sup> where analysis of mutual trust and confidence extends beyond a normative internal perspective of the rule<sup>26</sup> to contemplate how such a rule can be understood in today’s particular historical conditions. Taking a broader view of mutual trust and confidence that extends to how it might be embedded in the context of contemporary work relations operates to enlighten a jurisprudential assessment of this emerging rule. This assessment includes consideration of how mutual trust and confidence operates as a form of social regulation and the way it contributes to the social values that labour law hopes to achieve.

The findings of this paper are in two parts. First, I present a sociological account of the employment relation in a work context where features of the legal norm of mutual trust and confidence are likely to be practised.<sup>27</sup> This work context is that of early-stage digital technology startups – a key site within the innovation economy where it is well known that high-trust and cooperative work relations are promoted in order to facilitate the extraction of innovation labour from employees.<sup>28</sup> Such work relations typically demonstrate features that resonate with the implied duty of mutual trust and confidence.<sup>29</sup> This sociological account reflects social scientific knowledge of social life. This is in contrast to legal doctrinal knowledge. It does not, in and of itself, contribute to a juristic understanding and assessment of mutual trust and confidence.

<sup>19</sup>H Collins ‘Regulating the employment relation for competitiveness’ (2001) 30 *Industrial Law Journal* 17; I Nonaka and T Hirotaka *The Knowledge-Creating Company* (New York: Oxford University Press, 1995).

<sup>20</sup>*Our Competitive Future*, above n 18, at p 47.

<sup>21</sup>Tucker, above n 17; R Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014).

<sup>22</sup>Tucker, above n 17.

<sup>23</sup>Z Adams ‘Labour law, capitalism and the juridical form: taking a critical approach to questions of labour law reform’ (2021) 50 *Industrial Law Journal* 434.

<sup>24</sup>*Ibid.*

<sup>25</sup>Cotterrell (2023), above n 12; Cotterrell (2018), above n 12.

<sup>26</sup>As described by Hart, in HLA Hart *The Concept of Law* (Oxford: Oxford University Press, 2012).

<sup>27</sup>Funding for the data collection and subsequent analysis was provided by the Leverhulme Trust (RF-2020-287\8).

<sup>28</sup>Collins, above n 19; JN Baron et al ‘Labor pains: change in organizational models and employee turnover in young, high-tech firms’ (2001) 106 *American Journal of Sociology* 960; M Robertson and J Swan ‘Going public: the emergence and effects of soft bureaucracy within a knowledge-intensive firm’ (2004) 11 *Organization* 123.

<sup>29</sup>See my discussion in section 1 of this paper.

It should be noted that my empirical focus is on the employee relation in these emerging companies. This is broader than mutual trust and confidence. The reason for this is because I want to develop an expansive picture from which I can deduce what compliance, or practices beyond compliance, might look like in this context. Despite the broad normative values associated with mutual trust and confidence, such as the need for employer care, respect and dignity of employees, the specific applications of it by the courts are rather narrowly focused and below what might be expected in a work context that seeks to promote a high-trust and cooperative employment relation. Judges engage with law by viewing specific factual situations through a lens of compliance or non-compliance. Lessons have been learnt about situations where practices constitute a failure to comply, but far less is known about the range of practices that comply with the implied duty, nor how it might be appropriately operationalised. I seek to understand how practices resonating with the values of mutual trust and confidence manifest in the context of digital technology startups. More than this, though, my interest in the social goal of labour law to which mutual trust and confidence contributes requires a broad perspective in order to consider the interaction of this with other aspects of the employer relation, such as the furthering of employer goals.

Secondly, I offer reflections on how my sociological account of the employment relation might enlighten a sociological jurisprudence of mutual trust and confidence. I do this by contrasting empirical manifestations of the employment relation that resonate with mutual trust and confidence against current doctrinal analyses of its meaning. This includes consideration of the different elements of the legal norm and the particular emphasis and interaction between these that are demonstrated in practice. I also consider the ways that the sociological account of the employment relation within early-stage digital technology startups can inform an understanding of how mutual trust and confidence contributes to the possible social goals of labour law, and any complications or legal problems that arise in this regard. My findings unsettle the dominant jurisprudential analysis of mutual trust and confidence as unproblematically positively contributing to the social value of labour law as acting as a countervailing force to the power of capital, and suggest that the largely ignored alternative perspectives on the goals of labour law have more contemporary relevance than is presently recognised.

The format of the paper is as follows. Section 1, which follows, provides an overview of mutual trust and confidence and its links to the high-trust work relations found in the innovation economy. Section 2, sets out my methodology and includes details of my general approach and how I conducted my empirical data collection. In section 3, I present the first part of my findings – a sociological account of the employment relation in early-stage digital technology startups, as found from my original case study. Then, in section 4, I present the second part of my findings – reflections on how my sociological account might inform a sociological jurisprudence of mutual trust and confidence. The final section provides conclusions.

## 1. Mutual trust and confidence and innovation labour

The common law implied duty into the contract of employment of mutual trust and confidence developed out of the judicial response to legal claims made regarding the law of unfair dismissal, specifically to give shape to the contractual definition of constructive dismissal.<sup>30</sup> A contractual test was developed – the breach of which by the employer would amount to repudiatory conduct sufficient to constitute constructive dismissal by the employer.<sup>31</sup> This came to be known as mutual trust and confidence.<sup>32</sup>

The implied duty of mutual trust and confidence represents a positive version of the general obligation of cooperation.<sup>33</sup> It has been defined as follows: ‘... [the employer shall] not without reasonable

<sup>30</sup>Originally the Trade Union and Labour Relations Act 1974, Schedule 1, para 5(2)(c), now the Employment Rights Act 1996, s 95(1)(c). See Freedland, above n 1.

<sup>31</sup>*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 and D Cabrelli ‘Re-establishing orthodoxy in the law of constructive dismissal’ (2010) 38 *Industrial Law Journal* 403.

<sup>32</sup>*Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 (EAT).

<sup>33</sup>Hepple, above n 2; see also Lord Steyn in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 621E, recognising cooperation as its likely origin.

cause conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee'.<sup>34</sup> Protecting the employment relationship is its underlying purpose.<sup>35</sup> The implied duty has been characterised as '... no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages'.<sup>36</sup>

What this might mean in practice has been described variously. The courts have observed that mutual trust and confidence means '... that an employer must treat his employees fairly. In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith'.<sup>37</sup> This involves a balancing role between the interests of both parties to the contract of employment:

And the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.<sup>38</sup>

Two main strands of application of mutual trust and confidence have emerged.<sup>39</sup> In the first instance, it prevents disappointment of an employee's legitimate or reasonable expectations, enabling them to have legal effect. This includes the requirement on employers to treat employees consistently, to protect employees' legitimate expectations, and provide employees with information in particular contexts.<sup>40</sup> For example, in *Transco v O'Brien*<sup>41</sup> permanent employees were given an enhanced redundancy package. The employer's mistaken belief that Mr O'Brien was not a permanent employee and associated failure to offer him the enhanced redundancy package was held to be inconsistency of treatment and thus a breach of mutual trust and confidence. In the second instance, mutual trust and confidence limits the exercise of managerial prerogative. It intervenes, for example, when there has been capricious or abusive exercise of this power,<sup>42</sup> or, indeed, when there has been a failure to act so as to destroy mutual trust and confidence.<sup>43</sup> An example of this strand of mutual trust and confidence is *Blackburn v Aldi Stores Ltd*,<sup>44</sup> where employer failure to hold a proper appeal in respect of a grievance was deemed a breach of mutual trust and confidence.

