Lecture Notes

2018/2019

Business and Employment Law

TB2 – Employment Law

Lecturer and Unit Co-ordinator TB2 – Matt Atkins (matthew.atkins@port.ac.uk)

Important Dates:

Easter break: Monday 8th April – Friday 26th April

Coursework hand in date: 11:55pm on Friday 10th May

Recommended Reading

The custom made Business and Employment Law Text book is essential for this unit.

You may want to borrow other books from the library. If you do so I recommend you read Gwyneth Pitt; (2016) Pitt's Employment Law, 10th edition. You might also find these other texts helpful:-

Smith, I & Baker, A; (2017) Employment Law, 13th ed. OUP

Hepple,B; (2014) Equality, The Legal Framework. 2nd Edition Hart Publishing

Kidner, Blackstone's Employment Law Statutes 2017–2018 OUP (or regular and keen use of Westlaw).

Cabrelli, D; (2016) Employment Law in Context, 2nd ed. UOP

NB. You will be expected to consult and read primary sources, journals and digests. The two main series of law reports are the Industrial Case Reports (ICR) and the Industrial Relations Law Reports (IRLR). The leading academic journal is the Industrial Law Journal (ILJ). You will probably access these through online databases such as Westlaw and LexisNexis which also provide digests of cases.

Course Outline

Week	Week beginning	Lecture	Seminar
1	January 21st	Sources of Employment Law and Institutions	Introduction to Employment Law
2	January 28th	Barriers to Employment Rights	Sources of Employment Law and Institutions
3	February 4th	Contractual Employment Rights	Barriers to Employment Rights
4	Febraury 11th	Implied Terms	Contractual Employment Rights
5	February 18th	Atypical Workers	Express and Implied Terms
6	February 25th	Wrongful and Constructive Dismissal	Atypical Workers
	March 4th	**Consolidation Week**	**Consolidation Week**
7	March 11th	Unfair Dismissal – Reasons and Remedies	Wrongful and Constructive Dismissal
8	March 18th th	Unfair Dismissal – Reasonableness	Unfair Dismissal – Reasons and Remedies
9	March 25th	Introduction to Discrimination Law	Unfair Dismissal – Reasonableness
10	April 1st	Protected Characteristics – Equality Act 2010	Equality Act 2010
	April 8th – 26th	**Easter Break**	**Easter Break**
11	April 29th	Problem Question Technique and Referencing	Practice Questions
12	May 7th	Revision	Coursework question and answer drop in

Assessment 2 Hand in date: Friday 10th May 2018

COURSEWORK TB2 – GUIDANCE AND QUESTION

The submission date for the Coursework is Friday 10th May 2019. ***Work will be submitted electronically via TurnItIn on Moodle.***

Coursework Word Limit

*The word limit for the coursework is 2,250 words excluding footnotes and bibliography. The word count should be stated at the top of your work. Failure to state a word count will result in a penalty of 5% of the original mark. A falsely stated word-count is an assessment office which may result in a penalty, including the reduction of the mark to 0%. Note, that footnotes should be used to reference sources only. Examiners are free to disregard footnotes that contain inappropriate information or information that should belong in the main text. Coursework that is over the stated word limit will result in a penalty of 10% of the original mark****. For the avoidance of doubt, the penalty will be applied to any work that exceeds the stated word limit of 2,250 words excluding footnotes and bibliography. Students are NOT permitted to exceed the word limit by 10% or any other amount.***

Business and Law Study Support

The Faculty of Business and Law Study Support Tutors offer confidential support with all aspects of study skills.

You can send work (drafts or completed documents) to them electronically, or arrange a face-to-face appointment to help develop your skills and enhance your work.

They can provide guidance and feedback on things like academic writing, English language, planning and producing assignments, research skills, working in groups, presentations and exam/revision skills.

The tutors are available Monday-Friday throughout term time and most holiday periods. For more information, email them (studysupport@port.ac.uk) or visit their website (www.port.ac.uk/studysupport).

Plagiarism

Students are reminded of the need to avoid plagiarism in all assessments. The University Regulations describe plagiarism as:

> *the incorporation by a student in work for assessment of material which is not their own, in the sense that all or a substantial part of the work has been copied without any adequate attempt at attribution, or has been incorporated as if it were the student's own when in fact it is wholly or substantially the work of another person or persons.*

Any student suspected of plagiarising will be referred to the BaL Student Assessment and Assessment Regulations Lead and an Academic Misconduct Hearing will be arranged. Students should ensure that all sources are fully cited and in the bibliography, in accordance with Oscola, and that indentation or quotation marks (as appropriate) are used when quoting. Students who fail to include a bibliography will be penalised.

Guidance may be found at: www.referencing.port.ac.uk
If any student has a query about any of the above matters and wishes to obtain clarification or further information please contact the unit co-ordinator or your personal tutor.

Work that is not your own

As a student it is expected that you demonstrate the ability to select appropriate reading material, think, analyse, synthesise, and then produce your own work to submit for assessment. When you graduate you know that you earned your degree and that it is a reflection of your personal effort. In future, you may look back with pride on the achievement.

Sadly, some students deliberately submit work for assessment that is not their own. Working together with others to produce a piece of individual work is not your own work and is plagiarism. Copying the work of others, including the work of current or past students, and incorporating it as if it is your own work, is plagiarism. Work commissioned from contract tutors or paying a friend/other person to write your assessment work means that this is not your own work. Using on-line ghostwriters, private tutors, 'contract cheating', or any other third party (i.e. having any third party produce an essay or assignment) and incorporating it as if it is your own work, is plagiarism.

If you have any questions about what is meant by 'your own work' please contact the Unit Coordinator, any of your lecturers, or your Course Leader. BaL Study Skills and the University ASK team will also be happy to offer advice about what 'your own work' means.

Do not devalue your, or others' qualifications, by submitting work that is not your own.

Marks and Feedback

Marks for the coursework assignment will be available on 10th June 2019 (save in the case of work submitted after the due date). Marks and feedback will be released via Moodle. You will be emailed when the marks have been released, so please wait for that email before checking. If there is any delay in the processing of marks, the unit co-ordinator will communicate this to you.

Individual feedback will be provided on your coursework submission through the Moodle site. Please make sure that you view this on a compatible device as some tablets do not show the feedback comments.

Please note that all coursework and exam marks remain provisional until they have been confirmed by the Unit Assessment Board.

Part 12 paragraph 1.4 of the Examination and Assessment Regulations September 2013 makes it clear that students may not question the academic judgement of the examiners and states that any requests for a review of a mark based on such grounds alone will be dismissed. Students can only request a re-mark under the following circumstances: there has been a material and significant administrative error; or there has been a procedural irregularity in the assessment process as defined in the Examination and Assessment Regulations. You can obtain a full copy of the Regulations by following this link:

http://www.port.ac.uk/accesstoinformation/policies/academicregistry/filetodownload%2C163713%2Cen.pdf

Although you cannot question the academic judgement of a lecturer, we are happy to meet with students to discuss their performance. Lecturer's weekly office hours provide a good time for this discussion and you should approach the unit co-ordinator in the first instance. However, you must make sure that you have read and reflected on your individual feedback before you get in touch with a tutor to arrange a meeting to discuss your work.

Late Submission of Coursework

Coursework submitted after the published submission date without a valid Extenuating Circumstances Form (ECF), but within twenty working days of that date, will be marked. The mark awarded will be limited to the unit pass mark (40% unless otherwise specified in the unit handbook).

Coursework submitted more than twenty working days after the published submission date will not be marked, and a mark of zero will be recorded on the student's record. It will be recorded as a non-submission.

Second Attempt Assessment Arrangements

General Information

You will have to complete the second attempt assessment for this unit if you achieve less than 40% in the unit overall

The Examination and Assessment Regulations state that undergraduate students can only undertake second attempt assessment in units totalling no more than 40 credits.

Students should note that the decisions of Unit Assessment Boards and Boards of Examiners may mean that any work undertaken before the second attempt assessment period proves to be redundant because the volume of individual second attempt assessment necessary may mean that the student has the opportunity for second attempt assessment withdrawn.

It is your responsibility to check the Student Portal and make sure that you are registered for the second attempt assessment.

Second Attempt Assessment for this unit

The second attempt assessment for this unit is a like for like.

The second attempt assessment period will commence on Monday 8 July 2019 and will end on Friday 26 July 2019.

The mark for the second attempt artefact will be capped at 40% but it will be combined with the mark(s) for any artefacts that were passed at the first attempt in order to calculate the overall unit mark i.e. the final unit mark will not be capped automatically at 40%, although the second attempt assessment mark will be so capped.

Implications of failing the unit after the second attempt

If you fail any or all of your second attempt assessments, the Board of Examiners may offer you the opportunity of repeat assessment in the next academic year. This means that you must repeat the unit(s) that you have failed (with the full range of marks available). Attendance of students on repeat assessment will be monitored very closely.

You must have passed all your units before you can continue your studies.

Students who miss a second attempt assessment exam date or second attempt assessment coursework submission date will be deemed to have failed.

You cannot submit an ECF to cover the second attempt assessment period.

Where compensation is available, it cannot be applied if a student has not attempted the final artefact of a unit.

Do be aware that the CIPD will not make an award on any HR student that is compensated. You should speak to your personal tutor if you have any queries about this.

ECF Advice

http://www.port.ac.uk/accesstoinformation/policies/academicregistry/filetodownload,10380,en.pdf

If you are unable to submit coursework on the due date as a result of circumstances relating to your health and/or other personal matters, which are sufficiently serious to have prevented you from completing or submitting the assessment artefact, you should submit an ECF within 20 working days of the submission date.

You are strongly advised to speak to your personal tutor as soon as possible after the circumstances arise/you realise that you will not be able to sit/submit the assessment.

Deferral Arrangements

If you have been unable to submit your coursework by the due date and have a valid ECF which applies to the coursework, then you will be able to submit the coursework up to 20 working days late without penalty. Do not wait to be told whether or not your ECF was successful. It is important to discuss potential ECF claims with your personal tutor to make sure you understand the implications of late submission if the ECF is not upheld by the ECF panel.

Remember that you cannot submit an ECF to cover the second attempt assessment period.

Support for Second Attempt/Deferred Students

Students can arrange to meet with the unit co-ordinators (Helen Burton and Matthew Atkins) with any specific queries they may have.

Please read the case study below and answer the QUESTION.

Case Study – Performance at Portland

Julia is 29 years old and she is a children's entertainer. She regularly puts on performances for the children of the guests at the Portland Hotel. When she is not performing, she acts as a babysitter for parents at the hotel who wish to leave their children behind while they visit a local bar that is famous for its margaritas. She has been working for the hotel for 6 years.

Her contract with the hotel states that she is an independent contractor offering children's entertainment services. It says that she must be available to work for up to 40hrs per week as requested by the hotel, including on Saturdays and Sundays. In practice she works 8hrs a day from Wednesday to Sunday and gets Monday and Tuesday off. She puts on two children's performances a day when she is at work. This takes up about 3 hours of her day and she spends the rest of the time babysitting. Her contract says that either party can terminate the contract by giving one month's notice. She is given a uniform to wear and she works exclusively from the premises of the hotel under the supervision of the hotel manager, Deepak. She is paid £400 per week through the hotel's PAYE system. If she gets tips from the parents she gets to keep them.

Her contract also contains a provision which states that she can "send a suitably skilled substitute to perform work offered provided such substitute is agreed in advance by the manager of the Portland Hotel". Julia once asked to send her friend Fred, another children's entertainer, in her place as she did not want to miss the premier of the new Star Wars film. Deepak told her that she could not and that she should not ask to swap her work again.

Last year the government passed a new law which will requires hotel babysitters to have a childcare qualification by July 2019. Julia has not got a childcare qualification so Deepak agreed to allow her to attend college one day a week to get one. Unfortunately, last month Julia failed her end of year exam and will have to resit the year.

When Deepak heard the news he was very angry. He wrote a letter inviting Julia to a capability assessment in which he stated that if she could not continue to babysit the children her contract would be terminated. She was told she could bring a colleague along for support.

At the meeting Julia argued that she should be given another chance to complete the course and that a substitute could be used in the meantime for babysitting. She also argued that she could continue to give her performances even if she could not babysit. Deepak says that he has no reason to keep her on if she cannot babysit. He says he thinks the law is clear and he cannot continue to offer her work after July. He also says that he thinks her performances have been substandard for several months as she has not learnt any of the latest children's songs. He tells her he has decided to terminate her contract and gives her one month's notice.

***QUESTION:* Advise Julia on her employment status and any employment law claims she may have against the Portland Hotel.**

Lecture 1: Sources of Employment Law and Institutions

The English Legal System

Please revise the material on the general sources of law and the court system in English Law from TB1 – This is all also relevant to employment law.

Sources of Employment Law

The main sources of employment law are as follows:

Contract Law and the Common Law

Employment Law Statutes

EU Law

Human Rights Law, especially the ECHR and the Human Rights Act 1998

Employment law in Britain is governed by a combination of common law of contract and considerable bulk of statute law largely designed to provide minimum standards for employee.

Contract and Common Law

An agreement to offer work in exchange for pay is a contract. Therefore the basis of employment law is a form of **applied contract law**.

Take a look back at the way a contract is formed from TB1. What are the necessary elements?

Contracts are composed of:

Express Terms – Terms actually negotiated and agreed by the parties.

Implied Terms – Additional terms which the court finds are necessarily implied by the agreement of the parties.

Employment Law Statutes

The legislature (Parliament) has also intervened in the area of employment law by passing statutes – especially in relation to employees. *We will discuss this in more detail later.*

Revise the process by which Parliament makes law from TB1.

Some of the most important employment law statutes are as follows:

The Employment Rights Act 1996

The National Minimum Wage Act 1998

The Trade Union and Labour Relations (Consolidation) Act 1992

The Equality Act 2010

plus many more…

Legislation is required in the employment relationship to impose **minimum standards** into the contracts between employers and employees. If parties were left to negotiate their agreements on any terms then the relationship could be open to abuse by employers due to **inequality of bargaining power**.

