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CONTRACTS-DURATION OF INDEFINITE EMPLOYMENT CONTRACTS THAT SPECIFY PERIOD OF PAY

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COMMENTS

CONTRACTS—DURATION OF INDEFINITE EMPLOYMENT CONTRACTS THAT SPECIFY PERIOD OF PAY—Normally a contract which does not express a time for performance is treated as enforceable. The courts interpret it to require that performance be completed within a reasonable time, basing their conclusion on a presumption of the intention of the parties.¹ However, in the area of employment contracts, an exception to the reasonable time rule has developed. An indefinite contract for services is generally held to be terminable at will.² The questions that come to mind are two: What is the basis for the unique treatment of employment contracts? What are the manifestations of intent that will defeat application of the terminable-at-will rule by making the contract definite?

This comment is limited to the effect of a period of pay stated in the contract for hire as evidencing an intent to make the period of service definite. The decided cases are in conflict.³ Also, previous analyses of the problem have reached wholly opposite conclusions.⁴ Consequently, this discussion cannot do more than define present approaches to the question and weigh the policy factors which enter into decisions.

A. English Development

In England it was early held that a contract for services was presumed to last for one year in the absence of any set duration. Lord Coke expressed the presumption: "If a man retain a servant generally

¹ *Frankfurt-Barnett Co. v. Prym Co.*, 150 C.C.A. 223, 237 F. 21 (1916); L.R.A. 1918A 602 at 609; *Marsh v. Brown-Crummer Co.*, 138 Kan. 123, 23 P. (2d) 465 (1933); 88 A.L.R. 835 at 842 (1933); 1 WILLISTON, *CONTRACTS*, rev. ed., §38, p. 102 (1936); 1 *CONTRACTS RESTATEMENT*, §§30, 41, illus. 1 (1932).

² *Christensen v. Pacific Coast Borax Co.*, 26 Ore. 302, 38 P. 127 (1894); *Coffin v. Landis*, 46 Pa. 426 (1864); 1 WILLISTON, *CONTRACTS*, rev. ed., §39, p. 106 (1936); 2 *AGENCY RESTATEMENT*, §442, p. 1030, comment b (1933). A statutory provision is found in some states: "In the absence of any agreement or custom as to the term of service, the time of payment, or the rate, or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed." This provision is found in the following: Cal. Lab. Code (Deering, 1937) §3002; Mont. Rev. Codes (1935) §7796; N.D. Rev. Code (1943) §34-0403; S.D. Code (1939) §17.0503.

³ Cases are collected at 11 A.L.R. 469 (1921); 100 A.L.R. 828 (1936); 161 A.L.R. 711 (1946); 25 L.R.A. (n.s.) 529 (1910); 51 L.R.A. (n.s.) 629 (1914).

⁴ 42 *COL. L. REV.* 107 (1942) ("majority rule" presumes a hiring for the pay period); 32 *MICH. L. REV.* 107 (1933); 14 *ST. LOUIS L. REV.* 333 (1929) ("majority rule" presumes a hiring at will).

without expressing any time, the law shall construe it to be for one year for that retainer is according to law."⁵ The presumption was applied to contracts in which no period of pay was expressed⁶ or in which conflicting expressions of duration were found.⁷ The reason that impelled the English courts to adopt the presumption of a hiring for a year was stated by Blackstone: ". . . if the hiring be general, without any particular time limited, the law construes it to be a hiring for a year, upon a principle of natural equity, that the servant shall serve, and the master maintain him throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not."⁸

However, the statement of a pay period of less than a year was held to be sufficient to rebut the presumption that the employment was to last a year.⁹ An alternative analysis found in the early cases is that the expression of a pay period made the contract definite, preventing application of the presumption.¹⁰ It appears that the English courts gave great weight to the stipulation of a pay period as indicating the intent of the parties to establish a definite period for services.

Other exceptions to the presumption of a hiring for a year grew out of custom. For instance, the hiring of a domestic servant for an indefinite term was terminable on a month's notice or on payment of a month's wages.¹¹

⁵ 1 COKE ON LITTLETON 42b (1629).