An important feature of the implied duty of mutual trust and confidence that it demonstrates judicial recognition that the employment relationship is more than simply an exchange of work for wages.<sup>45</sup> It is also about social or personal relations.<sup>46</sup> The particular position of employees in this relationship has been noted: 'An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable'.<sup>47</sup> This is an important consideration when it is recognised that 'work is one of the defining features of people's lives',<sup>48</sup> and that it

<sup>34</sup>*Bliss v SF Thames RHA* [1987] ICR 700 at 714E–F per Lord Dillon.

<sup>35</sup>*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606.

<sup>36</sup>*Ibid*, at 610F–G per Lord Nicholls.

<sup>37</sup>*Eastwood v Magnox Electric Plc* [2005] 1 AC 503 at 523F–G per Lord Nicholls.

<sup>38</sup>*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 622A per Lord Steyn.

<sup>39</sup>As categorised by D Cabrelli *Employment Law in Context* (Oxford: Oxford University Press, 2018).

<sup>40</sup>A Bogg 'Good faith in the contract of employment: a case of the English reserve?' (2011) 32 *Comparative Labor Law & Policy Journal* 729.

<sup>41</sup>[2002] ICR 721.

<sup>42</sup>*Gogay v Hertfordshire Country Council* [2000] IRLR 703.

<sup>43</sup>*Blackburn v Aldi Stores Ltd* [2013] IRLR 846.

<sup>44</sup>*Ibid*.

<sup>45</sup>Brodie, above n 1, Brodie, above n 4.

<sup>46</sup>Brodie, above n 1.

<sup>47</sup>*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 613E per Lord Nicholls of Birkenhead.

<sup>48</sup>*Johnson v Unisys Ltd* [2003] 1 AC 518 at 549B per Lord Millett, quoting from the Canadian case of *Wallace v United Grain Growers Ltd* 152 DLR (4<sup>th</sup>) 1, 33.

gives ‘... not only a livelihood but an occupation, an identity and a sense of self-esteem’.<sup>49</sup> Moreover, mutual trust and confidence has been interpreted as an example of the shift in the employment relationship in which there are greater duties placed on the employer than in the past,<sup>50</sup> including ‘to care for the physical, financial and even psychological welfare of the employee’.<sup>51</sup> Brodie notes that judges now recognise what workers gain from employment, but also what workers contribute by participating in an employment relationship.<sup>52</sup>

There is, then, a recognition of the mutuality of the employment relationship beyond economic exchange. Mutual trust and confidence promotes the dignity of the employee by acknowledging the human factor in the contract of employment,<sup>53</sup> as well as the interdependence, caring and commitment that should form part of the relationship between employers and employees.<sup>54</sup> The contract of employment has been referred to as a ‘relational contract’.<sup>55</sup> This can be understood, in general terms, as a contract that embodies various commitments, rights and obligations in order to maintain the work relationship over a period of time.<sup>56</sup> In his investigation into the key characteristics of relational contracts, albeit in the context of commercial contracts, Collins identifies the contract’s indeterminacy as central.<sup>57</sup> This includes indeterminacy of the descriptions of the performance expected by the parties and the desired outcome of the transaction. While contracts for employment have a legal means to accommodate such indeterminacy, via managerial prerogative, employers’ authority relations still requires cooperation and fair-dealing, as set out in the implied duty of mutual trust and confidence.

It is important to note at this point that recent commentary on the implied duty has somewhat questioned its ability to counter the unequal power relations inherent in the contract of employment.<sup>58</sup> This is because of various limits on the operation of the implied duty in practice. Hints of these emerged in *Johnson v Unisys Ltd*,<sup>59</sup> when the court held that mutual trust and confidence does not extend to the dismissal of employees. A key reason given for this was that the statutory unfair dismissal regime deals with this area and that the implied duty should not intervene.<sup>60</sup> More recently, the case of *James-Bowen v Commissioner of Police of the Metropolis*<sup>61</sup> suggests that the application of mutual trust and confidence is also limited by tort, specifically, that it cannot be broader in scope than the law of negligence. Cabrelli observes that this case is a salutary reminder of the limits to the operational capacity of mutual trust and confidence and a ‘corrective to accounts of the implied term that bristle with over-confidence in extolling its worker-protective virtues and properties’.<sup>62</sup>

What might be the connections of these developments to innovation labour? It would seem that the cooperation and good faith promoted by the implied duty of mutual trust and confidence, as well as its association with fairness, care and employee dignity, would likely support the high-trust cooperative relations that are commonly associated with the extraction of innovation labour, and knowledge work more broadly. Indeed, Brodie has observed a link between the evolution of mutual trust and confidence and the judicial adoption of a view of industrial relations based on common interest and

<sup>49</sup>*Johnson v Unisys Ltd* [2003] 1 AC 518 at 539B–C per Lord Hoffmann.

<sup>50</sup>Brodie, above n 11.

<sup>51</sup>*Spring v Guardian Assurance plc* [1995] 2 AC 296 at 335A–C per Lord Slynn.

<sup>52</sup>Brodie, above n 1.

<sup>53</sup>*Ibid.* See also Bogg, above n 40.

<sup>54</sup>Brodie, above n 1.

<sup>55</sup>By Lord Steyn in *Johnson v Unisys Ltd* [2003] 1 AC 518 at 532F, and by Lords Hodge and Kerr in *Braganza v PB Shipping Ltd* [2015] WLR 1661 at 1679E.

<sup>56</sup>Freedland, above n 1.

<sup>57</sup>H Collins ‘Is a relational contract a legal concept?’ in S Degeling et al (eds) *Contract in Commercial Law* (Toronto: Thomson Reuters, 2016); H Collins ‘Employment as a relational contract’ (2021) 137 *Law Quarterly Review* 426 at 426.

<sup>58</sup>Cabrelli, above n 10.

<sup>59</sup>[2003] 1 AC 518.

<sup>60</sup>Now regulated by the Employment Rights Act 1996, Part X.

<sup>61</sup>[2018] UKSC 40, [2018] 1 WLR 4021.

<sup>62</sup>Cabrelli, above n 10, at 411.

partnership.<sup>63</sup> Similarly he noted that low-trust relations between employers and employees leave little scope for mutual longer-term diffuse obligations.<sup>64</sup> It would seem that there is a step change in judicial attitudes that is associated with the shift from an industrial model of production to that of the knowledge, and, more specifically, innovation, economy.