EU law

European law currently also plays a large part in employment law. For example **The Equal Pay Act 1970** was introduced to equalise the pay between men and women however its protection was limited until EU legislation broadened the scope. **Article 141 EC (now Art 157 TFEU)** now expressly confers a right to equal pay for work of equal value: 'Each MS shall ensure that the principle of equal pay for male and female workers for equal work or *work of equal value is applied.'* The original UK **1975 Sex Discrimination Act** did not contain any provision for the protection of those who were proposing to change their sex or who were in process of gender reassignment. The protection was purely available to heterosexuals who were able to compare their treatment to someone of the opposite sex**.**

Look back at the process by which the EU makes law from TB1, as well as how this law is ***implemented*** *in the UK.*

Human Rights Law

Another source of law in the UK is the **Human Rights Act 1998**. This Act incorporates the **European Convention on Human Rights** into UK law. The **European Court of Human Rights** hears cases when there is a complaint that the Member State (nothing to do with EU membership but those who are members of the ECHR) is in breach of one of the Articles of the Convention. This is an important source of law in relation to discrimination and employment rights.

Pay v Lancashire Probation Service [2004] IRLR 129

Pay v UK [2009] IRLR 139

Trade Unions

Traditionally trade unions had a large role in the negotiation of contracts in workplaces, but this has declined with the proportion of manufacturing and the reduction in heavy industries such as shipbuilding and mining. Unions still play a part as is evident from the recent action relating to Southern Rail and Junior Doctors.

The Employment Tribunal System

Claims based on employment law statutes are heard by specialist tribunals call **Employment Tribunals**. These tribunals are intended to be less formal and less costly than taking a claim to court.

Jurisdiction, composition, procedure etc. are regulated by **The Employment Tribunals Act 1996** and **The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

Lay members sit with a qualified lawyer to hear cases, BUT the legally qualified person will normally sit alone in a wide range of specified categories of cases, or in any case where the parties so agree. These include claims for breach of contract, unauthorised deductions from wages, redundancy payments, interim relief applications, written statements of employment particulars, itemised pay statements, certain complaints under the National Minimum Wage Act, stage 1 hearings under the equal value provisions and holiday pay and unfair dismissal cases. Thus there has been a significant drop in the number of cases in which lay members are involved.

The jurisdiction **was** only to hear statutory claims (such as unfair dismissal, sex discrimination, redundancy etc.) but tribunals now have a jurisdiction over certain claims in contract which arise from the termination of the employee's contract of employment. Subject to certain financial limit proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of **damages** (but not for personal injuries) if the claim arises or is outstanding **on the termination** of the employees employment.

Injunction proceedings must still be brought before County Court. Claims for non-payment of wages may also be resolved before an Employment Tribunal under Part II of the Employment Rights Act.

Procedural rules have been introduced to prevent the bringing of weak cases before employment tribunals by employees:

(i) s13 of the Employment Tribunals Act 1996 is amended to allow an ET to make an award of costs against either a litigant or their representative where time is wasted because of the way they conduct their case.

(ii) s13 is amended to allow an award of costs, where the losing side had behaved unreasonably, to reflect the time spent by the winning side in preparing their case. This may reduce the number of so called “nuisance value” settlements.

Some Statistics on ETs

According to research for the Department of Business Innovation and Skills released in December 2013 (IFF Research, Payment of Tribunal Awards (London: BIS, 2013) the median financial award was only £2900.

Most claimants earned less than £40,000 per annum; only 5% of claimants earned over this amount.

Almost a third of employers refused to pay when tribunals made awards. Businesses were more likely to refuse to pay awards below £5,000 than above.

59% of employers in the private sector are small to medium-sized businesses, BUT 68% of claims were made against this SMEs.

33% of claimants made claims against employers with 1-9 employees;

35% against employers employing between 10 and 49 workers;

11% against undertakings with 50–249 workers.

This suggests that compliance with Employment law by smaller employers is problematic.

Employment tribunals are bound by decisions of the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court.

Employment Appeal Tribunal

This is the tribunal to which either applicant or respondent may appeal as of right. The tribunal will only interfere with the decision of the tribunal if it considers it is perverse ie. no reasonable tribunal could have come to that decision, or if the Employment Tribunal has made a mistake in its interpretation or application of the law.

British Telecommunications v. Sheridan [1990] IRLR 27, 30

Piggott Bros v. Jackson [1991] IRLR 309

Appeals to Court of Appeal

s37 Employment Rights Act 1996 permits appeal with leave of the EAT or CA.

However there has been a policy shift away from dispute resolution in court hearings to conflict management balanced in favour of employers to promote a flexible labour market. (Employer can hire knowing they can fire without fear of costly repercussions).

ACAS, Arbitration and ADR

Arbitration is the process by which parties refer their disputes to a third party. This saves the cost of taking the dispute to Court. Firstly the parties must agree that they will be bound by the decision of the third party(ies) and the third party (arbitrator) decides the dispute according to the law but outside of the Court system. The system is cheaper and quicker than going through the Court system and is used for both individual complaints and by multinational organisations.

The **Arbitration Act 1996** sets out three general principles on arbitration.

> The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
>
> The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest
>
> In matters governed by the Arbitration Act, the court should not intervene except as provided by the Act

ACAS offers an independent and trusted service for dealing with disputes (collective conciliation) between groups of workers and their employers (collective disputes). ACAS has a legal duty to offer free conciliation where a complaint about employment rights has been made to an employment tribunal.

Under **s.18A of the Employment Tribunals Act 1996** the normal requirement will be that a claimant must send certain prescribed information about their claim to ACAS before presenting a claim to an ET. An ACAS Conciliation Officer is then appointed who will, during the "prescribed period", (likely to be one month) endeavour to promote a settlement in the case. Time limits for presenting claims to ETs will be modified to accommodate the time spent in pursuing possible conciliation. In other words, time spent complying with the pre-claim conciliation obligations will be disregarded when calculating the time periods for bringing a claim.

Central Arbitration Committee - its role is to promote fair and efficient arrangements in the workplace, by resolving collective disputes (in England, Scotland and Wales) either by voluntary agreement or, if necessary, through adjudication. The areas of dispute with which the CAC currently deals are:

i. applications for the statutory recognition and de-recognition of trade unions;

ii. applications for the disclosure of information for collective bargaining;

iii. applications and complaints under the Information and Consultation Regulations;

iv. disputes over the establishment and operation of European Works Councils;

v. complaints under the employee involvement provisions of Regulations enacting legislation relating to European companies, cooperative societies and cross-border mergers

Lecture 2: Barriers to Employment Rights

UK employment law does not give equal protection to everyone 'in work'.

A number of things depend upon employment status, most importantly:

What minimum statutory rights are available?

What implied obligations apply to the contract?

How tax is deducted?

The liability of the employer to pay for wrongs committed in the course of employment.

Identifying the status of workers

There are **four categories** of legal arrangement under which persons supply their labour to the market.

Employee

Statutory Worker

Employee Shareholder

Self-employed

Because the majority of statutory rights are given only to employees, personnel strategies often try to limit "employed" status to "core" workers. (The structuring of the workforce between full-time and part-time and atypical workers is sometimes referred to as the "flexible firm"). The question here is: who is an employee as opposed to (say) an independent contractor or a casual worker.

Accordingly, there has been a growth in non-core workers such as part-timers, casual workers, outworkers, temporary workers and also such mechanisms as "zero hours contracts".

Employee

The statutory definition is s.230 Employment Rights Act 1996 as follows:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" ….means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Employees as defined in the Employment Rights Act 1996 are entitled to, amongst other rights, **the right not to be unfairly dismissed, the right to receive written particulars of employment, the right to receive a statutory redundancy payment, the right to receive minimum periods of notice, the right to maternity and parental leave and time off for dependents, the right to protection of wages in the event of an employer's insolvency and the right to request to work flexibly**.

The employee:

Does work personally, has mutuality of obligations, is 'at employer's disposal'

Often enjoys significant 'perks' over and above minimum rights

Enjoys all available statutory rights subject to length of service, in particular; all family friendly rights; unfair dismissal protection; redundancy payment.

Tax is paid at source

Employer is vicariously liable for all wrongs.

Statutory Workers

'statutory workers' who are often employed on a casual basis or on a zero hours contract, qualify for a slightly wider group of rights than the self-employed. These include working time rights, paid annual leave, the national minimum wage and statutory recognition rights.

The worker:

Does work personally, has no job security

Typically casual/temporary/seasonal staff

Tax is paid at source

Employer is vicariously liable for all wrongs.

Employees and workers have the following rights:

- **Equal pay for equal work**
- **Non discrimination**
- **Right not to have unauthorised deductions from pay**
- **statutory health and safety rights**
- **Minimum wage**
- **Working time regulations**
- **Data protection rights**
- **Time off to care for dependants**
- **Part-time workers are protected**

Self Employed

The paradigm of someone who is genuinely self-employed is in business on their own account. They might have clients and employees. There are a number of key questions the court will ask to determine if someone is self-employed: *(See Mixed/Multiple Test below)*

Levels of control?

Mutuality?

More than one client?

Intermittent work rather than continuous?

Provision of tools and equipment?

Possibility of substitution?

Who provides training?

Does person get paid even if there is no work to do?

Does the person negotiate for his or her fee?

The tax authorities have long been suspicious of the 'self-employed contractor' who sets up a limited company (usually known as a 'service company') which consists of one director and one employee ie him/herself, and who then provides his services to a single client exclusively. This device has often been used by both employer and employee to avoid the higher taxes payable in respect of employees as opposed to self-employed people.

MBF Design Services Ltd v HMRC [2011]

Employee Shareholders

Employers have long provided share-ownership schemes for employees. But this scheme is different because it allows employees to "sell" their employment rights in exchange for shares.

See generally Jeremias Prassl, 'Employee shareholder "status": dismantling the contract of employment' (2013) 42 ILJ 307

s.31 of the Growth and Enterprise Act 2013 (in force April 2013) inserts a new section 205A into the Employment Rights Act 1996. This allows employees, in return for shares to contract out of unfair dismissal and redundancy provided the employer allots them shares valued at *not less than £2000 on the day of issue (and no more than £50,000).*

In exchange for the shares the employee shareholder will give up the right to:

Request to undertake study or training;

Request flexible working;

Not be unfairly dismissed*; and

A redundancy payment.

Increased notice of intention to return from adoption or maternity leave.

The agreement is not valid unless the employee has received prior independent legal advice.

*NB The right not to be ***automatically*** unfairly dismissed however remains.

Establishing a Contract of Employment under s230 Employment Rights Act

The question is who is an employee and who is an independent contractor or a casual worker and how do we decide who is who? The courts have developed tests to decide who is and who is not an employee.

The control test

A contract of service describes one who serves and that implies submission to the "will" or control of another person. An important test, historically, and still of some relevance is the control test - ie an employer tells an employee both **what** to do and **how** to do it. Why is this not appropriate in many modern employment relationships?

Integration or Organisation Test

Subordination no longer asks merely whether workers are "controlled" in the traditional sense but also whether they are integrated into an organisational scheme of work designed

for them by others. Integration is however a useful test for professional person exercising own skill and labour otherwise too ambiguous to resolve borderline cases.

Davis v New England College of Arundel [1977] ICR 6

The problem with this test is that it seems to identify as “integrated” only employees who are permanent or core

Mixed/Multiple Test

More recent tests include the **integration** test and the **multiple** test. The multiple test considers all the relevant factors from the circumstances of the contract to decide whether they are consistent with a contract of employment.

Ready Mixed Concrete Ltd v. Minister of Pensions [1968] 2 QB 497

Market Investigations Ltd v Minister for Social Services [1969] 2 QB 173

As essential factor in distinguishing between a contract of employment and a contract for services is whether individuals engaged to do work are **in business on their own account.** Contrast employees with professional and/or managerial expertise with consultants and company directors.

Also of relevance is the concept of **mutuality of obligations**.

O’Kelly v. Trusthouse Forte Ltd. [1983] ICR 728

Carmichael & Leese v National Power plc [2000] IRLR 43

Bunce v Potsworth Ltd t/a Skyblue [2005] IRLR 557

Stringfellow v Quashie [2012] EWCA Civ 1735

The **tax status** of the worker is by no means decisive.

Ferguson v. Dawson Ltd [1976] IRLR 346

However, those in business on their own account will be neither employees nor workers.

Ready Mixed Concrete SE Ltd v Ministry of Pensions [1968] 2QB 497

Stringfellow v Quashie [2012] EWCA Civ 1735

Economic Reality Test

The economic reality test asks whether the worker is independent of the business and therefore self-employed. It investigates such questions as profit and loss – *Ready Mix Concrete* above.

The Privy Council in Lee v Chung and Shun Shing Construction and Engineering Co Ltd
[1990] IRLR 236, [1990] ICR 409, PC

"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" .....The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'.

Contract as a strategic device – common clauses

Probation – a management tool.

This is an example of a common express term of an employment contract. Employers will provide a period of time during which the new employee is 'on probation'. During this time s/he will normally be on one week's notice of termination on either side and is likely not to be entitled to any 'perks' such as sick pay or pension. Often, but not always, the employer will increase the notice period once the probationary period has been successfully completed.

The legal position

Probationary periods have little legal significance in terms of statutory rights – each of the rights we will discuss later such as unfair dismissal, etc depends on a particular length of service for each right.

The case of *Przybylska v Modus Telecom Ltd* 2007 made it clear that if the employer fails to hold a probation meeting, the employee can assume that s/he has 'passed' their probation. In this case, this meant that Ms P was entitled to one month's notice not one week, since that is what the contract provided.

Agency Workers

Agency workers are people supplied by employment agencies. They are often known as 'temps' and tend to be used to fill in gaps where there is a spike in demand or where the employer is short of staff due to sickness or holidays etc.

They have traditionally had a raw deal in terms of employment rights. They have at times been classified as employees (employed by the agency), or been classified as workers and therefore entitled to some basic rights such as minimum wage and paid holidays, but have few other rights and no job security and sometimes described as employees of the 'end

user'. The Agency Workers Directive was introduced by the EU and has resulted in a change to the law as laid out below.

Reform of agency workers' rights

The Agency Workers Regulations 2010 took effect in October 2011. The basic principle is that of equal treatment between agency workers as compared to employees and workers of the hirer. The worker is entitled to the same basic working and employment conditions s/he would be entitled to for doing the same job had s/he been recruited on a permanent basis by the hirer. It also gives some rights from day one.

Rights from day one

These are the responsibility of the end user to provide.

Access to collective facilities and amenities.

An agency worker will have the right to be treated no less favourably than a comparable employee or worker in relation to access to end user client site facilities and amenities, such as the staff canteen, childcare facilities and transport services, from day one of an assignment.

Right to be informed of vacancies

From day one of an assignment an agency worker has the right to be informed by the end user client of any relevant job vacancies with the end user client that would be available to a comparable employee or worker. This would apply if the employer publicises vacancies via the internet, an intranet or on a notice board in a communal area. The key point is that agency workers know where and how to access this information.

Rights from 12 weeks...