⁶ *Lilley v. Elwin*, 11 Q.B. 742, 116 Eng. Rep. 652 (1848); *Buckingham v. Canal Co.*, 46 L.T. (n.s.) 885 (1882).

⁷ *Beeston v. Collyer*, 4 Bing. 309, 130 Eng. Rep. 786 (1827) (expression of quarterly, then monthly wages); *Rex v. Great Yarmouth*, 5 M. & S. 114, 105 Eng. Rep. 993 (1816) (weekly wages coupled with a provision for monthly notice); *Fawcett v. Cash*, 5 B. & Ad. 904, 110 Eng. Rep. 1026 (1834) (yearly salary payable monthly).

⁸ 1 BLACKSTONE, COMMENTARIES 425 (1773). An alternative reason, suggested by Macdonell, was that statutes had provided for hiring in certain types of employment to be for one year. By judicial legislation, the one year rule was extended to cover hirings in general. 1 MACDONELL, MASTER AND SERVANT 167 (1883).

⁹ *Rex v. Warminster*, 6 B. & C. 77, 108 Eng. Rep. 381 (1826). In *Evans v. Roe*, L. R. 7 C.P. 138 (1872), it was held that the expression in writing of a weekly wage established a presumption of a weekly employment that could not be attacked by parol evidence of an intention to contract for a year.

¹⁰ "But if the payment of weekly wage be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring." Buller, J., in *Rex v. Newton Toney*, 2 T.R. 453, 100 Eng. Rep. 244 (1788). The case was cited in *Rex v. Hampreston*, 5 T.R. 205, 101 Eng. Rep. 116 (1793), and followed in *Rex v. Pucklechurch*, 5 East. 382, 102 Eng. Rep. 1116 (1804), and in *Rex v. Mitcham*, 12 East. 351, 104 Eng. Rep. 137 (1810). A hiring "at a salary of two guineas a week for the first year" was held to be a weekly hiring in *Robertson v. Jenner*, 15 L.T. (n.s.) 514 (1867).

¹¹ *Moult v. Halliday*, [1898] 1 Q.B. 125.

In 1860 appeared the first case in which the basic presumption was attacked. In *Fairman v. Oakford*,¹² the court upheld a trial judge's refusal to instruct the jury that an indefinite hiring was a hiring for a year. Supporting the decision, Judge Pollock stated, "From much experience of juries, I have come to the conclusion, that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice."¹³ The attack on the presumption of fact continued down the years, until today it is safe to say the English courts have reached a position compatible with the basic reasonable time doctrine of the law of contracts. In the absence of expression or custom to the contrary, the modern English cases hold that a contract for services is terminable upon a reasonable notice.¹⁴ What is a reasonable notice is a question of fact, but it is recognized that the period of pay is good evidence of that fact.¹⁵ The rationale of the reasonable time rule applied to employment contracts is that it affords both the employer and employee an opportunity to adjust to the termination of the contract.¹⁶

B. *Historical Development in the United States*

The early cases in the United States rejected the then prevailing English presumption of a yearly hiring, on the basis that our social and economic conditions were substantially different. The courts presumed that an indefinite contract for employment was terminable at will despite the statement of a pay period.¹⁷ Other courts adopted a presumption that the indication of a pay period set the duration of the hiring.¹⁸

In 1877 the latter position was greatly weakened by the publication of a textbook by Wood which categorically stated: "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden

¹² 5 H. & N. 635, 157 Eng. Rep. 1334 (1860).

¹³ Id. at 636.

¹⁴ *Wilson v. Ucelli*, 45 T.L.R. 395 (1929); *Savage v. British India Steam Nav. Co.*, 46 T.L.R. 294 (1930); *Lowe v. Walter*, 8 T.L.R. 358 (1892) (yearly salary stated).

¹⁵ *Lowe v. Walter*, 8 T.L.R. 358 (1892) *Payzu, Ltd., v. Hannaford* [1918] 2 K.B. 348 (weekly salary, week's notice, but daily salary, day's notice).

¹⁶ *Lowe v. Walter*, 8 T.L.R. 358 (1892).