The emphasis on the relational nature of the contract of employment would seem to be supportive of what is needed to extract innovation labour, especially its emphasis on maintaining the employer-employee relationship over time in situations where the outcome and even path to getting there may be indeterminate. The particular dynamism of innovation may make this especially important. Innovation in the startup environment involves testing out an unproven idea, technology and or business model, iterating this, and, if the innovation is promising, scaling the company at pace.<sup>65</sup> As noted above, employers, through the right to instruct employees, have always had the ability to adapt production to changing needs. However, the emphasis of mutual trust and confidence on the social and personal relations involved in the contract of employment will be important during periods of change. Employer cultivation of employee trust via demonstrations of its commitment to employees, and treatment of employees with dignity, respect and fairness – all characteristics of mutual trust and confidence – will be vital.

While the broader normative direction of mutual trust and confidence resonates with the desired high-trust and cooperative employment relation in digital technology startups, the specific applications of the implied duty by the courts does not seem especially close to what is needed for high trust cooperative relations. In 2001, Collins observed that the implied duty of mutual trust and confidence may operate to support the ‘flexible employment relations’ required for knowledge work.<sup>66</sup> However, significant ‘instabilities’ in such an employment relation were not supported by the implied duty. These included the functional flexibility employers require of these employees, the difficulties employers will have in monitoring the performance of knowledge work, and the need that knowledge-producing organisations have for communication between all members of the organisation. Collins suggested that a sharpening of the implied terms in to the contract of employment, in particular that of mutual trust and confidence, is needed so as to more clearly set out expectations of the parties regarding how parties can use their discretion. This might include, for example, requiring employers to provide employees with detailed information about business plans, production methods and staffing requirements. These findings suggest that mutual trust and confidence likely offers some, although not in and of itself sufficient, support and protection of employees in the employment relation in innovation work environments.

## 2. Methodology

### (a) Approach

The approach I take to achieving this paper’s goal of contributing to a sociological jurisprudence of mutual trust and confidence is first, to undertake a sociological investigation of the employment relation in early-stage digital technology startups and, secondly, to reflect on how this social scientific knowledge can contribute to legal juristic knowledge of mutual trust and confidence in order that it develops into a sociological jurisprudence.

<sup>63</sup>Brodie, above n 11, in his discussion of the point raised by BW Napier in the article ‘Judicial attitudes towards the employment relationship – some recent developments’ (1977) 6 *Industrial Law Journal* 17.

<sup>64</sup>Brodie, above n 1, citing A Fox in his work *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber Ltd, 1974) p 74.

<sup>65</sup>See for example: E Ries *The Lean Startup: How Constant Innovation Creates Radically Successful Businesses* (London: Penguin, 2011); B Aulet *Disciplined Entrepreneurship: 24 Steps to a Successful Startup* (Hoboken, NJ: John Wiley & Sons, 2013); S Blank *The Four Steps to the Epiphany: Successful Strategies for Products that Win* (Hoboken, NJ: John Wiley & Sons 2013); K Beck et al ‘Manifesto for agile software development’, <https://agilemanifesto.org/> (last accessed 6 February 2024); K-M Cutler ‘The unicorn hunters’ (*Logic*, 1 April 2018).

<sup>66</sup>Collins, above n 19.

In terms of the sociological investigation, I sought to interrogate an employment relation that demonstrates employer practices that likely comply with the requirements of mutual trust and confidence. I chose to focus on the innovation economy, and startups in particular, as these work environments are known to be associated with high-trust and cooperative work relations. ‘High-trust and cooperative work relations’ is the language of sociologists of work to refer to practices such as employers trusting employees with autonomy, employers promoting and, indeed, relying on employee motivation, interest and even ambition when it comes to the undertaking of work tasks, and where social interaction between employers and employees, and within employee teams, involves respect of each other’s skill and viewpoint. These employee relations resonate with features of mutual trust and confidence, such as employer care and respect for employee dignity, and the recognition of employment as a social relationship between employers and employees that contributes to employee identity and self-esteem.

It is important to note that my aim is *not* to capture how the legal norm of mutual trust and confidence may have influenced (or not) practices within these work environments, or indeed the possibility of law as adapting to changing social standards.<sup>67</sup> Rather, my empirical lens focused on how workplace practices that resonate with mutual trust and confidence might manifest, and to understand any issues of interest that emerge in relation to these practices.

In terms of making linkages between the social scientific knowledge developed in my empirical investigation and legal juristic knowledge of mutual trust and confidence, I seek to highlight features of my empirical findings that I consider relevant information from which to develop a sociological jurisprudence. As noted in the introduction, sociological knowledge cannot contribute directly to legal knowledge of the meaning or parameters of norms. What my sociological findings can do, however, is to provide insight that can aid the *evaluation* of legal norms and how these legal norms contribute (or not) to broader legal values and social goals.

### **(b) Empirical data collection**

My method comprised a case study of early-stage<sup>68</sup> digital technology startups in Scotland. The empirical data collection took place between January 2021 and July 2022. My original intention of undertaking ethnographic techniques was not possible due to the lockdown during the Covid-19 pandemic. Instead, I conducted 46 interviews, via zoom, with people who worked in tech startups and/or organisations that support the Scottish tech scene<sup>69</sup> (see Table 1). The primary source of data reported on in this study is a subset of these interviews that comprised 17 people who worked in tech startups as either founders or in other employee roles.<sup>70</sup> This data was supplemented by a further 29 interviews with people who worked in the digital technology startup sector and whose roles included: educating future tech founders and employees (university and other tech educating organisations); supporting startups via tech accelerators, incubators and clusters; government agencies; equity investors; trade

<sup>67</sup>The judiciary has hinted at the complex interaction between legal evolution and practices within workplaces by noting that law has adapted to recognised changing social standards: *Wetherall v Lynn* [1978] ICR 205 at 213, with mutual trust and confidence said to ‘... reflect the changes in the relationship between employer and employee as social standards change’; Lord Hoffmann in *Johnson v Unisys Ltd* [2003] 1 AC 518 at 539B–C, ‘... over the last 30 years or so, the nature of the contract of employment has been transformed. ... The law has changed to recognise this social reality.’

<sup>68</sup>I define these as startups with at least one employee and up to about 50 employees.

<sup>69</sup>Interview data, by its very nature, relies on the reflections of interviewees on past events. Ethnographic data, in contrast, likely better captures the nuance of practice and feelings by study participants about practices at the time that they occur. Despite these differences, I consider that the conclusions reached by the study would be fundamentally the same regardless of the method used. In future, researchers may wish to undertake an ethnographic study in order to capture a thick description of the features of organisational life raised by the present research.

<sup>70</sup>The study focuses on employees as opposed to those in different contracting arrangements for work. I have not been able to find any statistics on the types of contractual arrangements for work used in the sector. However, in my interviews it became clear that employers preferred employees. Reasons given included ensuring that any intellectual property rights were owned by the employer and that employees were more committed to the work of the startup.