On completion of 12 weeks continuous assignment, the agency worker is entitled to the same' basic working and employment conditions' as the agency worker would be entitled to for doing the same job had s/he been recruited directly by the end user. There is no need to look for a comparator as it is 'as if'.

The agency worker is entitled to:

The same basic pay as though they were permanent

The same holiday rights as they would have if permanent

The same bonuses and commission, but only if paid on the basis of personal performance eg sale commission, not profit related bonuses

Paid time off for ante natal care.

Lecture 3: Contractual Employment Rights

As explained last week an 'employee' is the only individual who will have the full protection from the Employment rights Act 1996. Provided the 'tests' are satisfied, a contract exists even if there is no paper document. An employment contract is like any other contract in that there must be:-

An unconditional offer

An unconditional acceptance

An intention to form a legally binding agreement

Consideration

Certainty

Although it is not necessary for there to be a written 'contract', all **employees** are entitled to **a statement of particulars (s1 ERA 1996)**. This provides the employee with a written statement of the main terms of the employment and must be given within two calendar months of starting work. The mandatory terms that must be covered in this statement are:

- **The names of the parties**
- **The date that employment started**
- **If the employee is already employed, and the contract relates to a new position, on what date continuous employment with the employer started**
- **A job title, and/or brief description of the role**
- **Hours of work**
- **Scale or rate of remuneration**
- **Intervals of payment**
- **Hours**
- **Overtime**
- **Holidays**
- **Sick pay**
- **Grievance procedure***
- **Disciplinary procedure***
- **Pension***
- **Place of work**

- **Notice period**

  *these need not be laid out in full in the statement, but can be in a separate document to which the statement refers. This is important because putting these documents outside of the statement allows the employer to change their terms.

Where the employer gives or has given the employee a contract of employment covering all these matters, it does not also have to provide a statement. There is no need to provide such a statement for an employee who works for less than one month.

What happens if the employer does not provide a statement or a contract?

There is no freestanding right for an employee to obtain damages if the employer fails to provide either a compliant contract or statement, but if the employee takes an employment tribunal case against his employer relating to another aspect of employment and is successful, and a statement has not been provided, an additional award of 2-4 weeks' pay may be made against the employer.

What is the difference between a contract and a statement?

There is a legal difference between a contract and a statement. The statement of particulars is not a contract. Acceptance of the terms will be implied by the fact that the employee has acted in accordance with the terms of the statement. It is therefore of evidential value, but not conclusive as to the content of the contract.

Systems Floors v Daniel [1981] IRLR 475

Many employers who have jobs of low status and therefore low paid staff will try to avoid their obligations to the worker by 'dressing up' their contract as self-employment. These are known as 'sham' contracts.

Sham Contracts

A 'Sham' Contract is where the 'employer' purposely sets out to deceive the 'employee'. In this case, the court will intervene to decide whether the relationship is one of self-employed or whether the individual(s) concerned are actually employees, despite written evidence to the contrary,

Autoclenz v Belcher [2011] UKSC 41

Variation of Contract

The terms of the employment contract are binding on both parties and cannot be vaired except as follows:

By mutual agreement.

The contract allows for unilateral variation by the employer.

The contract ends and a new one begins.

Where the change involves a mutually agreed term of the contract, if there is no scope for variation in the contract, the employer will have to get the employee's consent to any change. If the employer imposes the change on an individual, it may well amount to an effective dismissal (so called 'constructive dismissal' dealt with later in course) if the employee leaves in disgust. Alternatively the employee may stay employed and make a claim for breach of contract eg for back pay.

Miller v Hamworthy Engineering [1986]

Rigby v Ferodo [1987]

But note an employee can agree to a change by conduct.

Henry v London General Transport Services Ltd [2000]

The employer may have allowed scope for variation e.g. 'and any other duties reasonably incidental to the post' or clause requiring the employee to be 'reasonably flexible' in relation to his place of work. Where this is the case, the employee will usually have to agree to changes, unless the request is inherently unreasonable.

Where the change requested is just to the 'works rules' or conditions of employment e.g. a no-smoking rule, dress code etc, the employer can enforce this unilaterally with reasonable notice.

What needs to be established is whether the change is a 'mere change in custom and practice' or a fundamental change.

Cresswell et al v Inland Revenue [1984]

Land Secutirites Trillium Ltd v Thornley [2005]

Even where the change required is a fundamental one, it is sometimes possible for the employer to enforce it where it is part of a 'genuine economic reorganisation' – is shown to be necessary and applicable to the whole workforce or the whole of a department and for good business reasons. This happens a great deal in the current economic climate – for example JCB negotiated with their workforce to reduce their basic hours and pay to 36 hours per week from 40 hours, which the workforce chose to accept rather than sustain redundancies. In 2009, BA negotiated for all of their staff to work in August for free – a reduction of 1/12 in their pay that year, again in order to try to stave off redundancies. Generally employees who have not agreed have been found to have been fairly dismissed *Catamaran Cruisers v Williams* 1994.

Incorporation of Collective Bargains

In general the terms of agreement with unions, known as '**collective bargains**' are not part of the contract of individual employees unless they have been directly incorporated either by an **express term** or an **implied term**.

Alexander v Standard Telephones and Cables No. 2 [1991] IRLR 286

Malone v British Airways [2011] ICR 125

George v Ministry of Justice [2013] EWCA Civ 324

Incorporation of Staff Handbooks

Some of the practices and procedures of the employer will not be found in the contract but in the staff handbook. As with collective bargains these documents are not automatically incorporated into the contract.

This gives the employer considerable freedom to vary these practices and procedures outside of the control of their employees.

Bateman v Asda Stores [2010] IRLR 370

However if the handbook sets out a clear promise on a matter which is incorporated into the contract then those provisions may become part of the contract.

Deadman v Bristol City Council [2007] IRLR 888

Lecture 4: Express and Implied Terms

As discussed, a contract of employment (s230 ERA 1996) is a legally binding agreement between an employee and an employer, which is formed when the employee agrees to work for pay. The contract, which need not be in writing (although it ought to be) is normally made up of both oral and written agreements. The contract is made up of both express terms and implied terms.

The terms that are agreed when the contract is formed are known as **Express terms**. These are terms to which both parties have agreed, and may include those negotiated during the recruitment process as well as those in a formal written contract or at the interview.

Implied terms are not written and not explicitly agreed to.

Implied terms

(i) terms that are too obvious too mention (eg that the employee will not steal from the employer);

(ii) those necessary to make the contract workable (eg that an employee whose contractual duties require driving must have a current driving licence)

(iii) those that are the custom and practice of the industry;

(iv) terms imposed by law (eg the right not to be discriminated against because of, for example sex/race).

In addition, there may be terms incorporated into individual contracts by reference to promises made (eg at the interview) or "non-contractual" documents, such as the letter of appointment, company handbooks, or collective agreements with trade unions.

You will remember that ‘incorporation’ is important and you should be aware of that not all the contents of handbooks or collective agreements will be contractual, but some may be.

Petrie v. Macfisheries [1940] KB 93

Deadman v Bristol City Council [2007] IRLR 888

Implied terms have become an increasingly important and controversial means of regulating employment standards. There is, however, no judicial consensus about the extent to which (if at all) this is appropriate. The traditional view, however, is that the parties are free to make their own agreement without interference from the law. This expresses *laissez-faire*, but such a philosophy is not neutral and tends to allow the stronger party to dominate. Under what circumstances is a term implied?

The classic tests have been the “business efficacy test” and the “officious bystander test”. The first of these was proposed by LJ Bowen in *The Moorcock* (1889) 14 PD 64. A term can only be implied if it is necessary to give business efficacy to the contract to avoid a result that the parties cannot as reasonable businessmen have intended. However, it means that only the most limited term should then be implied – the bare minimum to achieve this goal.

The officious bystander test originates in the judgment of Mackinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206. This test is that a term can only be implied in fact if it is such a term that had an “officious bystander” listening to the contract negotiations suggested that they should include this term the parties would “dismiss him with a common ‘Oh of course!’”.

Mears v Safecar Security Ltd [1982] IRLR 183

Societe Generale London Branch v Geys [2012] UKSC 63

Johnstone v Bloomsbury Health Authority [1991] ICR 269 CA

Implied Duties of the Employer

The Work/ Wage Bargain

To pay him/her as agreed. Failure to pay an employee’s full salary will amount to a breach of contract, which will entitle the employee to leave and claim constructive dismissal, or to stay and claim breach of contract. This is only the case where it is a deliberate refusal, rather than an administrative error.

Although the courts have sometimes insisted that the employee must actually do work in order to be entitled to their pay it seems now to be settled that the employee is entitled to be paid wages if ready and willing‘ to work; it does not matter that no work is actually done: *Beverage v. KLM (UK) Ltd* [2000] IRLR 765. Thus, as in this case, if the employer closes the business over Christmas the employees are entitled to be paid unless the contract states otherwise.

This is consistent with well-established authorities, such as Asquith J in *Collier v. Sunday Referee Publishing Co.* [1940] 2 KB 647 at 650:

"Provided I pay my cook her wages she cannot complain if I choose to take any or all of my meals out."

To Notify Employee of Contractual Benefits

Scally v. Southern Health and Social Services Board [1992] 1 AC 294

The duty applies where employees have not negotiated their own contracts and the courts seem unwilling to extend it - see *University of Nottingham v. Eyett* [1999] IRLR 87

To provide a grievance procedure and deal promptly and effectively with grievances

Goold (Pearmark) Ltd v. McConnell [1995] IRLR 516

It is an implied term in a contract of employment that they employer will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievances they may have. Reference to the procedure by which this is to be done should be included in the s.1 statement.

To provide work?

Piece work or commission?

Turner v. Goldsmith [1891] 1 QB 544

Devonald v. Rosser [1906] 2 KB 728

Giving no work but offering pay is now known as "Garden leave".

Although generally there is no right to work an employee cannot be placed on garden leave (unless there is an express teem in the contract) if they are able to earn more by being at work (bonus/commission) or if their reputation may be damaged as a result of not being given any work or if, because of their skills, they need to be in a situation where they can keep their skills up to date.

William-Hill Organisation Ltd. v. Tucker [1998] IRLR 313 CA

Symbian Ltd v Christensen [2001] IRLR 77 CA

Senior executives who give in their notice can cause all kinds of problems if they choose to go to work for another company or business within the sector. Most employers will keep their options open in the employment contract with a view to deciding what is the best course of action in this situation? The employee will have a certain period of notice to serve and most employers will include what is known as a PILON clause in all their employment contracts.

'...we reserve the right to make a payment in lieu of any period of notice or part of it whether given by either party. Such a payment shall be limited to your basic salary at the rate payable at the date the notice is given and shall not include...any other benefits or any kind whatsoever'.

This means that the employer reserves the option to pay the employee their full notice, with or without benefits (depends on contract), and terminate the contract immediately. The employee will not then remain on site where they may be able to pick up confidential information or cause problems.

For senior executives or those engaged in sales it is normal to have a garden leave clause which enables the employer to keep the contract in place during the whole period of the notice, while not requiring the employee come to work (hence the name).

Job Flexibility

There is a general expectation nowadays that an employee can be expected to perform whatever duties are necessary to achieve the tasks that are his or her responsibility. However, most employers make that clear as a matter of contract.

A term may also be implied by custom – although this is increasingly rare.

Sagar v. Ridehalgh [1931] 1 Ch 310. The problem for the employer in Sagar was that they had failed to gain authority to make the deductions by way of an express term. The issue is now regulated by Part II of the Employment Act 1996.

Repeated 'custom and practice' by the employer can lead to a term being implied into an employee's contract of employment. This only works where employees are well aware of the policy or practice is clear and where it is followed most if not all of the time over a lengthy period.

To cover the employee for reasonable work related expenses.

To take reasonable care for the safety of his/her employee, providing:

Competent fellow employees.

Adequate plant and equipment.

Safe place of work and system of work.

There is no obligation to give a job reference, except in limited circumstances covered by the Financial Services Act, but where one is provided, it must be prepared with reasonable skill and care to ensure that the information contained within it is accurate AND with reasonable skill and care to ensure that the information does not give an unfair impression of the former employee.

Mutual Trust and Confidence – Please read Pages 189 – 193 carefully

The most important implied term is the implied term of Mutual Trust and Confidence. Although this is expressed as 'mutual' it is really an employer term meaning that the employer must not conduct himself in such a way as to undermine the relationship of trust and confidence between the employer and the employee. This is a question of showing the employee respect. Most significantly this duty requires **employers to treat employees with respect**.

Woods v WM Car Services Ltd [1981] IRLR 347

Lewis v Motorworld Garages Ltd [1986] ICR 157

A breach of mutual trust and confidence can occur in any number of situations for example by unjustified increase in workload/unreasonable extension to working hours/lack of empathy with employees/lack of trust between the employer and employee for no specific reason. **Page 488 of the text gives a number of examples**

Stress

One such example is stress. These are cases where the employee claims that the employer has broken its duty to take reasonable care of his/her health and safety and that the failure has caused a 'breach of mutual trust and confidence'. The allegation will be that 'psychiatric injury' has been caused by the employer. In other words what has happened at work has been so devastating that it has caused the employee some mental anguish which means he/she can no longer perform their role at work.

The employer is usually entitled to assume that the employee can stand the normal pressures of work, unless he knew of some particular problem or vulnerability. The test is always the same, there are no occupations considered intrinsically harmful to mental health.

The employer is generally entitled to take what he is told by his employee at face value, unless he had good reason to think to the contrary – if the employee says s/he is 'OK' then that can be taken at face value.

The employer will only be liable for stress related illness where he could or should have been able to foresee the illness i.e. he knew or ought to have been aware of the 'warning signs' or his employee expressly brought them to his attention, warning signs may include employee actually complaining, absences accompanied by medical notes or self-certs stating 'depression' or 'stress' or behavioural change.

Barber v Somerset County Council [2004] UKHL 13

Abusive or bullying conduct from the employer.

Generalised unfair treatment of an employee, including depriving them of some benefit for no good reason, or leaving them out of a generalised pay rise arbitrarily.

Applying inappropriate and disproportionate disciplinary measures.

Refusing, or simply failing to deal with grievances or problems promptly when asked to do so by the employee.

Breaking promises made to the employee, upon which the employee has relied.

All the cases in this area tend to involve the employee leaving employment in response to such behaviour by the employer and seeking to claim constructive dismissal.

The Employee's Implied Terms

To obey lawful and reasonable orders - This includes adaption to new techniques and skills, as long as proper training is given, and there is a basic understanding that the employee should be reasonably flexible, especially in small businesses.