¹⁷ *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). For cases expressly rejecting the English rule, see *Coffin v. Landis*, 46 Pa. 426 (1864); *Kansas Pac. Ry. v. Roberson*, 3 Col. 142 (1876); *Boogher v. Md. Life Ins. Co.*, 8 Mo. App. 533 (1880).

¹⁸ *Newkirk v. N.Y. & Harlem Ry.*, 38 N.Y. 158 (1868) and *Beach v. Mullin*, 34 N.J.L. 343 (1870) expressly followed by *Rex v. Newton Toney*, supra, note 10.

is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."¹⁹ In later years that quotation was criticized strongly because it was not supported by the cases cited as its authority,²⁰ and because it did not recognize the existing conflict in authorities.

The statement made by Wood had far-reaching effects on the problem of determining the importance of a pay period as unveiling the intent of the parties. In many of the cases decided after 1877 the statement was cited²¹ or quoted²² in support of the conclusion that a hiring at will was to be presumed, despite the expression of a pay period.

As the basic problem was to determine the intent of the parties, some courts refused to follow Wood's proposition, because it arbitrarily excluded part of the evidence available which might bear on the question of intent. By the time the leading case of *Maynard v. Royal Worcester Corset Co.*²³ was decided, the Massachusetts court was able to make the statement that: "The unit of time used in describing the compensation was one year. In many jurisdictions, this fact standing alone is regarded as sufficient evidence of the term of employment."²⁴

C. Policies and Problems Today

The decided cases are in great confusion, both as to analysis and result. Even within a single jurisdiction, there are instances of conflicting approaches.²⁵ In most of the opinions little is said about the

¹⁹ WOOD, MASTER AND SERVANT, §134, p. 272 (1877).

²⁰ 11 A.L.R. 475-477 (1921).

²¹ *Savanah F. & W. Ry. Co. v. Willett*, 43 Fla. 311, 31 S. 246 (1901); *Morris, Tasker & Co. v. Agnew*, 57 Ill. App. 229 (1894); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887).

²² *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. 581 at 584 (1899).

²³ 200 Mass. 1, 85 N.E. 877 (1908).

²⁴ *Id.* at 4.

²⁵ *Arkansas*: Employment at an annual salary of \$2,500 was held to measure only the amount of compensation; the hiring was terminable at will in *Haney v. Caldwell*, 35 Ark. 156 (1879). But in *Moline Lumber Co. v. Harrison*, 128 Ark. 260 at 263, 194 S.W. 25 (1917), the court stated: ". . . for, where a unit of time is described in mentioning the compensation without any other reference to time, it is fairly inferable that the parties intended to contract for that period of time." *Illinois*: *Orr v. Ward*, 73 Ill. 318 (1874) found a hiring at an annual salary terminable at will. In *Great Northern Hotel Co. v. Leopold*, 72 Ill. App. 108 (1897), the court presumed that the employment was to last for a pay period. *Wisconsin*: An early case, *Irish v. Dean*, 39 Wis. 562 at 568 (1876) stated, ". . . if the contract is silent as to its duration, either party may terminate it at pleasure by giving reasonable notice to the

reason for adopting one set of presumptions over the other; the tendency is to rely upon precedent.

The basic objective of the court is to determine the intent of the parties concerning duration of the contract. In seeking that goal, the courts have developed three approaches: (1) a hiring at will is presumed; (2) the jury decides the question of intent without the benefit of any presumption; (3) a contract for at least one pay period is presumed. The validity of any presumption²⁶ selected should depend upon policy factors rather than upon an assertion that any one approach reflects the intent of the parties to a greater extent than its alternatives. Until some fact survey has been made which shows the customary and normal intent of the parties in such circumstances, the adoption of a "fair" presumption begs the question.²⁷ If finding the intent of the parties is the dominant objective, it is circular to argue that the presumption of intention derived from a written statement of the period of pay cannot be attacked by parol evidence of the actual intent.²⁸

(1) The legal consequence of the presumption of a hiring at will is that the employment contract remains executory.²⁹ No rights or ob-

other party of his intention to terminate it." *Kellogg v. Citizens Ins. Co.*, 94 Wis. 554, 69 N.W. 362 (1896), said that the pay period was evidence for the jury which might show an intention of the employment duration. Another shift in Wisconsin decisions is illustrated by *Conemillar v. Duluth-Superior Milling Co.*, 134 Wis. 248, 114 N.W. 432 (1908), in which the court said there was a presumption of a hiring for a pay period. The most recent development is found in *Milwaukee Corrugating Co. v. Krueger*, 184 Wis. 139, 198 N.W. 394 (1924), where the court adopted the presumption of a hiring at will, quoting Wood to support its conclusion. See note 18, *supra*.