**Table 1.** Summary of study participants

Role	N	Male	Female
Startup founders	8	6	2
Startup employees	9	5	4
Other roles in wider tech ecosystem	29	16	13
<b>Total</b>	<b>46</b>	<b>27</b>	<b>19</b>

unions; lawyers; tech-focused recruitment agents; and tech-focused careers advisers. It should be noted that there was quite a bit of fluidity in participants' job roles. This means that some founders (who represented employers) could share insights into the experience of being an employee, or people who worked in the wider tech ecosystem could share insights of working in a startup itself. Table 1 notes the primary roles held by participants at the time I spoke with them.

All of the participants, apart from two, were based in Scotland. (The two outside of Scotland comprised one startup employee based in England and one startup founder based in Germany. These participants provide a useful varying geographical perspective to my primarily Scottish focus.)

Interviews were semi-structured and, given the movement between roles of individuals in the sector noted above, were adapted to participant experiences. However, in general terms, interviews with startup founders focused on features of the startup and people management practices; and interviews with startup employees focused on career decisions, experiences of people-management practices, and likes and dislikes regarding working in startups. I did not ask participants directly about legal norms relating to the employment relation, let alone the implied duty of mutual trust and confidence. Instead, my questions and interview prompts sought to explore their understandings of and practices with respect to the employment relation.

The majority of interviews were recorded and fully transcribed. In cases where participants preferred not to be recorded, I took handwritten notes of the interviews. I utilised NVivo to undertake thematic analysis of workplace practices of the employment relation from the perspective of employers and their representatives (in this case, founders and other employees with managerial roles) and non-managerial employees.

To contextualise my interview data and to further my understanding of practices within the sector, I attended and/or participated in, again via zoom, 15 digital technology events and training sessions targeted at those involved in, or thinking of entering, the Scottish and UK tech startup sector. These included: university-led training about how to create a startup, how to protect intellectual property in a startup or spin-out, and how equity investment funding works; the launch event of DataFest 2021; Engage, Invest, Exploit 2021; Turing Fest 2021; the Tech Nation Law Tech Sand Box: Showcase 2022; and the Tech Nation Rising Stars 4.0 Showcase. I also undertook a review of relevant secondary resources to further enhance my understanding of 'startup thinking', including the latest in international best practice business guides and podcasts on various issues relating to startups by thought leaders influential in the Scottish startup scene.

An important point to note regarding my choice of case – ie digital technology startups – is that, by definition, these companies are small. Indeed, my particular focus is on early-stage digital technology startups, which I define as those with at least one employee and up to about 50 employees. The size of these companies is a relevant consideration in interpreting my findings relating to practices that resonate with mutual trust and confidence. A review study of small firms and employment rights identified that small companies, compared with larger firms, are less likely to have formalised human resources systems.<sup>71</sup> However, the degree to which employee processes are bureaucratised depends

<sup>71</sup>P Edwards and M Ram 'HRM in small firms: balancing informality and formality' in A Wilkinson et al (eds) *The Sage Handbook of Human Resource Management* (Los Angeles: Sage Books, 2020).

on the sector in which the small firm operates and the preferences and assumptions of the owning group – there is a wide degree of variation. It cannot be assumed that small firms are unsophisticated when it comes to human resources management. They may, for example, use high commitment models rather than bureaucratic practices.

This variability within small companies suggests the need for caution when considering the broader applicability of the study findings. While small firms may share the tendency towards informal human resources management practices, digital technology startups are fairly unique for at least two reasons: first, the particular type of labour digital technology startups employers are seeking to extract from employees; and secondly, the fact that startups almost always operate on the basis of a high growth model and, as a result, are typically hugely dynamic in their organisation and form. It may be the case that the study findings are applicable to other types of innovation environments, such as fairly autonomous teams operating in larger organisations in industries that have an interest in technological development.

### 3. Practising the employment relation in digital technology startups

#### (a) *Autonomy, dignity and trust*

Below I describe how the case study participants spoke of various practices relating to the employment relation that can be broadly described as comprising workplace norms of: employee autonomy; employer treatment of employees with dignity; and trust between employers and employees. It is critical to note that the term ‘norm’ used here, and throughout Section 3, refers to patterns of behaviour described by study participants, ie sociological knowledge captured through my social scientific study of social life in early-stage digital startups. It does *not* refer to legal norms. The workplace norms of employee autonomy, employer treatment of employees with dignity, and trust between employers and employees, were actively encouraged through the practices of employers (via their representatives of founders and employees with managerial roles) and, generally, received positively by employees. They were also linked very strongly with ideas about the optimal conditions for extracting innovation labour.

The workplace norm of employee autonomy extended to employees being able to determine how to undertake work tasks and how to manage their time, often including when they worked and having the ability to take time out from work to attend to personal life matters, as well as taking ownership of aspects of the production process.<sup>72</sup> The latter point often involved employees taking it upon themselves to actively learn and develop their knowledge as needed in order to address work tasks.

Employers sought out in the recruitment process employees who could and would work autonomously. A member of a startup senior management team explained what she looked for in new recruits:

You know when you get that gut feel when you’re talking to someone, you’re like, yeah, I can work with you, I know you’re going to really put your all in and you’re going to go in, you’re going to be able to be autonomous and figure out what’s needed, and you’re going to be able to come up to me and go ‘that’s not working, can we do this instead’, and they’ve got the solution as well. (036, employee, female)

Being able to thrive in a workplace where employees had autonomy was very much part of the selection criteria.

Once employed, employers interacted with employees in particular ways so as to encourage an autonomous mode of work. A founder described his style of instruction to employees as one that empowered them to come up with their own ways of doing things:

<sup>72</sup>As expressed by the following participants: 030, employee, female; 031, employee, male; 032, founder, male; 037, employee, female; 039, employee, male; 040, founder, male; 042, employee, female; 043, founder, male; 044, employee, male.

There's the 'why', why do something, then there's the 'what' to do, and there's the 'how' to do it. So my job is to answer to the 'why', first and foremost, then sometimes the 'what', but the 'how', you leave it to them. It's a step. Right at the beginning you tell them 'how', then they learn how to do it. Then you tell them 'what'. Then at some point you don't even tell them what to do, you just tell them 'why', why we need something, and then they come up with that. (040, founder, male)

Likewise, another participant with a management role emphasised that his role involved: 'To be able to clarify why they're [employees] being asked to do a certain thing. To be able to take their opinions on-board' (039, employee, male). He explained why taking on board 'their opinions' was essential to gaining optimal performance from the startup employees:

So if I say, the business needs to do x and they say, well x is really, really hard, why do we want to do x? And I say, well this is why. And they say, well we can achieve that by not doing x, by doing this other thing over here that's a lot simpler. And that allows me to then represent that out. Whereas if I'm just saying, do x, and don't provide any context then we lose all of that opportunity. (039, employee, male)

It is clear that employee autonomy was vital to the extraction of the knowledge and ideas held by employees.