To exercise reasonable care and skill in the performance of his/her employment - This is not an obligation to be 'perfect' but to be reasonably competent in the context of the skills and experience the employee has. The employee is also responsible for carrying out the training they receive.

Not to delegate his/her duties – the essence of a contract of employment is that it is performed personally, and the employee cannot substitute someone else even if that person is able to perform the role.

To co-operate – the employee must not stand in the way of progress – eg he must take on new equipment/new ways of working – *Creswell v Inland Revenue*

To give faithful service - this includes things like not leaking confidential information, taking bribes, working for a competitor or setting up in competition.

NB: This usually only operates during the currency of the employment. If an employer wants to restrain an ex-employee from competing etc., a restraint of trade clause may be necessary, and that will have to be reasonable in order to be enforced by the courts.

Not to undermine the employer's trust and confidence in him/her - This is rarely invoked in practice as a standalone allegation. However it may become more prevalent since the rise of social media. There have been a number of recent cases where the employee has posted matters online which have had an adverse impact on the employer's reputation and this implied term might well be relevant in cases such as that.

To take reasonable care for his own safety and that of colleagues.

Relationship with Express Terms

Implied terms which "limit" the application of unfair express terms

In *Johnstone v. Bloomsbury Health Authority* [1991] ICR 269 CA Leggatt LJ (dissenting, although with the support of Stuart-Smith LJ on this point) appeared to reject the idea of overriding implied terms: "In my judgment as a matter of law reliance on an express term cannot involve breach of an implied term."

Scally v. Southern Health and Services Board [1991] 4 All ER 563

United Bank Ltd v. Akhtar [1989] IRLR 507

Was the clause permitting the bank to relocate Akhtar in its discretion and to pay re-location expenses in its discretion actually "limited" or overridden?

Lecture 5: Atypical Workers

In recent years with changing social attitudes there has been a substantial increase in flexible working. Flexibility has advantages and disadvantages for both employers and employees however prior to changes in legislation workers/employees who did not conform to the usual 9am - 5pm Monday to Friday pattern of working faced severe discrimination.

Part Time Workers

There is no specific number of hours which constitute part time; it is simply when someone in the organisation works less than those employed on full time contracts. An employer must be able to objectively justify any less favourable treatment of part time employees and demonstrate that the difference in treatment is because of a genuine business need.

Advantages for an employer of job share can be significant in that he is better placed to cover absences and perhaps having two people sharing a role means that additional skills are brought to the job, however there are also disadvantages in that there will be additional costs and if one person leaves it might be difficult for the employer to be able to cover those specific hours. Employees may benefit from more flexible working hours and more time out of work.

Legal Protection

Under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** part time workers must be treated no less favourably than full-time employees in employment conditions unless the difference can be objectively justified.

Part-time workers are entitled to equal treatment in respect of:

- Rates of pay.
- Pension benefits.
- Training and career development.
- Holidays.
- Other contractual benefits such as sick pay and maternity pay.
- Treatment in selection criteria for promotion, transfer or redundancy.

As with equal pay claims, part time workers have to compare themselves with someone doing the same or broadly similar work. However, that worker must also be someone who is employed full time under the same type of contract whether on a permanent or fixed term basis.

The issue of comparators was considered in the leading 2004 case of *Matthews v Kent & Medway Towns Fire Authority* in which part time fire fighters claimed they were treated less favourably because they were denied access to the pension scheme. The House of Lords held that, when considering whether the comparators were engaged in the same or broadly

similar work, tribunals should focus on the similarities of the work being done as well as the importance of the work to the employer as a whole rather than the differences between the two groups.

Pro rata principle

Less favourable treatment is subject to two tests – the pro rata principle and objective justification.

The pro rata principle allows employers to claim that, although the part time worker was treated less favourably, it was in proportion to the terms on which they offered pay and/or benefits to other workers. Eg, regarding holidays – these should be pro-rated for a part timer in line with the number of holidays for a full timer, based on the number of part time hours they work.

The same principle does not, however, apply to overtime, with the result that part time workers cannot claim less favourable treatment when they are not paid overtime until they have worked the same hours as a full timer.

In some cases, the pro rata principle will be difficult to apply, particularly where the benefit is of a type that cannot easily be divided up. In those circumstances employers may need to consider other options available or whether they can justify the less favourable treatment.

For example employers may choose to:
- provide the same benefit to the part-time worker as they provide to the full-time worker
- provide a pro-rata monetary allowance to compensate for not providing the benefit
- choose not to provide the benefit (but this must be objectively justified).

The fact that part-time workers could be treated more favourably than full-time workers if certain benefits are not proportionately reduced is not unlawful because full-time workers cannot claim less favourable treatment by comparison with part-time workers.

In relation to part-time workers, it is not appropriate to justify treatment by looking at the whole package and considering if the value of the contractual package overall is as favourable. Instead employers must adopt a 'term by term approach' and consider the difference and potential justification in relation to each term.

Once less favourable treatment of a part-time worker on the basis of his or her part-time status has been identified, employers must consider if that treatment is objectively justified, in other words, if it is designed to achieve a legitimate aim or business objective and the treatment is a necessary and appropriate way to achieve this objective.

Objective justification

Employers can also justify less favourable treatment of a part time worker if they can show that the treatment was necessary and appropriate to ***achieve a legitimate aim, such as a genuine business objective***.

However, The ECJ in 2006 in *Adeneler v Ellinikos Oranismos Galaklos* and the 2007 case of *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* stated that reliance on a general law or collective agreement will not amount to objective justification. The ECJ stated that, to establish objective justification, courts have to look at the "precise and concrete factors characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose".

It is worth noting that cost, in and of itself, is generally not a good enough reason under the Equality Act to amount to objective justification and a justification defence on the grounds of limited funding is arguably cost by another name.

Fixed Term Employees

The **Fixed Term Employees (Prevention of Less Favourable) Treatment Regulations 2002** introduce the principle of non-discrimination between those working on fixed term contracts and comparators who are permanent employees of the organisation.

An employee is said to have a fixed term contract if he has an employment contract (orally or in writing) and that contract ends on a specific date or on the completion of a specific task.

Wiltshire County Council v National Association of Teachers in Further and Higher Education and Guy [1978]. The employee may also be fixed term if they are seasonal employees or casual employees taken on for a specific time during a busy period or covering maternity leave.

However, they will not be considered as a fixed term employee if they have a contract with an agency rather than the company where they are working – agency workers are discussed later in the lecture.

Those who benefit most from the regulations are those who are employed to cover periods of absence for such things at maternity or parental leave, and those employed at times of peak demand eg. teachers in higher education.

Employers must not treat fixed term employees less favourably than permanent staff doing the same or largely similar work unless they can provide 'objective justification' for doing so.

Fixed term employees are entitled to receive the same benefits as permanent members of staff, for example in relation:-

Terms of the contract

Opportunity to receive training

Pay and conditions

Equivalent benefit packages

Information about permanent vacancies

Protection against redundancy

These benefits are only available if the fixed term employee works in the same organisation (not associate organisation) and fixed term employees have the same access to discipline and grievance procedures as permanent staff.

Objective Justification

The issue of limited funding as justification for retaining a contract researcher on a fixed term contract was considered by a Scottish tribunal recently in the case of *Dr Ball v the University of Aberdeen*. It accepted that the tests in *Adeneler and Del Cerro* were similar to the tests applied in other discrimination legislation and as such the correct approach was to consider whether there was a genuine business need to be addressed and whether the use of a fixed term contract amounted to "means" that were necessary and appropriate to meet that need.

In applying this test, the tribunal decided that the business need for the university was how to cope with the fact that the research funding from grant-giving institutions was short term. It therefore had to consider the disadvantages to the employee (uncertainty of future employment, disadvantage in terms of career prospects and potential difficulties in obtaining credit) against the advantages to the employer.

It rejected the employer's argument that it would be too expensive to retain Dr Ball beyond the end of the fixed term contract as a red herring, and said that, in attempting to match up future labour needs with future revenue, the University was really in no different a position to many other employers.

The choice for the employer was to employ Dr Ball on a fixed term contract or an indefinite contract with the possibility of his being made redundant.

Ending a Fixed Term Contract

In general terms a fixed term contract will come to an end automatically when the agreed date is reached. No notice is required. However a contract may still be considered as fixed term if it contains a provision enabling either side to terminate it on giving notice before the term expires – *Allen v National Australia Group Europe Ltd* [2004] other than this situation, a fixed term contract can only be terminated before its expiry date if the employee has committed an act of gross misconduct or if it terminated by mutual consent – *Lyritzis v Inmarsat* (unreported). If the contract is not renewed, the employer must be able to provide a

'fair' reason why the contract is not renewed – eg that the work has come to an end or that the project has been achieved. If the contract continued for 1 year (if employed prior to 6th April 2012), the fixed term employee has the right not to be unfairly dismissed as would any other employee having been employed continuously for the same period. If the fixed term employee has been employed continuously for 1 year he has a right to a written statement of reasons for the employer's decision not to renew the contract. If the employment ends unexpectedly, the fixed term employee may be entitled to a statutory redundancy payment if he has worked continuously for 2 years. The ability of the employer to end the contract early depends on the construction of the contract. If the contract says nothing about ended early, the employer may be in breach of contract. If the contract states that it can be ended early and the employer has given proper notice, the contract may be ended with no action available to the employee.

Notice Periods

If the contract can be ended early, minimum notice periods apply. The minimum notice periods required for a fixed term contract are:-

- After 1 month's continuous service, but less that 2 years – 1 week
- After 2 years' continuous service – 1 week for each year worked

But these periods are the minimum, the contract may state otherwise. If the employer ends a contract without giving the proper notice, the employee may be able to claim breach of contract.

The Limit on Renewing Fixed Term Contracts

If an employee has a fixed term contract for four years he will automatically become a permanent employee when the contract is renewed or when the employee is given a new contract. However, an employer and union (or staff association) may come to a collective agreement which removes the automatic right to become a permanent employee in these circumstances. The employee may be able to negotiate terms with the employer. If an employee on a fixed term contract wants to end the contract early and they have worked for the employer for one month or more, they must give a minimum of one week's notice – the contract may stipulate more. Non-renewal of a fixed term contract does not, in itself, amount to less favourable treatment – *Department for Work and Pensions v Webby* [2004].

Challenging objective justification – relates to both part time and fixed term employees

• Is the employer's stated business need a legitimate aim? A blanket policy or collective agreement that has not taken a fixed term or part time employee's particular circumstances into account will not of itself amount to a legitimate aim.
• Is it necessary to achieve that aim? A blanket policy of putting all employees who have

short term funding on fixed term contracts may not be the only way of achieving that aim, particularly if there is a possibility of further funding.
• Is it appropriate? This will be a question of fact balancing the disadvantages to the employee such as uncertainty of future employment, adverse impact on career progression/professional development and credit worthiness versus advantages to the employer.

Agency Workers

After an agency worker has worked in the same role for at least 12 weeks then they are protected by the **Agency Worker Regulations 2010**. The Regulations state that the worker is entitled to the same basic terms and conditions as he would have been had he been recruited directly by the employer.

Rehabilitation of Offenders

The Rehabilitation of Offenders Act 1974

This Act applies to England, Scotland and Wales, and is aimed at helping people who have been convicted of a criminal offence and who have not re-offended since.

Anyone who has been convicted of a criminal offence, and received a sentence of not more than two and a half years in prison, benefits as a result of the Act, if he or she is not convicted again during a specified period otherwise known as the 'rehabilitation period'. After the rehabilitation period a conviction becomes **spent** and the offender has two basic rights in seeking employment:

1. The right not to reveal the spent conviction on an application.

2. The right not to be dismissed due to the spent conviction.

The aim of the rehabilitation of Offender Act 1974 (ROA) is to ensure that if an individual has made a genuine effort to be rehabilitated into society after the conviction of a criminal offence, he will be protected from having to disclose his criminal past. Provided the individual does not commit a serious offence within the rehabilitation period, he is to be regarded at the end of that time as a rehabilitated person and his conviction will be treated as if it had never happened. The general rule is that the length of the rehabilitation period will depend on the age of the offender at the time of the conviction and the sentence given for that particular offence.

Rehabilitation periods

Sentence length	***Rehabilitation period***
Community order (& Youth Rehabilitation Order)	*1 year*
Fine	*1 year (from date of conviction)*
Absolute discharge	*None*
Conditional discharge	*Period of order*
0 - 6 months	*2 years*
6 - 30 months	*4 years*
30 months - 4 years	*7 years*
Over 4 years	*Never spent*

The above periods are halved for persons under 18 at the date of conviction (except for custodial sentences of up to 6 months where the buffer period will be 18 months for persons under 18 at the date of conviction).

Once the person becomes rehabilitated he cannot be asked questions about the offence and, if he wishes, can deny any knowledge of it. He cannot be treated any less favourably because of any 'spent' conviction.

S4(3(b) of the Act states that an employee cannot be dismissed if he has a 'spent' conviction or for his failure to disclose that he has a previous conviction – neither can he be excluded from training, holding any offence, profession, occupation or for treating him in any way less favourably than the employer treats or would treat others. In *Hendry v Scottish Liberal Club* [1997] one of the reasons why the claimant was dismissed was connected to the discovery that he had been convicted many years previously of possessing cannabis. This conviction was spent and therefore this was not a fair reason for dismissal. In *Property Guards Ltd v Taylor and Kershaw* it was held to be unfair dismissal after two security guards signed a document stating that they had never been guilty of a criminal offence but were later dismissed when the employer discovered that they had spent convictions for minor offences.

See also *Brooks v Ladbroke Lucky Seven Entertainment* [1977] IRLIB

A number of occupations are excluded from the provisions of the Act and for these professions, the candidate must tell the truth about his past. All cautions and convictions must be declared if the employment involves:-

- working with children or vulnerable adults
- health, pharmaceutical or legal industries
- Banking and financial roles

- Any roles related to national security

If an exemption exists, the employer is obliged to note this in the job advertisement.

Wood v Coverage Care Ltd [1996] IRLR 264, EAT

Changes were made in 2015 which altered the details prospective employees are required to disclose to potential employers about their past convictions.

Firstly, changes were made to the Data Protection Act 1998 so that job seekers who have committed less serious crimes will now have a better chance of finding work. Under s56 it is now a criminal offence for a person to require someone else to produce information about their convictions or cautions as a condition of their employment, except where the relevant records are required by law or where disclosure is justified in the public interest, for example where a person is applying for a role involving interaction with vulnerable members of society – eg children/elderly those with mental health issues.