²⁶ The term "presumption" is used to denote an inference of fact which must be drawn from the statement of a pay period in a contract that has no other indication of duration. By its nature the inference is rebuttable.

²⁷ The decision in *Edwards v. Seaboard & Roanoke Ry. Co.*, 121 N.C. 365, 28 S.E. 137 (1897), was based on the argument that if the parties had wanted to contract for one pay period, they would have so stated. Cf. 1 WILLISTON, *CONTRACTS*, rev. ed., §39, p. 108 (1936): "It is, of course, possible that this mode of expression was merely to fix the rate of compensation, but in the absence of evidence to the contrary, it seems a fair presumption that the parties intended the employment to last at least for one such period." *Hardman*, "Contracts of Agency Without Stipulation as to Duration," 35 W.VA. L. Q. 116 at 121 (1929): "It is believed that this inference of fact is based on the common experience (in the United States at least) that, where reasonable persons enter into an agreement of employment and do not stipulate as to duration, they do not normally understand that there is any definite duration."

²⁸ 42 COL. L. REV. 107 at 109, n. 12 (1942).

²⁹ The following cases applied this presumption. *Hay v. Pittsburg Lodge*, 137 Pa. Super. 205, 8 A. (2d) 434 (1939); *Title Ins. Co. v. Howell*, 158 Va. 713, 164 S.E. 387 (1932); *Amelotte v. Dold Packing Co.*, 173 Misc. 477, 17 N.Y.S. (2d) 929 (1940); *Binnion v. M. & D. Drugs, Inc.*, (La. 1942) 8 S. (2d) 307. The decisions were based on precedent without argument. The position of the AGENCY RESTATEMENT is similar: "The fact that a servant or other agent is employed under a contract which merely specifies a salary proportion-

ligations are created under it until the employee has rendered services. In effect it is nothing more than a series of offers for each day's employment. Can the presumption be justified? It militates against use of the pay period as proof to show the intent of the parties, at least in the absence of other evidence. Thus it restricts the factors to which the court can look.

It has been argued that it is necessary to hold the contract terminable at will in order to prevent forfeiture of services performed by the employee. The argument is that the employee must perform in full to be entitled to any pay under a contract for a definite period. If he breaches through no fault of his employer, he cannot recover even for the services rendered.³⁰ To the extent that the courts are willing to give quasi-contractual relief to a defaulting employee, and to the extent that the courts are inclined to construe employment contracts as divisible, the argument for the presumption is not valid. Moreover, the main concern of the law should be for the employee who was fired, not for the employee who quit. The former is adequately protected even under a definite contract.

If indefinite contracts for labor are presumed to be terminable at will, the result will be to promote greater mobility in the labor market. In the days of frontier expansion, this consideration probably had great attractiveness. Today, however, the emphasis is on security of jobs. It is clear that definite employment relationships would not be promoted by the presumption of a hiring at will.

(2) The approach that places the question in the lap of the jury for determination has the merit of considering all factors that may bear on the question of intent.³¹ It entrusts to the jury complete control over interpretation of the contract.³² This procedure departs consider-

ate to units of time which are commonly used for the purpose of accounting or payment, such as a month or year, does not, of itself, indicate that the parties have agreed that the employment is to continue for the stated unit of time. Such a specification merely indicates the rate at which the salary is earned or is to be paid, and either party is privileged to terminate the relationship at any time unless further facts exist." 2 AGENCY RESTATEMENT, §442, comment b (1933). The comment admits in following passages that the unit of time for computing pay may be an indication of duration, if found in connection with "other relevant facts."