For their part, employees valued the norm of autonomy and often associated it with a sense of freedom and the potential for self-actualisation via developing one's own unique area of interest and input into production.<sup>73</sup>

... working with tech start-ups and actually working alongside a business that is actually growing ... We can implement changes and have a voice basically ... So I essentially get a blank slate, get to come in, put my own spin on things. (042, employee, female)

Similarly, another employee observed: '... I've got loads of autonomy ..., I've got the luxury of choosing where I want to sit [within the startup work structure] and changing direction ... There's so much possibility' (030, senior management team, female). Employee appreciation of autonomy at work demonstrates that they get more from their job roles than financial remuneration. The rewards extended to the development of their skills and even their sense of identity and self.

The norm of employee autonomy was further encouraged and supported by the other two general norms of the employment relation – that employers treated employees with dignity and trust between employers and employees.

The norm that I am referring to as employee dignity was broad ranging and included employers demonstrating kindness and generosity to employees as individuals (as opposed to a person in a role), as well as an acceptance of, and respect for, an employee's individuality.<sup>74</sup> There were various manifestations of this in practice. For example, employers gave employees their time to listen to and support them. One manager explained:

And I think also what motivates employees is giving time and support. So as I mentioned, even at CEO level, [name of CEO is] still really involved, which definitely motivates people to work to the best of their ability, give the best output. And it's just a very open platform really. (030, senior management team, female)

This was experienced by employees as a form of generosity:

<sup>73</sup>In addition to those quoted below, this was expressed by participant 031, employee, male.

<sup>74</sup>Beyond those quoted below, this point was expressed by the following participants: 031, employee, male; 033, founder, female; 042, employee, female.

So, the way it was explained is, we know there's a deadline or whatever, if you can't get it done by that time, then he [a manager] can step in and help us finish it. ... because obviously everyone at the company was really, really busy but I always experienced, 'always happy to help you'. ... they were always really generous with their time. (037, employee, female)

It is clear from the first quote that the giving of time and support was associated by employers with facilitating the extraction of innovation labour. It was motivating and, as suggested in the second quote, simply helped employees to complete tasks.

Employers giving time and communicating with employees extended beyond a focus on work tasks to address more of the emotional or psychological elements of employees' relationship to their work. A manager explained how these helped her to check-in with employees, note how they were feeling, reassure them, and capture any problems or dissatisfactions early.

We have regular one-to-ones with everyone. ... that's their opportunity to tell me if they do have any problems or if they are worried about anything. So really it's just talking it through and making that acknowledgement of 'yeah, I know it is a bit scary, I don't really know what's going to happen but that's the nature of it. We're all in it together and what happens, happens. If it doesn't work out, don't worry, we'll figure it out, we'll fix it, we'll find another way to do it.' Which is why we do need those people with that kind of mind-set that are able to be on board with that. (036, senior management team, female)

Again, employer demonstrations of kindness and care for employees had the dual effect of treating employees with dignity and supporting the extraction of innovation labour. Some employers also noted the importance of respecting the dignity of employees and valuing the work they undertook in order to simply retain them in a tight labour market.<sup>75</sup>

The workplace norm of dignity also presented as employers seeking out and legitimating employees' 'authentic selves' – something employers conceived of as deeper than an employee's professional persona.<sup>76</sup> This was actively performed by one founder through the development of company values. He talked of what they involved:

So things like supportive and generous to each other, I think that's really important in a small company. Then respectful. So we have diverse backgrounds and we need to learn and adapt to these diverse backgrounds. Reliability and responsibility. ... Then we have one which is, yeah, a bit interesting. It's like authenticity. (040, founder, male)

When asked what he meant by authenticity, he replied:

I think just try to be yourself but in a respectful way. In big corporations ... So I worked in a big corporation, and you hear one thing but actually the person thinks differently. So being open and kind of, yeah, candid, I guess, about what you believe and who you are is important. Speak up. (040, founder, male)

A similar notion was expressed by another founder, who more directly linked this norm of respecting employees as individuals to getting the best out of the team:

... I think the key thing is definitely that these are individuals and they are going to bring themselves to the business rather than a bunch of check boxes. And I think the most important thing

<sup>75</sup>Participants 038, founder, male and 034, founder, female.

<sup>76</sup>In addition to those quoted below, this was expressed as being vitally important by participant 042, employee with a human resources function, female.

that I've experienced when it's going well is to make sure that people aren't being what they think the company needs. You know, they're not putting on a work face and going out to do their job, they're coming along as themselves and, you know, being...doing what they're interested in, being genuine, if that's not too strange a way to put it? And I think that's what leads to what people might call the startup culture where you've got a bunch of folk working together who will then happily go to the pub later because people are who they are, you know, they're not their work version of themselves, they're not some façade or even it's not a part of themselves that they're taking, it's everything, which leads...I mean it leads to phenomenal outcomes if you get it right. (041, founder, male)

In seeking out the employee 'authentic self', it can be understood that employers are treating employees with a certain dignity. It seems as if the individual as a person is important and what they bring as that person is valued. Simultaneously, the same practice of seeking out employees' 'authentic selves' is very strongly linked to the extraction of innovation labour. The employer above<sup>77</sup> suggests that this means that employees should feel free to contribute their own knowledge and ideas, and want to do so because they enjoy communicating and spending time with the team and contributing to its shared goals.

The other key workplace norm that I want to highlight is that of trust. This trust went in both directions – from employers to employees and vice versa – and was strongly interrelated. And, once again, the norm of trust operated to facilitate employer extraction of innovation labour.<sup>78</sup>

Employer trust of employees manifested as trust with information and trusting employees to use their autonomy to determine how they work. This was positively received by employees.

From day one, ... I was included in the, sort of, leadership meetings on that, sort of basis. I was getting copies of the financial status from the get go as well so, yeah, there's the trust there. ... it's good that way. They're pretty inclusive in everything. (031, employee, male)

Well, I think to be honest, I think, from my perspective, what I really value is trust. So, firstly, and that's partly why I like the fact that, certainly startups that I've been at, tend to be quite open, so you're trusted with that kind of insight into what's happening and why it's happening. But also, that goes for software development as well, just like trusted to make reasonable decisions, trusted that you're going to get on with your work, you know, rather than being monitored. (044, employee, male)

It felt good to employees to be on the receiving end of such trust.

The trust that employers gave to employees – especially with business 'insight', as observed by the employee above – had the effect of aiding employee trust in employers and facilitating the effective use of employee autonomy to make appropriate work decisions. This was particularly the case due to the dynamic nature of startup life – be this from the testing out of new ideas, iterating them, pivoting, or scaling. Providing employees with foreknowledge of potential change or shifts in direction reassured employees and helped them to locate their own work tasks within a bigger picture. A founder observed:

I've worked for some CEOs who describe quite accurately the rollercoaster ride of being in a startup ... there will be ups and downs. But I think it can also gloss over the fact that sometimes it's not going to come back up on the other side, you know, things have fundamentally changed direction. And the more you know about how the company is running the easier you can identify when something like that changes and ... make the clear communication and discuss with people what that means for them. (041, founder, male)

<sup>77</sup>Participant 042, founder, male.