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2015

Also in 2015, the Ministry of Justice's changes to the Rehabilitation of Offenders Act came into force. As a result, people applying for jobs in any way connected to regulated activity regarding children, vulnerable adults or NHS security management can now be asked by prospective employers about spent convictions and cautions (except where they are 'protected'* convictions and cautions). Regulated activity covers any role, either paid or voluntary, involving interaction with children or vulnerable members of society, for example patients or the elderly. Convictions/cautions for sexual and violent offences are likely never to be protected and, in principle, will always need to be disclosed to potential employers.

On 22 January 2016 the High Court ruled that excessive disclosure of minor historical criminal convictions in England and Wales is unlawful under Article 8 of the Human Rights Act, the right to a private and family life.

There is no evidence that minor historic convictions link to current offending behaviour but there is significant evidence to show that minor historical convictions are linked with low pay and unemployment in the long term and this s is particularly true for women with convictions, where their median income is less than half the median income of a 24 year old, eight years after their conviction. This is excessive in comparison to the gender pay gap. When convictions combine with protected characteristics it could be argued that the historical convictions allow employers to reinforce or justify stereotyping and it has a multiplying effect of disadvantage.

Lecture 6: Wrongful and Constructive Dismissal

You will remember that employment protection is provided by the Employment Rights Act 1996. Here we consider how a contract can come to an end.

Employment may be terminated in a number of ways:

Resignation – notice given by the employee.

Consensual Termination – the employer and employee may reach an agreement about the employment ending, for example in relation to an early retirement scheme that the employer offers on certain terms.

Death - employment ends automatically on the death of the employee.

Dismissal - the employer ends the employment by dismissing the employee with or without notice – this includes a failure to renew a fixed term contract. The employee may also be constructively dismissed where s/he resigns in response to a breach of contract by the employer (see below).

Resignation

The employee may hand in his or her notice indicating the date s/he intends to leave. This should be done in writing, but is effective whether it is done orally or in writing. An employer cannot presume that an employee has resigned if s/he fails to turn up at work, and in this situation, an employer should contact the employee and try to get them to return for investigation and possibly a disciplinary for unauthorised absence. If s/he fails to attend for work and/or contact the employer then the employer should send a letter dismissing the employee enclosing their P45.

Zulhayir v JJ Food Services 2011

Retirement

Since October 2011 it has not been lawful for employers to terminate their employees' contracts because of age ie for retirement. Therefore it is only employees who are entitled to make the decision that they wish to retire. If an employer wishes to terminate the employment of an older member of staff, they will have to do it on the normal grounds of competence, health or misconduct and treat this employee exactly as they would have done a younger employee. This is discussed in the lecture relating to fair reasons for dismissal.

DISMISSAL

There are only two types of unlawful dismissal

Wrongful dismissal – breach of contract

Unfair Dismissal – breach of statutory right

Constructive dismissal is either constructive wrongful dismissal or constructive unfair dismissal – discussed below

Wrongful Dismissal (s95 ERA 1996)

Remember, this is dismissal in breach of the employee's contract and has nothing to do with whether the employer acted reasonably.

1. **Termination by dismissal**

- a) Dismissal by Notice. The employer has a **contractual** right to dismiss for any reason (or no reason whatsoever) providing the employee receives due notice. The period of notice will normally be expressly stated otherwise there will be an implied term of reasonable notice.

  Minimum periods see s.86 ERA 1996.

- b) Summary Dismissal. Summary dismissal (i.e. without notice) will, prima facie, constitute a breach of contract – as will termination of a fixed-term contract prior to its expiry. Dismissal in breach of contract is termed wrongful dismissal. However, an employee who commits gross misconduct can be summarily dismissed (as the employee will have breached a condition of the contract). N.B. the misconduct must go the root of the contract and thus constitute a repudiatory act by the employee. See: *Laws v London Chronicle Ltd* [1959] 2 ALL ER 285.Cf. *Pepper v Webb* [1969] 2 ALL ER 216 and *Wilson v Racher* [1974] ICR 428; IRLR 114

- c) Constructive Dismissal. A constructive dismissal occurs where an employee resigns in response to the conduct of the employer. For there to be a constructive dismissal, it is not enough that the employer has treated the employee unreasonably, the employer's conduct must amount to a repudiatory breach of an express or implied term of the employment contract. See: *Western Excavating Ltd v Sharp* [1978] ICR 221; IRLR 27.
  Note that it was subsequently made clear that the employer does not owe a general duty to act REASONABLY: *White v Reflecting Roadstuds Ltd* [1991] IRLR 331

Examples of breaches of express terms may include imposition of a pay cut, unilateral changes to contractual hours and demotions. However, remember the employer's breach must go to the root of the contract (i.e. be a breach of a condition) and the employee may be deemed to have affirmed the breach if he/she does not act reasonably promptly. The implied duty on the employer not to destroy mutual trust and confidence is of primary importance with respect to constructive dismissal. Duty to maintain Mutual Trust and Confidence (or trust and respect). Most significantly this duty requires employers to treat employees with respect. See lecture notes on express and implied terms.

Who can bring a claim for Wrongful Dismissal?

Wrongful dismissal and unfair dismissal are quite different however, in some circumstances an employee can bring a claim for both (and as we will see, can also bring a claim for discrimination at the same time).

The important thing to remember is that to bring a claim for unfair dismissal, (generally) an employee must have worked for the firm for two years therefore it might be the case that bringing a claim for wrongful dismissal is his only option. The introduction of unfair dismissal was largely as a result of the realisation that wrongful dismissal protection failed to adequately protect employees. Groups of employees who do not quality for unfair dismissal or who are seeking higher levels of compensation than can be paid under unfair dismissal may bring a claim for wrongful dismissal

For example:

> Where the employee is highly paid and is dismissed without their full contractual notice or without use of a contractual disciplinary procedure
>
> Where the employee does not qualify for unfair dismissal because he is employed in an employment area which is not covered by the Act – Police/Armed Forces etc.
>
> Where the employee's compensation under unfair dismissal (which is capped) is considerably less because the remedy under unfair dismissal takes into account contributory negligence (the employee is dismissed without the correct procedure but has heavily responsible because of his own conduct).
>
> Where the employee is 'out of time' to bring a claim of unfair dismissal to an employment tribunal – a claim for wrongful dismissal can be brought to the County Court up to six years after the incident.

Remedies

As wrongful dismissal is dismissal in breach of contract – it follows the normal rules for calculating contractual damages apply (see e.g. *Addis v. Gramaphone Co Ltd* [1909] AC 488; reaffirmed in *Bliss v. South East Thames Regional Health Authority [1987] ICR 700).*

Contractual damages aim to put the injured party in the position they would have been had the contract been properly performed.

In contracts of indefinite duration (as opposed to fixed-term ones) there inevitably is a term that the contract can be brought to an end by giving notice. Accordingly, damages for wrongful dismissal are often restricted to the pay during the period of lawful notice which should have been given (whereas in the case of fixed-term contracts this could be until the end of the term). If there is a contractual disciplinary procedure, the award may also include damages for the time that would have been taken for that disciplinary procedure to be completed (as that is a term of the contract).

In very rare situations it is possible to recover damages for loss of reputation or future prospects on the labour market where the employer is in breach of the duty of trust and confidence – the so-called 'stigma damages' in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606. However, it should be noted that this is very rare.

While contractual damages are not strictly limited to pecuniary loss, damages for wrongful dismissal are limited to pecuniary loss. The manner of the dismissal, even if causing emotional distress or consequential unemployment, cannot be the basis of a claim for damages (See Johnson v Unisys Ltd [2001] IRLR 279 (HL). Nor can damages be granted to compensate for the loss of opportunity to claim unfair dismissal (Virgin Net v Harper Ltd [2004] IRLR 390, CA).

As is the norm with contractual damages, the employee is under a duty to mitigate, i.e. take reasonable steps to minimise or reduce the loss resulting from the wrongful dismissal.

Pay In Lieu of Notice

Pay in lieu of notice (or PILON), if there is a contractual provision allowing it, it would prevent a dismissal from being wrongful. If there is no contractual provision then making a payment in lieu of notice does not stop the dismissal from being wrongful but does provide the employee in effect with damages upfront (but it may render any post-employment restrictive covenant – e.g. not working in the same field and in the same area for a set period of time – ineffective as the contract was ended wrongfully). Whether bonuses are to be taken into account would depend on the terms of the contract (in *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350 the PILON clause was silent as to the matter of bonuses while the bonus clause held that bonuses were for employees leading a majority of the CA to hold that as he was no longer an employee on the due date he was not entitled to a bonus element).

Injunctions etc.

In certain circumstances, an injunction may be granted (e.g. keeping the contract alive long enough to allow for a contractual procedure to be completed, *Irani v Southampton and SW Hants Health Authority* [1985] ICR 590, *Robb v Hammersmith & Fulham LBS* [1991] IRLR 72).

However, injunctions play a minor role, not least because of the nature of the contract: Fry LJ in De Francesco v Barnum (1890) stated 'I think the courts are bound to be jealous lest they should turn contracts of service into contracts of slavery' – and this has been given statutory force by s.236 Trade Union and Labour Relations (Consolidation) Act 1992 which holds that no court may make an order compelling an employee to work (a principle which is interpreted as being reciprocal, i.e. an employer cannot, either rightly or easily, be made to employ someone).

As wrongful dismissal is a claim for breach of contract, claims can be – and in the past had to be – made in the ordinary civil courts. Claimants can now go to an employment tribunal (designed to be swifter, cheaper, less formal) so long as the sum sought is under £25,000. Remember, where the claim is brought in an Employment Tribunal a failure to follow the principles in the new ACAS code may lead to compensation for wrongful dismissal being reduced or increased by up to 25% depending on whether the failure is attributable to the employee or the employer and the severity of the failure. Where the claim is brought to the County Court (or High Court), the potential uplift/reduction does not apply.

Consider the size of 'normal' wrongful dismissal damages. See also *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 re discretionary bonuses.

Lecture 7: Unfair Dismissal – Reasons and Remedies

Unfair Dismissal – Every employee has the right not to be unfairly dismissed (s94) ERA 1996

This is where the employee is arguing that:-

The reason given for the dismissal is unjustified in the circumstances, or dismissal is a disproportionate response to what has occurred and/or, the procedure that the employer has followed is defective.

Please ensure you read the terminology regarding dismissal on page 526 of the textbook.

In order to make a claim for unfair dismissal the following must be proved.

For the person is qualified to make a claim – they must be:-

An employee

Working or based in the UK

Have completed the minimum required continuous service (1 year if the employee started work before 6/4/12, or 2 years if s/he commenced service on or after 6/4/12)

There has been a dismissal.

The Employment Rights Act 1996 defines three categories of reasons for dismissal.

Fairness in relation to dismissal is dealt with under s98 ERA 1996

Automatically fair reasons

Automatically unfair reasons

Potentially fair reasons

There are only two categories of **automatically fair** reasons why an employer can dismiss someone.

Firstly for national security reasons

Secondly for unofficial industrial action - that is to say when employees organise unofficial industrial action outside the sanctions of the recognised trade union.

Automatic Unfair Dismissal

There are a set of underlying reasons for dismissal which are deemed to be automatically unfair. In some cases, the employer will have attempted to hide the real reason for dismissal by using some other excuse, such as poor performance.

Because this protection is deemed particularly important in that it protects employees from employers who seek to take away their most basic rights, it does not require a one year's qualifying service and several of the grounds provide for a higher level of compensation. There is no single source of law which sets out these rights – eg some may be found in the ERA 1996 while others will be stated in the Equality Act 2010 – and the list is growing!

Dismissal for a reason relating to pregnancy or maternity

Dismissal for a health and safety reason – eg refusing to work in an unsafe location or with unsafe materials

Dismissal because of a spent conviction – **note 2 years continuous service is still required.**

Dismissal for refusing to work on a Sunday (retail and betting shop only and subject to individual contracts)

Dismissal for a reason related to trade union activity (or non-trade union activity)

Dismissal for taking part in official industrial action (during the first twelve weeks of the action)

Dismissal in contravention of the part time workers or fixed term workers regulations

Dismissal for undertaking any duties related to an occupational pension fund trustee/employee representative/member of European Works Council

Dismissal for attending as a jury member

Dismissal for asserting statutory right - eg national minimum wage/Public Interest Disclosure Act/right maternity leave/right to paternity leave etc.

Dismissal by reason of a transfer of undertakings. This occurs when one firm is transferred by sale to another and, as a result, the employee is dismissed – **note 2 years continuous service is still required.**

Remember that it is **only** employees who can claim unfair dismissal but this does not mean that workers do not have rights. For example if a pregnant worker is dismissed because she is pregnant, she may be able to bring a claim under the Equality Act but she will not be able to claim unfair dismissal.

Ajayi v Aitch Care Homes 2012

Evans v Open Sight 2012 – a probationary part-time employee was moved to a full time role within her probation period and then agreed to accompany two colleagues, including her boss, at disciplinary proceedings against them. Her new boss, who had initiated those proceedings, dismissed her for poor performance at the end of her probation. The court concluded that there was no evidence that her performance was poor, in fact it was quite the

opposite, and the real reason for her dismissal was her support for her old boss and colleague.

Potentially fair reasons

Assuming that there has been a dismissal, it is for the employer to establish the reason for the dismissal and that the reason falls into one of the potentially fair categories in s98 ERA 1996:-

Capability and qualifications (covers competence and sickness, also whether the employee satisfies the qualifications required to continue in the job eg passing accountancy exams)

Conduct- must be gross misconduct to justify dismissal

Illegality (statutory bar)

Redundancy

Some other substantial reason

Competence and Capability

Competence Issues caused by Sickness

If an employee has a long term sickness problem, or is consistently absent for sickness on a short term basis, the employer will have to consider its position.

If the employee is suffering from a disability, the employer will need full medical information before considering dismissal and will only be able to do this if all reasonable adjustments have been tried to endeavour to get the employee back to work.

With intermittent absences, the employee will have to examine the medical position but, if any adjustments that are tried do not work, and there is no improvement in the employee's attendance, it may well be reasonable to dismiss.

Managing Performance - Competence

Why do we manage performance?

Managing performance is about recognising good performers and motivating them to stay and grow the business.

Managing performance is also about addressing poor performance and helping people to improve, but if managers do not then they are liable to spend longer on managing poor staff, and lose good performers who become disillusioned, also there are likely to be morale issues within a team

Where the allegation is of general poor performance, critical aspects are:

The setting of standards – the expectations of the employer should be clearly documented as far as possible in terms of performance and objectives – see process below

Communication with the employee – the employee should not be in any doubt as to where s/he is failing to meet these objectives and this should be clearly explained. Although any initial meeting is informal in tone and is not part of any formal disciplinary, the whole conversation should be documented and actions to be taken should be recorded. The employee should always have an opportunity to state his case – this might include issues around sickness, home related or work related difficulties which are affecting performance.