³⁰ Peacock v. Va.-Cal. Chemical Co., 221 Ala. 680, 130 S. 411 (1930), turned on this argument.

³¹ Cudney v. Phillips Mfg. Co., 181 App. Div. 257, 168 N.Y.S. 268 (1917); Dennis v. Thermoid Co., 128 N.J.L. 303, 25 A. (2d) 886 (1942).

³² In Pryor v. Briggs Mfg. Co., 312 Mich. 476, 20 N.W. (2d) 279 (1945), the Michigan court said that the question of the effect of a pay period was a matter for the jury. The

ably from the reasonable time inference generally applied in the law of contracts; in addition, it results in greater uncertainty.

(3) Under the view that the statement of a pay period establishes a presumption of a hiring from period to period, the burden of rebutting the definite contract is placed upon the party who has wrongfully terminated the relationship.³³ This seems to be the position taken by the *Contracts Restatement*,³⁴ and Professor Williston supports this view with the argument that courts ought to construe language found in a contract to make it "give rise to a legal obligation."³⁵ Several states have adopted the presumption by statute.³⁶

It is probably to the mutual advantage of both employer and worker to perform under a bilateral contract for a definite term. By such a legal relationship, both parties are given a measure of security, in that neither can terminate, without the consent of the other, except at the end of a pay period. The right to fire for necessary reasons is no more restricted under this presumption than it is under a definite contract for hire.

If security of tenure is to be the touchstone, the best rule would be the English doctrine of reasonable notice. Of the three approaches considered, however, the presumption of a hiring for a pay period is

statement was made to clarify an existing confusion on the point, but to support its conclusion, the court cited the AGENCY RESTATEMENT. The dissent pointed out that the language of the RESTATEMENT prevented the use of monthly wages, in itself, to show a hiring for a month.

³³ *Dallas Hotel v. Lackey*, (Tex. Civ. App. 1947) 203 S.W. (2d) 557; *Stift Co. v. Florsheim*, 203 Ark. 1043, 159 S.W. (2d) 748 (1942); *Knudsen v. Green*, 116 Fla. 47, 156 S. 240 (1934); *Alkire v. Alkire Orchard Co.*, 79 W.Va. 526, 91 S.E. 384 (1917).

³⁴ 1 *CONTRACTS RESTATEMENT*, §32, illus. 2 (1932): "A promises B to serve him as a chauffeur and B promises to pay him \$100 a month. The full period for which the service is expected to continue is not stated. There is at once a bilateral contract for a month's service. It is often a difficult question of interpretation to determine whether an agreement specifies merely a rate of compensation, or indicates, at least impliedly, an understanding that the employment shall continue for not less than one of the periods for which the rate is stated, in which case there is a contract for one period, and at its expiration an offer for another in the absence of revocation."

³⁵ 1 *WILLISTON, CONTRACTS*, rev. ed., §39, p. 108 (1936).

³⁶ Cal. Lab. Code (Deering, 1937) §3001; Mont. Rev. Code (1935) §7795; S.D. Code (1939) §17.0502, all provide that: "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece-work, for no definite time." In *Rosenberger v. Pac. Coast Ry. Co.*, 111 Cal. 313, 43 P. 963 (1896), the provision was interpreted to mean that a hiring at a yearly salary payable monthly was a monthly employment. N.D. Rev. Code (1943) §34-0402, provides: "Unless it is otherwise provided in the contract of employment, the length of time for which a servant is hired shall be presumed, if he is hired: . . . (3) at a monthly rate, to be for one month; . . . (5) at a yearly rate, to be for one year." Ga. Code (1933), §66-101 states: "That wages are payable at a stipulated period raises the presumption that the hiring is for such period."

substantially the same, except at the end of a pay period. At that time, either party may terminate without notice.

In conclusion it can be said: (1) the basic problem is to ascertain the intent of the parties; (2) the use of any presumption is an artificial restriction on the free determination of that question, in the absence of any factual survey to show which inference is the "fair" one to make; (3) the value of any given presumption must be judged in the light of policy factors; and (4) the reasonable notice rule is the most valuable, if consistency in the law of contracts is a worthy objective.

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