<sup>78</sup>Beyond the participants quoted below, this was expressed by: 032, founder, male; 039, employee, male.

Employees greatly valued being kept informed by employers. The importance of this is described by one employee participant:

And otherwise it can feel, ... it just feels sometimes like there's no coherency, and there's no, that people are doing things that are almost kind of contradictory, and there's a lack of decision making. I think that's the most important thing actually, it's just making decisions. (044, employee, male)

So, it can be seen that there is an intricate relationship between employer trust of employees and the trust that employees place in the employer. Moreover, the trust that employers place in the employees, via the sharing of business information, facilitates employer extraction of innovation labour.

**(b) Employer flexibility: managing dynamism, asserting control**

The workplace norms described above present a rather positive image of the employment relation as captured by my case study participants. However, startup life is not static. The material practices of participant employers and employees changed over time. What became clear was that the norms of employee autonomy, employer treatment of employees with dignity, and trust between employers and employees, were fragile. As highlighted below, employees could become dissatisfied with aspects of the employment relation, employers could become unhappy with the performance of employees, or the norms were otherwise not delivering in terms of facilitating the extraction of innovation labour. In such cases, another important workplace norm of the employment relation became more particularly apparent: employer flexibility.

Some founders sought to pre-empt a situation whereby the norms of autonomy, dignity and trust broke down by forewarning employees of the inherent dynamism of the innovation process within startups. This was especially so when employees had not worked in the sector before.

And so I keep on saying [to an employee who previously worked in a 'traditional' or non-innovation environment], well, you know, let's do that. But, you know, ... it could change in the next six weeks, so don't get too comfortable. ... And it's that constant re-affirmation, because it comes out in a slightly separate way, right, and that separate way is that [employees] get frustrated or they don't realise that all you're doing is putting a bet on something happening. Right? (033, founder, female)

I think a lot of it is people want to know how do they succeed? And it's harder in this context. If you come from an environment where success was, you know, you deliver predictable results, and you're kind of working up a ladder or something like that, and then you come here and success is, in the stage that we are in, success is learning, and trying something and it failing, and you making an adjustment as a result of that. And that can be a real mess up in their minds for people who come from a different context, because they're just like, wait, I don't know how to do well here. (034, founder, female)

These founders hoped that their employees would remain positive in the face of constantly changing demands and priorities.

Another tipping point highlighting the fragility of the workplace norms described above was when employers considered that employees were not performing as they should.<sup>79</sup>

... we've had senior people in the past that report to [the founder], and, as it should be, they're trusted to just do what they should be, but because they've maybe never done it in this environment before, there's a misalignment around what's required. It's not necessarily that they're a bad person, or that they're behaving inappropriately, it's just that because when we hire people at this

<sup>79</sup>Beyond the participants quoted below, this was observed by the following participants 032, founder, male; 038, founder, male.

stage the expectation is so broad, a lot of people come in, expect to be doing a very specific thing, and they're not picking up, they're not reactive to a lot of other things going on. It's happened a few times, and there's not really a formal process for, kind of, raising a concern or reporting that ... (030, senior management team, female)

Again, we've had issues in the past of all of a sudden you go, hang on a minute, this person isn't actually outputting anything, and then when you try and go in and find the evidence and measure it they're like 'whoa, what are you doing, that's a bit invasive, we've never done that before, why is it happening now?' We still haven't figured out the best solution for that. (036, senior management team, female)

As is suggested in the quotes, the autonomy given to employees regarding how they go about their jobs, and the trust that they will do this satisfactorily, sometimes does not deliver the results desired by employers.

Employee participants also described the fragility of the norms of autonomy, dignity and trust. One participant sought clarification on pay levels as she observed strange variations in remuneration between herself and her colleagues. She explained:

Because I essentially was just wanting to know what the rules were because there were no formal guidelines or anything. Our performance evaluations and goals, those sorts of things, we had to fill stuff out but it never aligned to what we did and there was no information back about, these are the pay bands or something, for instance. (037, employee, female)

Despite directly asking her employer about the situation, she never felt that she received a clear-cut answer. She reflected: 'I think it's almost that cliché of sometimes you're in a family, in a startup, and that works really well until you realise that it doesn't and so you start thinking about it in different ways' (037, employee, female). She began to view the informality as lack of effective management: 'I think to a certain extent, you can get away with a lot more non-management if all the people that you are working with are managing themselves, in a way' (037, employee, female).

What becomes apparent from the quotes above is that a key issue underpinning the fragility of the norms of autonomy, dignity and trust is the lack of formalised human resources management processes and procedures. It seemed that employees were not sufficiently clear on all that their job roles entailed; the measures of success were not static; there were few, if any, processes in place for monitoring work that clearly linked to pre-stated goals; and there was little, if any, information about how pay was determined or how it linked to performance reviews.<sup>80</sup>

Various rationales were put forward for this tendency towards informality. A common theme was that these types of human resources processes and procedures were not a priority, as these comments below demonstrate:

... generally, I write a policy when I'm faced with something and we go, oh, what should we do here? Then we sit down and figure it out and I go, right, I'm going to convert that to a policy because we're probably going to see that again, rather than trying to guess what we'll be faced with, because otherwise I'll just spend the next year only writing policies. (036, senior management team, female)

Start-ups are always thinking about funding, and they're ... always thinking about what do we need to do, and there's so many existential problems for the company, that, you know, putting in place frameworks and things like that, it can take a back seat. ... it's not that people aren't aware it's an issue, it's just that, yeah, it's not the forefront of somebody's mind if they're worried about getting a funding grant in a week or two. (033, founder, female)

<sup>80</sup>A lack of clarity of these issues was experienced by other participants, including 031, employee, male.

Implicit in these responses is the exertion of employer flexibility to use their managerial prerogative to focus on other issues.

Indeed, employers do engage with human resources management issues to a point that they consider sufficient for their purposes. This can be seen from the following comments.

And there's definitely a flirting relationship with, is this enough to be responsibly running a business? I'm, my current situation is, you know, do we, what do we need in an employment contract to be making, you know, to be doing enough that investors will be happy or the Government would be okay with what we're doing. (041, founder, male)

There's that thing where you've also got this idea of MVP, minimum viable product [a term used in software development innovation that refers to the stage where there is basic usability of the product]. So why wouldn't you apply that to the whole business? What is the minimum that you need as a business to be able to achieve your goals, the fairness and equality and diversity within your workforce? What's the minimum that you need to be able to do that? And actually that can help you be really, really focused. (039, manager, male)

In such a framing, human resources issues are only likely to be dealt with when it is beneficial for the business or if it is incumbent upon the business to do so.

This was reinforced by the recollection of a founder participant<sup>81</sup> of a time in a previous startup when she was an employee. She observed that in this startup people's careers were progressing simply because the company was growing: 'It's almost like they don't need to build the discipline of real career progression, because it just comes so naturally as part of the growth process. It's like, "oh shit, we need to hire more people, I guess you're a manager now"' (034, founder, female). However, once the company hit a plateau, particularly in terms of headcount growth, difficulties began to emerge. '[T]here was this huge ... debate, everybody was up in arms, because suddenly, they were like, "what about my career? When am I going to be promoted to manager?'" She noted that it was only at that point that the startup brought in procedures recognising employee contribution, and formally group- ing job roles and developing a path for progression.