Outcome of the meeting - this might include:-

> Training to be planned – whether formal or 'on the job' – if the latter, then who is to do it and when?
>
> Addressing particular issues which have been raised e.g. relationships at work, sickness of the employee etc.
>
> Mentoring or coaching – where this is appropriate, what arrangements have been/will be made?
>
> Where are the goalposts? What is the employee expected to have achieved realistically by the time of the next meeting, or what other action should have been taken by each side?
>
> Feedback – when is the next meeting, and where should the employee go if s/he has problems or issues to raise before this?

Once this process has been commenced, a continuing failure to meet objectives and to perform can result in the employee being dismissed (s98 ERA 1996).

Taylor v Alidair (1978)

Davidson v Kent Meters (1975)

Other reasons for poor performance

It may be that during this informal preliminary meeting, or later in the process, the employee discloses that s/he has another problem which is leading, or contributing, to the problems of poor performance.

Illness or disability – the employee may indicate that he has a medical condition or health concerns. It will be inadvisable for the employer to take any further action until the extent and effect of this has been determined. Once it has, if the condition is a disability, the employer will have to consider what reasonable adjustments can be made to accommodate this disability

Stress - the employee may state that s/he is under stress for personal reasons or because of work-related issues. Again the employer will need information about the nature and extent of

the stressor. If it is a home related issue, such as a divorce, debt or serious illness in the family, most employers would give the employee some latitude. A tribunal would almost certainly take a dim view of a dismissal for poor performance in the teeth of serious personal problems. If a work related issue is cited, such as excessive workload or bullying, then the employer should carefully investigate the allegations in order to decide whether they are justified, taking appropriate action eg reduction of workload, disciplinary action against bully, where appropriate.

Formal performance management procedure

When concerns about performance arise it is necessary to carry out a formal procedure.

Once the informal stage has taken place, if there has been no improvement, or insufficient progress towards the objectives, the employer should move into a more formal process. Many employers have a performance management procedure, but if there is no such written procedure, it is acceptable to follow the pattern of the standard disciplinary procedure. The employee is effectively taken through three stages similar to the three warnings, but the meetings are different in that there is no issue of conduct or wilful behaviour; it is a question of competence. The employer will set objectives, discuss with the employee how they may be achieved and what training and support might be required. If, despite this, the employee does not reach a satisfactory standard, then the employer moves to the next stage.

Ultimately, the employee may be dismissed at the final meeting, with notice. It is critical, as always, that these meetings are carefully documented and backed up by letter to the employee confirming the outcome of the discussions. The dismissal procedure should conform with the ACAS Code of Practice, otherwise there is a danger that the dismissal could be seen to be unfair.

Misconduct

The allegation here is that the employee has been guilty of wilful misbehaviour.

Investigation

Before taking any disciplinary action for misconduct, the employer will need to be sure of its grounds. Other than in exceptional cases, the employer will normally launch an investigation into the misconduct. In cases where the allegation is of gross misconduct, it would normally be appropriate to suspend the employee, normally on full pay, pending the outcome of the investigation.

Any investigation will normally be conducted by the employee's line manager or some other suitable person. They will seek to interview witnesses, review any documents and try to establish exactly what has happened. They will then recommend whether disciplinary action should be taken.

A more senior manager will normally review the investigation, and then decide whether to accept the recommendation. If they do, a disciplinary panel or disciplinary officer will be appointed to hear the internal disciplinary. That person or person(s) must be unbiased as far as possible.

This person(s) will then hear the evidence, including that given by the investigating officer who will present his/her report, any other witnesses on either side, and very importantly, the employee him/herself. They will then make a decision.

Misconduct tends to be divided between -

Gross misconduct – examples are dishonesty, violence, harassment or bullying of other employees and this kind of conduct, if found to be proved, will tend to lead to instant or summary dismissal.

Serious misconduct – this is also very serious, but tends to matters that might constitute gross misconduct where the employee is able to show that there are mitigating circumstances and persuades the employer to give him/her a last chance by issuing a formal final written warning.

Minor misconduct – this is misconduct which will not lead to dismissal, but leads to a warning, whether a written warning or a formal verbal warning – it is up the employer which to issue and is a matter of judgment.

All warnings will last for a specific period of time – tendency is for verbal warnings to last 6 months and written warnings to last 12 months. If the misconduct is repeated within this period, the employer will move to the next warning stage or to dismissal.

A key question relating to misconduct is whether particular behaviour amounts to gross misconduct or is merely an instance of serious misconduct. This matters because a dismissal will only be fair if a **reasonable** employer could conclude it was gross misconduct.

Here are some cases on the difference between gross misconduct which can lead to dismissal and serious or ordinary misconduct which should not:

Weston Recovery Services v Fisher (2010)
Look Ahead Housing & Care Ltd v Rudder (2011)
Quadrant Catering v Smith (2011)
Pepper v Webb [1969] 2 All ER 216
Wilson v Racher [1974] ICR 428

Misconduct outside work

Where the employee has been guilty of misconduct at work, the employer will need to carry out the procedure above and a decision will be taken as to whether to take disciplinary action. It is more complicated if the misconduct has taken place outside work.

It has generally been held that where the employee has committed some offence of dishonesty, the employer will generally be justified in dismissing him or her. It will generally

be necessary to show that there is a real impact on the employee performing his or her role, or some reputational issue.

Leach v Office of Communications 2012

Gosden v Lifeline Project Ltd [2012]

In Gosden a tribunal held that an employer had fairly dismissed an employee who had sent an offensive chain e-mail, outside working hours and from his home computer, to the home computer of a friend who worked for the employer's client. The e-mail eventually entered the client's computer system and caused the employer's reputation with that client to be damaged. The decision to dismiss the employee was reasonable. The e-mail had been a 'chain' type mail which had at the bottom 'it is your duty to pass this on', and it was clearly intended for the friend to pass on.

Illegality

This is a legitimate reason for dismissal and is confined to situations where it is no longer legal for the employee to be employed in that role eg s/he is a professional who has lost their licence to practice, a company director who has been disqualified by the court or a driver who has lost their licence.

Redundancy

There are cases where an employee has been deemed to be 'redundant' – the job no longer exists, when the reality is that the employer has used this as a tool to dismiss an employee. There are strict rules regarding redundancy and it is up to the employer to demonstrate that the job does not exist or that the reason for employment does not exist – eg a factory has closed (s139 ERA 1996)

Some other substantial reason

This is confined to reasons which do not fit neatly into one of the other categories but which the tribunal still considers mean that the employer can legitimately claim that there is a sufficient reason for a lawful dismissal.

Examples include

A refusal to accept a reduction in pay or benefits which has been imposed by the employer on the workforce for good economic reasons and which the overwhelming majority of his or her colleagues have accepted.

Reputational issues where the employee is involved in lawful conduct which may impact eg in *Pay v Lancaster Probation Authority* , Pay was dismissed because his employer discovered that he was a leading person in the UK branch of a French sado-masochistic society and was involved in a local club which promoted these activities. The employer felt

that his employment as a senior probation officer assisting young offenders who had been guilty of sex offences was prejudiced by his activities as would the authority's reputation if his activities became general knowledge.

Remedies

There are 4 potential remedies for unfair dismissal in the ERA 1996:

- Reinstatement – **s114**
- Re-engagement – **s115**
- Compensation – **s112 and s118-127B** This is the main and most common remedy.
- Declaration of unfair dismissal.

Reinstatement and Re-engagement

If the tribunal finds a dismissal unfair, it must explain to the complainant that these orders are available, and ask if the employee wants the tribunal to make such an order.

Reinstatement is taking the employee back to his/her job, treating him/her as if s/he were never dismissed, inclusive of benefits such as increments/promotion etc. S/he will get their old job back on the same terms and conditions.

This will not be ordered if the claimant does not want it, or where it is not practicable.

Re-engagement is where the employee is taken back by the employer or by a successor or associated employer, in an employment comparable to that from which s/he was dismissed or other suitable employment. Here the tribunal specifies the identity of the engaging employer, the nature of the employment and the rate of remuneration. In either case, continuity is preserved.

These orders are extremely rare, as it is unusual for the claimant to want anything other than compensation – they are awarded in less than 1% of cases.

Compensation

Compensation is the main remedy and is divided up into various 'heads'. The employee is eligible for a 'basic award' calculated in the same way as redundancy payment and a 'compensatory' award, which seeks to put a figure on the employee's actual loss. Both heads are subject to a maximum and tribunals are now permitted to award interest on their awards.

Basic Award

Dependent upon the employee's length of service and his/her pay, the award can be reduced by the amount of any redundancy pay received, and may also be reduced for

contributory fault, where the employee has refused an offer of reinstatement, refused to attend any disciplinary proceedings or where the employer has made some ex gratia payment meant to offset legal rights. An uplift may also apply because of the procedure/lack of procedure by the employer.

The basic aware is **calculated** by multiplying a **weekly pay** amount up to a maximum limit (see below) by the **number of years of service (up to 20 years)**.

The employee receives **1 week** of pay for each year he worked between the ages of **22 and 41**. He receives **1.5 week's** pay for each year he worked over the age of **41**, and **0.5 week's** pay for each year between the ages of **18 and 22**.

The *Polkey* Rule

The case of *Polkey v AE Dayton Services Ltd [1988] AC 344* ruled that any award of compensation may be reduced (by up to 100%) to reflect the employee's responsibility for his dismissal – if an employee caused his dismissal by serious misconduct then he may not be awarded compensation.

The Compensatory Award

The objective of this award is to compensate the employee to some extent for the loss of his job, subject to a maximum. The onus is on the employee to produce evidence of his/her loss.

It should be the amount the tribunal considers to be just and equitable having regard to the loss sustained by the complainant.

There may easily be a nil compensatory award where there has been no loss, or where there has been a procedural defect, which would have made no difference to the decision to dismiss.

Also this may be the case where the original dismissal was on weak grounds, but later a cast iron case against the employee emerged.

The major headings are: -

(i) Loss up to the date of the hearing i.e. actual loss of income including loss of other benefits e.g. car.

(ii) Future loss - actual likely loss times a multiplier, taking into account matters such as local conditions, likely future occurrences in the complainant's life e.g. redundancy.

(iii) Loss of accrued rights - loss of statutory rights which depend on continuous service

(iv) Loss due to manner of dismissal - loss of dignity, 'name' in the industry etc.

(v) Loss of pension rights.

Compensation limits

Limit on weekly pay for calculation of basic award – **£489 (After 6th April 2017)**

Maximum basic award - **£14,670** (£489 x 1.5 week's pay x 20 years' service)

Maximum Compensatory award - **£80,451 (After 6th April 2017)**

Dismissal for making a protected disclosure (whistleblowing) - No limit

Discrimination – race, sex, disability, sexual orientation, religion or belief, age - No limit

Lecture 8: Unfair Dismissal – Reasonableness

Please read s98 ERA 1996

There are three stages to a claim of unfair dismissal

Stage 1

For the person is qualified to make a claim – they must:-

1 Be an employee

2 Working or based in the UK

3 Have completed the minimum required continuous service (1 year if the employee started work before 6/4/12, or 2 years if s/he commenced service on or after 6/4/12)

4 Have been dismissed.

Continuous service is not interrupted by:-

Sick or injured

On leave for under any of the family friendly rights

On annual leave

What is the termination date? (s97)

This is important for calculating how long the employment has been for continuous service purposes.

The employee must put in the claim no more than 3 months from the date of termination.

Vasella Ltd v Eyre 2012

E wished to resign from her job as an operations manager of an hotel in Glasgow and went into work on Sunday 21 November 2010 and hand delivered a sealed envelope containing her resignation for the attention of P, the hotel's general manager. P did not work on Sundays and she knew this – she asked the duty manager to put it in his pigeon hole but M told her that P was on leave and would not be back until Wednesday. She accepted this and left the envelope for him. Later that evening she e-mailed her letter to B, an executive PA at the company, B. B did not work on Sundays but read the e-mail and circulated the information to others in the company that evening. The letter of resignation was dated

Monday 22 November and stated that she wished to resign' with immediate effect'. On Monday, B replied to her e-mail accepting her resignation and stating that her last day of work would be Monday 22nd November. When she later put in a claim for unfair dismissal, there was a question of whether she was within the 3 months time limit for unfair dismissal and this depended on when her resignation took effect.

Held

A resignation does not have to be in any particular form as long as the employee clearly communicates to the employer that s/he is treating the employment as being at an end. Even though her letter was delivered to the hotel, it stated clearly that she was resigning on the following day and their response to her made it clear that that is what they believed. E had no reason to think that her decision to resign would have been communicated before the following day. E's resignation date was 22nd November and her claim was in time.

The effective date of termination is usually the date upon which notice expires, if it is given, or the date upon which an instant or summary dismissal takes place or the date upon which a fixed term contract that is not renewed expires.

The employee must have been dismissed

In order to make a claim of unfair dismissal, the employee must be able to show that s/he has been dismissed.

Futty v Brekkes

The employee does not have to prove anything other than these four elements.

Stage 2

It is for the employer to demonstrate the *reason for the dismissal* ('I dismissed Mrs Smith because I found evidence that she stole money from the till') and that the *reason falls within s98 ERA 1996*. (I dismissed Mrs Smith under the heading of **misconduct** – I found her conduct to be gross misconduct which entitled me to dismiss her')

Stage 3

It is then for the tribunal to establish whether the employer acted reasonably when dismissing the employee. **Please ensure you read *British Homes Stores Ltd v Burchell* 1980 which will help to explain reasonableness**

Reasonableness is divided into two.

Substantive reasonableness and Procedural reasonableness.

Substantive reasonableness - Was the action taken by the employer a reasonable response to what has occurred? What is meant is, for example, if the employee is late for work on two consecutive days, does this give the employer to right to dismiss? Was the employee guilty of misconduct or gross misconduct? Is there sufficient evidence? The employer can only dismiss if the employee is found guilty of gross misconduct following a full investigation – *Burchell v BHS* is the leading case on this issue. What is being asked is whether the sanction (dismissal) was the correct action for the employer to take or would a warning have been more appropriate? The test established in this case is the '**range or reasonable responses' – Is the decision one that a reasonable employer could make?**

This test represents wide discretion on the part of the employer – the employment tribunal is not willing to substitute its own decision for that of the employer, the question is whether or not a reasonable employer could decide in the way the employer in question did.

