

An Introduction to Employment Law

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Employee status: employee

- The test for whether someone is an employee
- Is there a contract with the “employer”? - see s 230(2) ERA
- Is there an obligation on the “employee” to provide work personally?
- Is there mutuality of obligation between the parties?
- Is there control of the “employee” by the “employer”?
- Do the terms of the contract as a whole reflect an employment relationship?
- The final point is a balanced judgment. The preceding four points are “musts”.

Qualifying for unfair dismissal rights

- Who qualifies for the right not to be unfairly dismissed?
- employees only - see previous slides
- two years continuous employment
- working ordinarily in GB at the time of dismissal
- not in an excluded group e g armed forces, police

Time limits for unfair dismissal

- Claim must be presented within three months
- time starts to run with the effective date of termination (EDT)
- early conciliation - the clock stops and there is a minimum of a calendar month after it restarts before the limit expires
- ET has discretion if it was not reasonably practicable to present within the limit
- and the claim was presented within a reasonable time after the limit expired

Dismissal

- claimant must have been dismissed - the ways:
- (a) express dismissal
- (b) termination of a limited-term contract
- (c) constructive dismissal

Constructive dismissal

- Requires a fundamental breach of contract (which includes breach of the implied duty of trust and confidence)
- breach must have caused resignation
- resignation must have been without such delay as to constitute acceptance of the breach
- note the effect of the last straw doctrine

Potentially fair reasons and reasonableness

- the employer must show a fair reason - one of the following:
- capability or qualifications
- conduct
- redundancy
- statute would be contravened by continued employment
- some other substantial reason (SOSR)
- In addition: The employer must act reasonably in deciding to dismiss for that reason

Misconduct dismissals

- The test in **British Home Stores v Burchell** [1978] IRLR 379 EAT is applied - was there:
 - genuine belief in the misconduct
 - based on reasonable grounds
 - after a reasonable investigation
 - is dismissal a sanction which is within the band of reasonable responses?

Band of reasonable responses

- Were the actions of the employer within the band of reasonable responses?
- ET must not substitute its own judgment

ACAS Code of Practice

- It helps to determine what is reasonable
- It applies to conduct dismissals, but not redundancy
- Follow its principles where competence or capability is in issue
- Relevant to whether a dismissal is unfair
- And breach may lead to an increase/decrease of up to 25%

Whistleblowing

- Was there a qualifying disclosure? e.g. reasonable belief in failure to comply with a legal obligation
- Is it protected? - was disclosure made in accordance with ss 43C to 43H ERA 1996?
- Was disclosure the principal reason for dismissal?
- Or did it materially influence the employer in imposing a detriment
- A Day One right
- No limit to compensation

Remedies for unfair dismissal

- Reinstatement
- Re-engagement
- Compensation

Compensation - basic award

- statutory maximum per week currently £508
- number of weeks pay depends on years of service
- 1 week per year, 1.5 weeks if over 41 at the time
0.5 if under 22

Compensation - compensatory award

- Financial loss to date of hearing
- Future loss after the hearing
- Statutory industrial rights e g £350
- Statutory cap £83,682 or 12 months wages (does not apply to whistleblowing, pregnancy dismissals)

The duty to mitigate

- Claimant should make reasonable efforts to mitigate loss
- Credit should be given for receipts in a new job
- And also for what claimant would be expected to receive if reasonable efforts to mitigate loss had been taken
- Onus is on respondent to show failure to mitigate

The Polkey principles

- Laid down in **Polkey v AE Dayton Services Ltd [1988]**
AC 344
- what is the effect of a finding that the employer acted unfairly, but that the adoption of a fair procedure would not have made a difference?
- the dismissal is still unfair
- but compensation may be reduced e.g. to reflect the percentage chance that the employee would have been dismissed anyway

Contributory conduct

- Was the claimant the author of his own misfortune?
- Conduct must be (1) blameworthy and (2) the partial cause of the dismissal
- deduction % depends on what is just and equitable

Recoupment

- If C receives jobseeker's allowance or income related employment support allowance, Recoupment Regulations apply
- ET must determine the "prescribed element"
- And R must hold the prescribed element back until the Benefits Agency has reclaimed, then pay C the balance
- recoupment does not apply to a settlement

Discrimination - features

- no service requirement
- no compensation limit
- prospect of damaging publicity
- costs can be considerable

Employment status for discrimination

- Protection against discrimination is wider than for employees. The test is:
- Is there a contract which the person claiming protection works under?
- Is it to provide work or labour?
- Applicants are covered if the job applied for falls under the above definition
- Note that other groups such as agency workers are specifically included

Discrimination- time limits

- claim must be presented within three months of the act of discrimination
- if the act extends over a period, time starts to run at the end of the (continuing) act
- subject to the clock being stopped during the early conciliation process
- ET has a discretion to extend time if it considers it “just and equitable” to do so

Protected characteristics

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

The main forms of discrimination

- direct
- indirect
- victimisation
- harassment
- but somewhat different for disability - see later

Direct discrimination

- A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (Equality Act 2010, s 13)
- “because of”
- need for a comparator (may be hypothetical)
- no material difference between claimant and the comparator (s 23)

Indirect discrimination

- involves application of a provision, criterion or practice (PCP) by A to B
- puts those with whom B shares the protected characteristic at a particular disadvantage when compared with those who do not share it
- puts B at that disadvantage
- A cannot show it to be a proportionate means of achieving a legitimate aim

Victimisation

- A victimises B if he subjects B to a detriment because he has done a protected act
- Protected acts include doing anything in connection with the Equality Act
- Also making an allegation that A or another person has contravened the Act
- A false allegation or evidence is not protected if made in bad faith

Harassment

- A harasses B if A
- engages in unwanted conduct
- which is related to a relevant protected characteristic and
- which has the purpose or effect of
- violating B's dignity or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for B

Employer liability

- Employers are liable for the acts of employees in the course of their employment
- It can include unauthorised acts, and some out of work activity: **CC of Lincolnshire Police v Stubbs** [1991] IRLR 81 EAT
- Employers have a defence if they took “all reasonable steps” to avoid the discrimination
- Individual employees can also be held liable

Disability

- C is disabled if she has
- a physical or mental impairment which has
- an effect upon her ability to carry out normal day-to-day activities which is
- substantial
- long-term (think 12 months) and
- adverse

Forms of disability discrimination

- All those for other protected characteristics - see earlier slide PLUS
- discrimination arising from disability and
- failure to make reasonable adjustments

Compensation for discrimination

- pecuniary loss
- personal injury including physical and psychiatric damage (in practice, medical evidence crucial)
- injury to feelings
- interest

Injury to feelings

- In calculating this head of compensation, ETs make use of the **Vento** bands (recently updated)
- top band £25,700 to £42,000 for most serious cases
- middle band £8,600 to £25,700 for serious cases not in the top band
- lower band £900 to £8,600 for less serious cases e.g. one off cases

Procedure in the ETs

- A separate course is needed! but note
- Costs can be awarded e.g. where a case has “no reasonable prospect of success” or is conducted unreasonably
- Deposit can be required where a case has “little reasonable prospect of success”
- At the hearing procedure is less formal than a court, but quite disciplined

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