Another explanation provided for not formalising processes and procedures simply reflected a desire to retain control. One founder reflected on the time prior to the Covid-19 pandemic when working from home was much less prevalent. He described how the startup did not have a working from home procedure in place. It was his preference to have the ability to make decisions on a case-by-case basis, in part taking into account the employee's performance and likelihood of maintaining such performance when working outside the physical work environment.

However, the situation was not so simple as employees unconditionally wanting the formalisation of procedures.<sup>82</sup> Above, I described how employees typically appreciated the norms of autonomy, dignity and trust, the particular manifestation of which in the startups did involve an element of informality. When employers sought to use their flexibility to transition towards formality, this was received as a potential risk by employees. Employees could feel vulnerable. One participant employee explained:

I'm not going to say [startup employers who have informal styles of management] are less judgemental, I think it's maybe they don't want to appear [judgemental]. So I think what I mean is, is that people who have maybe been at a start-up for a while, and they have particular ways of working that they're used to, have a particular kind of understanding of their own autonomy, their own responsibility, that sort of thing.

<sup>81</sup>Participant 034, founder, female.

<sup>82</sup>For example, participant 031 (employee, male) experienced a lack of clarity especially in relation to his job description. This was only periodically problematic, notably when the tasks expected of him grew to levels that were simply too much for him to deal with.



So when these processes start to be introduced, I think people can get very worried, about, okay, what's happening, are we turning into a big company? Am I suddenly going to have to start filling in timesheets? Am I going to have to put some software on my computer that will monitor what I'm doing? That sort of thing. So, I think the way it's introduced, has to be quite careful and quite well thought out. (044, employee, male)

The participant noted that for many employees introducing the formality of human resources management practices represented a change for the worse.

A central issue here is that employers always have the flexibility to set the tone of the employment relation – be this to instigate the norms of autonomy, dignity and trust in the forms described above, or to shift this to a more formalised style. However, the exercise of managerial prerogative in the former style can give an impression that downplays the power they have to change their approach. This was observed by a founder who was very experienced in the sector.

I think it's [informality] actually quite dangerous because it doesn't look like that [power] from the outside and that's not the way start-ups kind of sell themselves. And so there's this informality in start-ups between the founders and other people where they almost kind of...they don't want to radiate that power on a day-to-day basis unless they have to. And they want to be like, oh, we're all just friends, let's all have drinks together, we're family, which is like a red flag for me now if I hear that.

You know, like they kind of want to embrace that informality and stuff. And sometimes, ... if they're not experienced, they think that they can do that and then suddenly they have to be a boss. And then often, if they've not set those expectations, well, it turns into a bit of a disaster where everybody's really pissed off with them because suddenly the party's over essentially. (034, founder, female)

#### 4. Linking sociological accounts to jurisprudential concerns

An initial point to consider is whether or not the workplace norms of the employment relation, ie the patterns of behaviour described by study participants in section 3 above, reflect features of the implied duty of mutual trust and confidence. It seems that many of the dimensions of the implied duty were demonstrated. Employers cooperated positively with employees and in good faith. They treated employees with respect and recognised the importance of work in their lives. This was especially in evidence in the workplace norms of dignity and trust as described in section 3(a) above. There, I described how employers were available to listen to employees, acknowledging employee concerns, helping them in their work tasks, and allowing – even encouraging – employees to be themselves. Employers also shared information about the business with employees and trusted employees to get on with their jobs. Employees, for their part, were generally very happy with this employment relation. They valued the kindness, care, trust and respect for their individuality that they experienced.

However, the findings detailed in section 3(b) do raise certain issues. The lack of formalised human resources management processes and procedures may detract from an apparent compliance with the aspect of mutual trust and confidence that emphasises the need to treat employees consistently. Employers, also, might be said to raise certain expectations in employees regarding how they can conduct their job roles and the type of interaction between employers and employees, but these expectations were not always upheld. It became clear that the norm of autonomy, supported by trust and dignity, was fragile and subject to employer flexibility to change the way they interacted with employees.

The case study data reveal a particular manifestation of dignity present in the digital technology startup context. It is interesting to consider whether such manifestation of dignity in practice corresponds with the legal conception of dignity envisaged by mutual trust and confidence. Employers did not treat employees with dignity via the provision of clarity around expectations in job roles, or

the way that performance was monitored, assessed or remunerated. Nor did employers treat employees with dignity via the provision of measures to ensure equal treatment between employees. The foreknowledge of rules relating to human resources management and their equal application – the rule of law within workplaces – was not emphasised in the startups. Rather, it was a dignity in the form of individualised attention, respect for employees' ideas, and the listening to and consideration of individual concerns and needs. This hyper-individualised dignity felt good for many employees. They weren't simply a person performing in a role; they, themselves – indeed, their 'authentic selves' – mattered.

Similarly, with trust, a particular manifestation was present in the startup companies. The trust between employers and employees was very much intertwined. Employees felt that employers trusted them with critical knowledge about the direction of the business and its financial status, as well as trusting them to get on with their work in the way they considered best. Employers, for their part, by their very sharing of this information, facilitated employee trust in them. When employees knew what was happening and what the startup was aiming for, this induced a sense of employee trust in the employer. And, critically for the employer, it enabled them to better trust employees to use their autonomy at work appropriately because employees could see how their role fitted with the broader direction of the startup. However, employee trust in employers did not manifest as the clear communication of policies and processes relating to human resources issues. Nor did it manifest in a stability of the mode of employer interaction with employees. Employers retained a strong degree of flexibility regarding how they managed the employment relation.

The picture that emerges from the sociological account of the employment relation in early-stage digital technology startups is one that suggests something of a re-prioritisation of the legal values that comprise the duty of mutual trust and confidence. The practices demonstrate an emphasis on recognising the value and contribution of employees to the employment relationship – features of employee dignity envisaged by the legal norm of mutual trust and confidence. The practices simultaneously suggest a de-prioritisation of equal treatment between employees and the maintaining of reasonable expectations of employees in terms of the tasks required of them or the mode of management employees can expect, which also comprise features of the legal norm of mutual trust and confidence.

Indeed, the workplace practices that indicate an alternative prioritisation of the legal values comprising mutual trust and confidence also reveal interesting linkages between those values, at least in the form they manifest in these startup companies – something not recognised by doctrinal analyses of the term. Most notably, the very means by which employers display care to employees and develop social relations with employees that are perceived by employees as more than a mere exchange of work for wages appears to clash somewhat with ideas of equal treatment of employees. This is because the care for and social valuing of employees occurred via the hyper-individualised relations between employers and employees. The apparent incompatibility of the legal values also reveals the difficulty in moving from practices that resonate with one set of these legal values to practices that resonate with the other legal values comprising mutual trust and confidence. The social scientific data demonstrate that this can be experienced as a breach of trust by the startup employees.