This test has arguably been modified in its effect by the case of *Newbound v Thames Water Utilities Ltd (2015) EWCA Civ 677* **(please read)** in which the Court of Appeal seems to be more willing to investigate the substantive merits of the employer's decision in finding no reasonable employer would reach the same decision.

Procedural Reasonableness - Whether or not the reason for the dismissal has been established and whether dismissal is a proportionate response to what has happened is one thing; the other is whether or not the employer has carried out a fair (reasonable) procedure. If this has not been done, then the dismissal will be unfair.

The issue is s98(4)(a) 'whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee' and whether he followed a reasonable procedure.

It is quite clear that the tribunal should hold the dismissal fair, even if in its opinion the employer was being harsh, provided the dismissal fell within the 'range of reasonable responses' within which one employer might decide to dismiss, whereas another might not.

The **tribunal** will have to be satisfied that dismissal is a proportionate response – it does this by applying the **'range of reasonable responses test.'**

The employer will have to follow the proper procedure. This should be set out in the employee handbook. The handbook should explain to the employee exactly what will happen if he/she takes action at work.

For example, the handbook may say that if the employee is late for three consecutive days, he/she will be subject to disciplinary action. When deciding any action to take, the employer MUST follow the procedure he has laid down in the handbook – he must act reasonably.

A failure to follow a reasonable procedure may render an otherwise fair dismissal, unfair.

Polkey v AE Dayton Services Ltd [1988] AC 344

Dismissal Procedure

REMEMBER, unfair procedure can make what would otherwise have been a fair dismissal, unfair. It is absolutely crucial that the proper procedure is followed.

With misconduct, competence and incapability dismissals, the standard is set by the **ACAS Code of Practice on Disciplinary and Grievance Procedures 2015** (can be found on www.acas.org.uk.). A failure to follow the recommendations therein will often count against an employer in judging the fairness of the dismissal. The standard procedures of most large employers conform to this.

Important points are:

It is crucial that any individual employee should be aware that s/he is to attend a disciplinary hearing. Employees must have notice of the charge against them.

Under s.13(4) of the Employment Relations Act 1999, the right to be accompanied applies to only those disciplinary hearings that could result in: the administration of a formal warning; the taking of some other action (for example dismissal or other disciplinary sanctions); or the confirmation of a warning or other action already issued or taken (ie an appeal hearing). Although the statutory right does not apply to an investigatory meeting, an employee may have the right to be accompanied under the employer's own disciplinary procedure.

Employers should try to ensure that the decision to dismiss is not taken by the person who has initiated the complaint or someone whose dealings with the employee might have already tainted his/her view of the case.

The employee should have an opportunity to put his/her side of the story - this is of vital importance.

The employer should talk to any witnesses and gather relevant documentation; there is no general principle that the employee must be shown the witness statements, as long as they are told the substance of the accusations.

The employee should be able to present evidence and/or cross-examine witnesses if s/he wishes.

It is not generally acceptable to dismiss an employee for a 'first offence' unless it is gross misconduct. He should normally be subject to a series of warnings before dismissal is an option. It will not be fair to take into account expired warnings in taking the decision to dismiss.

Reasons for the decision should be given and the panel should consider a full range of actions it might take, not just dismissal.

There should be a right of appeal against any disciplinary decision.

In order to justify a dismissal for misconduct, the employer will have to show that s/he honestly believed on reasonable grounds that the employee was guilty, and this belief must exist at the time that the employer took the decision to dismiss.

In order to back this up, the employer must show that s/he has carried out as much investigation into the matter as is reasonable in all the circumstances and this will depend, to some extent on the size and administrative resources of the employer.

The employer may not rely on after-acquired information to justify a previous dismissal, but where this was discovered during the appeal process, they may so rely.

With illness, the tenor of the procedure is different, but the principles are the same. Tribunals consistently stress that to warn a genuinely ill person is inappropriate - what is important is consultation and the gaining of medical evidence as to future prospects of the employee.

The ACAS Code

The general rules that employers should follow are:

The Code concentrates on disciplinary situations, which include misconduct or poor performance. It is legitimate to use a separate procedure to deal with performance issues, but the basic principles of fairness must be followed.

Principles

Disciplinary and grievance policies should be laid out in writing.

Where possible, employees should be involved in the development of policies.

Managers should be made aware of them.

Often formal action is necessary, but what is reasonable or justified will depend on size and resources of employer.

However, disciplinary matters should be dealt with fairly:

Employers and employees should deal with matters promptly eg meetings and decisions under the procedure.

Employers and employees should act consistently.

Employers should carry out any necessary investigations, to establish the facts.

Employers should inform employees of basis of the problems and given them an opportunity to put their case before decisions are made.

Employers should allow employees to be accompanied.

Appeal against any disciplinary sanction should always be allowed.

Disciplining Staff

Establish the Facts

Investigate without delay

Either

Hold an investigatory meeting without unreasonable delay, or

Collate evidence

If a disciplinary meeting results, a different person should investigate and conduct disciplinary if possible.

There is no statutory right to be accompanied at investigatory meeting, but employer procedure might allow it if employer is suspending with pay, should be as short as possible, kept under review and the suspension itself is not disciplinary action.

Inform the employee

If a disciplinary meeting is to be held, inform the employee in writing with enough information to be able to defend himself, and possible consequences, and copies of any written evidence, including statements to be included, and notify employee of time and date and venue, and advise employee of right to be accompanied.

Hold the Meeting

This must be done without unreasonable delay, but give enough time for the employee to prepare his or her case. Employers and employees should make ‘every effort’ to attend meeting.

The employer

explains the complaint; listens to employee’s response; gives employee the opportunity to ask questions, present evidence and call witnesses; gives employee opportunity to challenge employer’s witnesses; where either party intends to call witnesses, they should give notice to the other side.

Right to be accompanied

There is a statutory right to be accompanied where meeting could result in:

formal warning being issued; or

taking of some other disciplinary action or

the confirmation of such (ie appeal hearings)

The companion can be a workmate, TU Rep or official employed by TU (if a TU rep, they must be certified by Union as competent to accompany worker).

The companion can

address the hearing to sum up the employee’s case; respond on behalf of the worker to any views expressed at the meeting; confer with the employee during the hearing.

The companion cannot

answer questions on the worker’s behalf; address the hearing if the worker does not want this, or prevent the employer from explaining its case.

Decide on Appropriate Action

Inform employee in writing. The usual sanction is written warning, first or final. This should set out in writing the nature of misconduct/poor performance and what is required to improve.

The timescale for this

How long the warning will last and the consequences of any repetition.

If it is a dismissal, the employee should be informed

Reasons

Date of termination of contract

Period of notice

Right of appeal

If gross misconduct has taken place

Only an employee with the appropriate authority can take that decision

There must still be a fair process

Generally what constitutes gross misconduct should be set out by the employer.

Where an employee is persistently unable to attend a disciplinary hearing without reasonable cause, the employer should take a decision on the evidence available.

Opportunity to appeal

Should be heard without unreasonable time and delay

Ideally at an agreed time and place

Employees should set out grounds for appeal in writing

Where possible should be held by someone not previously involved in case

Workers have statutory right to be accompanied

Result should be conveyed to employee in writing.

Grievance Procedures

It is important that the employee is able to bring a grievance against anyone within the organisation, it fact, it is an implied term that a grievance and discipline procedure is in place. There is no set format for this, but the system must be robust and must provide the employee with an opportunity of raising issues within a confidential framework. The employee is entitled to raise any issue and his grievance must be heard in a timely manner.

The employee must also be satisfied that action is taken/or that his issue with dealt with/or that he has received a full explanation as to why this situation has occurred.

For example in organisation in A it has been decided that all grievance letters should be addressed to the HR Manager and that he/she will decide who is the most appropriate person to hear the grievance. If the grievance is in relation to the HR Manager him/herself, then the grievance letter is to be sent to a Senior Manager within the firm. In this scenario:-

Jo feels aggrieved because he feels that his Manager is not allowing him to take holiday to which Jo is entitled. Jo writes a simple grievance letter, the format of which has previously been set out by the HR Department. In the letter Jo states that he feels that he is being 'picked on' by his Manger because others in the department are able to take heir holidays when they choose. The grievance letter is sent to the HR Department who decide that they will write back to Jo and explain to him that they will speak to his Manager on his behalf and find out why holiday time is not being given. The HR Manager then arranges a meeting with Jo's Manager who states that the work Jo is involved in is critical for a major contract and that once the work is completed, Jo will be free to take holiday. The HR Manager points out to Jo's Manager that this bad feeling could have been avoided and that it is his responsibility to explain his decision to Jo and not to merely refuse his request for holiday. Jo's Manager then holds a meeting with Jo and explains the position, apologising for not explaining the situation more clearly in the first place. As a gesture of good will, the HR Department decides to award Jo (and other involved in this contract) an extra day's holiday for helping the organisation with this very important contract.

If a letter of grievance does not resolve the issue, the procedure becomes more formalised, again there is no set format for this.

In essence:-

The employer holds a meeting; formal meetings should be held without unreasonable delay.

Employers/employees and companions of the employee should make every effort to attend; employees should be allowed to explain their grievance and how they think it should be resolved, adjournment may be necessary if investigation is needed.

At all times, the employer must allow the employee to be accompanied, this also applies where the employee is complaining about the employer breaching a duty which is owed to the employee, which will be most usual cases.

The employer must decide on appropriate action and must then communicate this to the employee, and where appropriate, set out the action that the employer intends to take.

The employee should be informed that they have a right to appeal and the grounds of the appeal should be set out in writing without reasonable delay. The appeal meeting should be set without unreasonable delay and at a time and place which should be notified to the employee in advance. The appeal meeting should be heard without unreasonable delay by someone not previously involved in the case if possible. There is a statutory right to be accompanied and the outcome should be communicated to the employee in writing without unreasonable delay.

Overlapping grievance and disciplinary cases

Where an employee raises a grievance during the disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance.

Where the two are related it may be appropriate to deal with them concurrently.

Collective grievances

What is said above is not appropriate for grievance raised by 2+ people to a trade union – they should be dealt with by the organisation's process.

Lecture 9: Introduction to Discrimination Law

The law recognises the right of an individual worker to be treated equally with others regardless of factors which should be irrelevant in decision making.

The Equality Act 2010 provides protected related to protected characteristics as discussed below.

The word ‘discrimination’ simply means to decide between one thing and another. As a matter of course, employers will often have to ‘discriminate’ or make choices at work. The fact that an employer decides to employ one candidate rather than another, or decides to promote one member of staff rather than another is itself a form of discrimination. The important thing is that the employer does not make the decision, or appear to do so on an unlawful basis; so the issue to be determined is the reason for the decision that was made.

Why do we have a law about equality of opportunity?

It has an important role in protecting the dignity of the individual worker

It tries to correct the disadvantages which are suffered by certain groups (perhaps in introducing some element of ‘affirmative action or positive discrimination’)

It tries to overcome the failure of the market by bringing down barriers against certain excluded groups.

General Principles

Anti-discrimination legislation has a number of features which make it different from standard employment protection, which we discuss later:

There is no qualifying period of employment required before the worker can take advantage of the protection (unlike, eg unfair dismissal)

All forms of discrimination allow for unlimited damages, and the legal costs involved in defending claims is high because they tend to be complicated

There is a reversed burden of proof once the applicant shows that there is a genuine question mark over the decision and prima facie evidence of discrimination is found i.e. the employer has to show that in taking the decision or action in question there was not unlawful discrimination – (EqAct 2010 s136)

A discrimination action is often interesting enough to generate unwelcome publicity

The law applies to all persons who work for the organisation, whether employees, workers or contractors and also to ex-employees, for example, where a failure to give a reference is claimed to be victimisation, and also to job applicants.

The Equality Act 2010 (EqAct 2010) was passed to place all anti-discrimination provisions under a single consolidated statute. The Act also reformed the law in the number of areas, and reference is made to this in the relevant sections.

'Protected Characteristics' (s4)

Just because a decision seems unfair, does not necessarily mean that it is unlawful. In order to be so, the less favourable treatment needs to because of certain protected characteristics.

Less favourable treatment will be unlawful if it is because a person has the following characteristics

Age (s5)

Disability (s6)

Gender reassignment (s7)

Marriage and Civil Partnership (s8)

Pregnancy and Maternity (s18)

Race (which includes colour, nationality or ethnic or national origin) (s9)

Religion or Belief (s10)

Sex (s11)

Sexual Orientation (s12)

There is also separate provision which prevents discrimination against part-time workers, and those on fixed term contracts. Part Time workers are protected by the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and Fixed term workers are protected by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Part-timers' treatment and terms and conditions should be equalised with full timers and the same applies to fixed term employees (other than the fact that their contract is set to run for a specific period, rather than being permanent).

Discrimination Generally

What kind of act is discriminatory?

In all cases, the legislation provides for **four** main kinds of discrimination, and a fifth more restricted type.

1. **Direct Discrimination (s13)** – **less favourable treatment** specifically because of one of the protected characteristics, for example, the person's sex, race, colour, nationality or ethnic or national origin, disability, gender reassignment or sexual orientation. This might be, for example, a refusal to employ, a denial of promotion or training, a dismissal or redundancy or undermining someone because of a protected characteristic. Except for Age, direct discrimination cannot be justified

2. **Indirect Discrimination (s19)** – where the employer uses a provision, criterion or practice which disadvantages one or more of these protected groups and which cannot be objectively justified. For example, a required level of English to qualify for a job might discriminate against persons who have not been born in the UK, may have had to learn the language late and may not have such a good command of English. A minimum height requirement will discriminate against women, as will a strength requirement; a dexterity requirement may discriminate indirectly against men. The question in all cases will be; can that requirement or criterion be justified in the context of the genuine requirements of the job?

3. **Harassment (s26)** - unwanted conduct violating the dignity of men and women in the workplace and causing a hostile and intimidating atmosphere for them, and which takes place because of a protected characteristic The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient, and it is reasonable for them to have that effect.

4. **Victimisation (s27)** - less favourable treatment meted out to any person related to the use of this legislation, e.g. because a person has brought unlawful discrimination proceedings, or assisted another person to do so.

5. Discrimination based on association or perception or because someone is deterred from doing something (the definition in s13 is wide enough to cover this type of discrimination and this type of discrimination also comes under the heading of direct discrimination)

It is also unlawful for an individual to 'instruct' someone to discriminate. If, for example senior management require a manager to discriminate, senior management will also be responsible for the discrimination (s111). Employers (management) also have a responsible to ensure that discrimination in the workplace does not occur. Employers are liable for the acts of their employees (s109) and anything done in employment must be treated as also done by the employer. The only defence the employer will have is if he can demonstrate that he took all reasonable steps to prevent the discrimination from occurring (s109(4).