This information is potentially useful for jurisprudential analysis that may seek to evaluate mutual trust and confidence. In particular, it raises questions about the interaction between legal values that are associated with the bureaucratic organisation of work, namely the foreknowledge of rules, and equal treatment with respect to the application of those rules, and the more recently emphasised legal values of treating employees with dignity, respect and trust. Relevant doctrinal considerations include whether there might be an appropriate hierarchy of these values, which particular manifestation of these values might be acceptable, and how employers might appropriately move from emphasis on some of these values to others. At present, these issues are not clear.

At the beginning of the paper, I mentioned that current doctrinal analyses of mutual trust and confidence frames it as operating as a countervailing force to the power held by employers in the employment relationship. Such analysis seems to assume that the values of employer treatment of employees with respect and dignity and employees having trust in employers are unconditionally positive. This

makes sense when considered in the abstract. However, when presented with empirical data of particular manifestations of these values it is possible to develop a more nuanced perspective. Certain manifestations of these values will offer greater protections to employees than others. Indeed, the values might even be Janus-faced: protective of employees until the trust is broken and then potentially detrimental – appearing positive or negative at different times, or by different employees. This was evident in the empirical data through the way that employers demonstrated the dignity of employees or their good faith to employees by treating them with a form of individualised care and commitment. However, this same personalisation can be interpreted completely differently if an employee loses trust that the employer is operating fairly, such as with a possibly unequal allocation of pay levels. At that point, the individualised valuing of employees becomes a problem.

It is worth considering the possibility that mutual trust and confidence is a legal norm that promotes an alignment of employer and employee interests. It was clear from the case study data that some of the practices engaged in by employers resonated with values that comprise mutual trust and confidence – in particular dignity and trust – while simultaneously facilitating employer extraction of innovation labour. Indeed, employers suggested that happy and engaged employees were productive employees and hoped to achieve an alignment of employee interests with their own.

However, it should be noted that it was employers that sought out this ‘mutually beneficial’ form of the employment relation. They exercised their managerial prerogative in this way. The power to do this was in their hands. Employees did seem to benefit from the way that employers treated them with dignity and trust. The active role of the employers in bringing this about, in part driven by their desire to facilitate the extraction of innovation labour, does not change this. However, to view such employer actions that fit with mutual trust and confidence through the lens of complying with an employee protective legal norm seems to obscure the reality of the situation. This calls into question the early doctrinal claims that framed mutual trust and confidence as a countervailing force against the power of the employer. The unequal power relation constructed by the contract of employment is not fundamentally altered by mutual trust and confidence,<sup>83</sup> nor is the deeper structural inequality between capital and labour in capitalist work relations.

The active role of employers in determining how, and when, it will treat employees with this particular manifestation of dignity and trust is clearly evidenced by the way in which employers simply changed their approach to employee relations when that approach no longer delivered results in terms of the extraction of innovation labour. Often this change of approach involved introducing formalised human resources processes and procedures. Such a move can be understood as demonstrating a different manifestation of features of mutual trust and confidence – that where foreknowledge of rules and the equal application of these is prioritised. Mutual trust and confidence is described by doctrinal scholars as involving a balance of interests between employers and employees. Just what this means when the interests of employers in ensuring productivity can result in such different modes of interacting with employees is unclear.

It is also important to consider the possible role of mutual trust and confidence in supporting capitalist work relations. Other protective legal norms, such as limits on working time, minimum wage provisions and health and safety protections, can be understood as supporting capitalist work relations by facilitating the sustenance of labour and its continued ability to be productive as required by capital. In contrast, and as demonstrated by the sociological data captured in the case study, mutual trust and confidence can support capitalist work relations by first, assisting with the continuance of the labour contract itself and, secondly, supporting capital to extract innovation labour from employees.

In the first instance, mutual trust and confidence can be understood as helping to facilitate change that is integral to business in the post-Fordist knowledge economy and to technological innovation, in particular, which is presently structured in a way that involves a hugely dynamic innovation and business growth model. The underlying purpose of the implied duty of mutual trust and confidence is to preserve the employment relationship. And, given that the contract of employment has been

<sup>83</sup>Note also the comments by Cabrelli, above n 10, on this point.

acknowledged as a relational contract, this relationship takes place over time and sometimes with an indeterminate outcome. While the contract of employment has always facilitated change by virtue of employers' managerial prerogative, mutual trust and confidence can, in part, be understood as seeking to modify the exercise of this managerial prerogative to a form that respects employees during periods of change. The case study data presented in section 3 demonstrate that accepting and adapting to change is an essential element of the job for startup employees. While some employers sought to forewarn employees of possible change and help them to prepare for it, as detailed in section 3(b), it was not necessarily comfortable for the employees. Compliance with mutual trust and confidence, and practices beyond this in support of its normative values, would seem to facilitate change by making it more palatable to employees. But more than this, acknowledgement of the relational nature of the contract of employment appears to be legal acceptance of the inevitability – and perhaps even an assumed neutrality – of change within employing organisations.

In the second instance, the emphasis of mutual trust and confidence on the social meaning of work for employees beyond pay aligns strongly with current ideas about how to extract innovation labour. Employers in the innovation economy attempt to develop an employment relation of high-trust and cooperation in order to create an environment whereby employees willingly share their knowledge, ideas and utilise their communication and cooperative skills. Command and control models are not sufficient to extract the labour now required. Mutual trust and confidence aims, in part, to improve the relation between employers and employees. Judges claim, and doctrinal scholars reaffirm, that this is important because work means much to employees these days – including their social and psychological selves. However, any attempt to ensure that employees are able to get these personal non-financial dimensions and satisfactions from their jobs both supports the extraction of labour and further entrenches workers in capitalist market relations.

## Conclusion

In this paper I have sought to provide sociological knowledge, and reflections on this sociological knowledge, that can inform the development of a sociological jurisprudence of mutual trust and confidence. My approach has been to explore the employment relation in a context that is likely to demonstrate practices that resonate with features of mutual trust and confidence. Examining specific manifestations of these features of the employment relation in practice has enabled me to draw out links between sociological knowledge and areas of interest and concern for legal jurisprudential knowledge of mutual trust and confidence. It is hoped that my analysis reveals a degree of complexity regarding the implied duty. Elements of it that sound entirely positive in the abstract, such as employer treatment of employees with dignity, can take on particular forms in practice that may not be entirely positive or that may be utilised by employers for their own benefit, namely to assist them extract labour from employees. Moreover, apparent compliance of employers with the implied duty of mutual trust and confidence, or practices seemingly beyond this, while promoting the continued operation of the employment relation in a way that is more of a positive experience for employees, operates to further entrench capitalist work relations in the innovation economy. The point of the paper is not to draw on sociological knowledge to directly critique the law, but rather to present such knowledge as a potential resource for the development of legal jurisprudential knowledge; specifically, to inform a sociological jurisprudence in which legal scholars can appropriately evaluate doctrine, problematise it and engage in the development of legal solutions to any such problems.