Please note that on page 592 of the text dual discrimination is identified. This has not been brought into legislation.

Where less favourable treatment of the worker is not based on his or her own particular protected characteristic eg disability or age or race, but is because of his or her association with another person who does have those particular characteristics, that treatment will be unlawful. An example might be that a worker is treated less favourably by the employer because of the time s/he is spending away from work caring for an elderly relative, or a disabled child. This will be a form of direct discrimination (s13) because of the worker's association with someone who is disabled or someone who is aged. The perception discrimination provisions make it unlawful to treat someone less favourably because it is perceived that they are eg gay, or a Muslim, even though, in fact, they are not, but the less favourable treatment takes place 'as if' they were gay. An example might be that a worker is subjected to homophobic abuse on the basis that he is gay, when in fact he is heterosexual or an application from a prospective employee which is rejected because her name makes her 'sound' like she is from an Africa.

How does this apply in employment? (s39)

An employer must not unlawfully discriminate against someone:

in the arrangements he or she makes for the purpose of determining who should be offered that employment, or

in the terms on which he or she offers the person that employment, or

by refusing or deliberately omitting to offer that employment.

in the way it affords access to that person to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford access to them, or

by dismissing him/ her, or subjecting him/her to any other detriment.

In relation to direct discrimination, the motive of the person discriminating is irrelevant – even if he means well, it will still be discriminatory. Please see *James v Eastleigh Borough Council* [1990]/*Amnesty International v Ahmed* [2009]/*Nagarajan v London Regiosnal Transport* [1999]

Positive action (s158)

Employers have been able to take 'positive action' for many years to reduce the effect of discrimination on the make-up of the workforce. Where an employer has a particularly low proportion of a particular group, in practice this is most likely to be in relation to one sex or a racial group:

in one department or part of the business compared with the rest of the organisation, or

in the business compared with the proportion of that group in the wider community.

The employer is entitled to attempt to redress that balance by:

placing job advertisements in particular parts of the press

by using employment agencies where such groups are concentrated

by aiming recruitment or training schemes at school leavers from particular groups

by encouraging these employees to apply for promotion or training opportunities

by providing special training for promotion or skills to this group.

These provisions are aimed at encouraging participation and up-skilling members of unrepresented groups. Ultimately, however, the actual decision making around recruitment, promotion or training must be fair and not unlawful discrimination.

Positive Discrimination

This is very different from Positive Action. From April 2011, the **Equality Act 2010 s159** introduced a **very limited** ability for employers to discriminate positively. This is specifically in the area of recruitment and promotion. The employer is entitled to take a protected characteristic into account when deciding who to recruit or promote where people having one of the protected characteristics are at a disadvantage or are underrepresented in its workforce. This is quite limited, as it only applies where the candidates are **otherwise equally qualified**, and it is not lawful to have some kind of blanket rule of treating candidates with a particular characteristic more favourably than others.

Harassment (s26)

It is unlawful to harass a worker at work on the basis of any of the protected characteristics. This means that the employer has an obligation to take all reasonable steps to ensure that such harassment does not take place and to support the worker if it does. If this is not done, the liability for the harassment may shift to the employer.

The potential damages can be extremely high – even in an isolated example of severe harassment, the employer will have to demonstrate that it has a well enforced and well understood harassment policy and that it takes such matters very seriously.

The vicarious liability of an employer for acts of harassment by an employee towards a fellow employee usually extends to work related social activities, but not purely private social engagements (**s109**).

Recent changes to law on harassment

There is a new approach to the definition of sexual harassment, which has the effect of simplifying it and widening it. The general harassment provisions apply to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. They make it unlawful for A to harass B by engaging in conduct 'related to' one of these protected characteristics where the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Thus it would obviously cover a situation where B was being harassed because he was gay, but it also covers any situation where the conduct is 'related' to that characteristic and so it would cover a situation where offensive remarks were made to C about eg his son's disability, or D about his daughter's sexual orientation, or indeed remarks made about one worker in the hearing of another, who is upset about the treatment of his colleague. This means that someone has a perfect right to sue based on upset they are suffering because of conduct which relates to another person's sexuality or race.

An employer will only be able to protect himself from a liability if he can demonstrate that he has taken 'all reasonable steps' to prevent the harassment (s109).

Occupational requirements

Under the previous law, exceptions where discrimination was allowed applied in different ways to different strands of discrimination. The Equality Act applies a general occupational requirement defence to all protected characteristics. What this means that if a person is able to show that, having regard to the nature or context of the work, it is an occupational requirement to have a particular characteristic and that applying that requirement is a proportionate means of achieving a legitimate aim, then it will be lawful. For example, female staff may be required where the job involves close personal contact with women, or the authenticity of a dramatic performance may require a black actor. In both cases the recruiter will argue an occupational requirement, and will reject candidates who do not have that characteristic. There is also provision to deal with organised religions and organisations which have a religious ethos. This is a strict provision and does not allow generalised discrimination by those bodies. They will have to show that the post in question is either for a minister of religion or is one of the small number of lay posts which exist to promote and represent religion. It certainly would not apply to support posts, administrators etc, but only to those positions where the religious ethos was fundamental to the work.

Burden of Proof

In English Courts the defendant is 'innocent until proven guilty' in other words we must assume that he has done nothing wrong until it can be proved otherwise. In relation to discrimination, the opposite is true. **S136(2)** explains that if the court looks at the facts and there is no convincing explanation for why the alleged discrimination has occurred, the court is entitled to assume that the employer has discriminated. We call this a 'reversal of the burden of proof'.

s136 EqAct 2010

(1) *This section applies to **any** proceedings relating to a contravention of this Act*
(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.*

One of the biggest obstacles in relation to direct discrimination cases is proving that discrimination has taken place. The common law has long accepted that applicants rarely have direct evidence of discrimination, so any evidence of discrimination normally consists of **inferences** drawn from primary facts.

If the primary facts indicate there has been discrimination of some kind, the employer must give an explanation and, if it does not provide a clear and specific explanation that satisfies the tribunal the complaint will succeed.

On numerous occasions, Courts have set out guidelines as to how to approach the drawing of inference that discrimination has taken place, usually avoiding the concept of shifting the evidential burden of proof.

Guidance as to how tribunals and courts should approach the issue of the burden of proof in direct discrimination cases was given by the EAT in:

Barton v Investec Henderson Crosthwaite Securities Ltd. [2003] IRLR 332 and refined by the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 CA.

In *Brown v London Borough of Croydon* [2007] EWCA Civ 32 the Court of Appeal clarified the fact that a tribunal is entitled to move directly to considering whether or not the employer's explanation provides non-discriminatory evidence. The guidelines, although not binding, should end the 'lousy/bastard employer defence' as was categorised in Zafar v Glasgow City Council [1998] IRLR 36, HL. In this case, an employee who had been dismissed for sexual harassment claimed that he had been the victim of race discrimination. The tribunal stated that the Council's conduct in relation to the disciplinary and dismissal proceedings did not achieve the standard of a reasonable employer. The tribunal concluded that there was an unreasonable delay in dealing with the matter and that some allegations were not properly investigated. The House of Lords held that the fact that the employer had acted unreasonably in relation to this employee did not mean that he had been treated less favourably than anyone else would have been. The employer might have acted just as unreasonably with other employees.

Lecture 10: Protected Characteristics – Equality Act 2010

'Protected Characteristics' (s4)

You will remember from last week that just because a decision seems unfair, does not necessarily mean that it is unlawful. In order to be so, the less favourable treatment needs to because of certain protected characteristics. There are nine in total.

Less favourable treatment will be unlawful if it is because a person has one or more of the following protected characteristics

Age (s5)

Disability (s6)

Gender reassignment (s7)

Marriage and Civil Partnership (s8)

Pregnancy and Maternity (s18)

Race (which includes colour, nationality or ethnic or national origin) (s9)

Religion or Belief (s10)

Sex (s11)

Sexual Orientation (s12)

Age

Direct Discrimination as previously explained usually cannot be justified however if it relates to age, it can be justified.

s13 Equality Act 2010

A person (A) discriminates another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

'Age' in this context refers not only B's age but also to persons in a particular age group. Associative, perceived and deterred[i] discrimination also apply, therefore it will be unlawful if an employer treats an employee less favourably because he/she cares for an elderly relative.

However there will be no discrimination if it can be shown that the treatment complained of is a proportionate means of achieving a legitimate aim. (s13(2)) this is a major change from the other protected characteristics. So far this has been used in relation to enhanced redundancy payments but this will be a key issue in the development of this area of the Act. In *Rolls Royce plc v Unite the Union* [2009], the CA upheld as justified the use of length of service as a 'tie breaker' in a redundancy selection scheme.

In *Reynolds v Secretary of State for Work & Pensions* [2006] the claimant argued that paying her less on job seekers allowance because she was in the 18-24 age range caused her a detriment. The House of Lord stated that people under the age of 25 could legitimately be expected to have lower earnings expectations and lower living costs than those over 25 therefore justifying them being treated differently as a group. This decision was reached despite the fact that the claimant herself was a single mother who, it was accepted, had higher needs. Categorising people into groups in this way are called 'bright line' policies.

In relation to age, indirect discrimination is aimed at outlawing disguised age barriers, but not barriers that exist because of retirement. See ***Homer v Chief Constable of West Yorkshire Police*** [2010]. Within the Police force, in order for staff to gain promotion a law degree was required. The claimant who was 61 could not comply with this before he retired and he claimed that the requirement was indirectly discriminatory because of his age. His claimed however failed because although he clearly suffered a disadvantage, that disadvantage was linked to the fact that his working life would have come to an end prior to him gaining the degree – therefore an inevitable result of age and not of discrimination.

Disability

It is unlawful to discriminate against a person who qualifies as disabled. Every employer has an additional obligation to make reasonable adjustments to 'level the playing field' for disabled workers or job applicants.

This area of law applies to employees and to workers. However, in practice the major issues in relation to absence tend to concern employees as they are required to provide continuous service. Most employees on long term sick leave, and some who are frequently absent for short periods, may qualify as 'disabled'. This imposes extra duties on the employer.

It is unlawful for an employer to discriminate against a disabled employee or job applicant by treating that person less favourably than s/he treats, or would treat, others for a reason relating to his or her disability - that treatment is defined below.

The duty placed on an employer is twofold:

not to discriminate against a disabled person, and

to make reasonable adjustments to accommodate the disabled person.

Who qualifies as disabled?

This definition goes far beyond the traditional perception of disability.

A disabled person is someone who has: (s6)

'A physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.

It covers any normal physically related illness which has a substantial effect on the person, e.g. heart conditions, angina, epilepsy, diabetes type 1, and medical evidence of the condition will need to be produced

It also covers mental conditions ranging from schizophrenia or manic depression to anxiety disorders; reactive and clinical depression can also be regarded as a disability. The law used to require that the mental illness was clinically recognised, this is no longer necessary but it is particularly important here that the employee produces clear medical evidence of his/her condition.

It can cover disorders which recur, although the person may not suffer any symptoms in between attacks, such as serious asthma and epilepsy.

Learning disorders such as dyslexia are now recognised as a disability.

There are some conditions which are automatically regarded as disabilities, even though the employee may not currently be suffering any or many symptoms; these are **HIV AIDS, multiple sclerosis and cancer.**

Some conditions are expressly excluded, including alcoholism and drug addiction unless they cause other problems – eg liver disease.

In order for the disability to be seen to be substantial, it must have lasted or be predicted to last at least one year, or for the rest of the person's life.

What activities must be affected?

It is not necessarily activities at work that must be affected. It is essential in order to satisfy the definition that the employee should have substantial difficulties in his or her everyday life, but it is not necessary that the disability has to affect any particular function.

The first duty - do not discriminate. (s39)

In an employment context, it is unlawful to discriminate against a disabled person i.e. treat them unfavourably, in

Making the arrangements for deciding who to employ.

The terms on which you offer that person employment.

Refusing to offer that person employment.

The terms which you give the employee, compared with employees already working for you.

The employment opportunities afforded to the disabled person, namely promotion, transfer, training or the receipt of any other benefit e.g. facilities and services, which plainly includes fringe benefits - this also applies where the employer refuses to afford these opportunities.

Dismissing him/her or by subjecting him/her to some other detriment.

The second duty - to make reasonable adjustments (s20)

The Act places a specific duty upon the employer to make reasonable adjustments to work arrangements and the working environment so as to accommodate disabled persons. Where any employer is faced with a disabled employee then there will be a fundamental duty to make a full and proper assessment to enable it to decide what steps it would be reasonable to take to prevent a disabled person from being at a disadvantage. This will apply with a disabled job applicant, but also where an existing employee is, or becomes, disabled. This may involve an employee who has been absent long term coming back on reduced hours or duties until s/he is able to fully perform the role.

The duty arises where the arrangements made for the work or the way the work is done, or the physical features of the premises or the equipment place the disabled employee at a significant disadvantage compared to persons without that disability.

Examples of reasonable adjustments include altering premises, allocating some of the disabled person's duties to another member of staff, altering the disabled person's working hours, transferring the disabled person to fill an existing vacancy etc However, the employer is only required to make reasonable adjustments, bearing in mind its size and its resources.

The third duty - An employer has an additional duty in relation to disabled people and that is not to discriminate because of something arising from the disability (s15). For example and employer cannot discriminate by refusing to allow a guide dog on to the premises. They are not discriminating against the blind person but against the dog, therefore this is 'arising from the disability'.

The defence

It is never lawful to directly discriminate on grounds of disabilty e.g. to have a rule not to employ epileptics. However, less favourable treatment for *disability related* reasons can be justified where the employer can justify it. The net effect is that if the employer can explain his/her treatment of the employee eg a decision to dismiss the person, by reference to economic imperatives, health and safety of the employee or fellow employees, or general impracticality, it may be possible to defend the action. If the employer can show that either there are no possible adjustments or, despite any adjustments that it might reasonably be expected to make, the disabled employee cannot be taken on or retained without significant difficulties, it may be justified in refusing to employ or in dismissing the employee.

Gender reassignment

Transgender is a generic (**but not legal term**) term applied to a number of 'trans people' it can be described as:-

> A very broad term to include all sorts of trans people. It includes cross dressers, people who wear a mix of clothing, people with dual or no gender identity and transsexual people. It is also used to define a political and social community which is inclusive of transsexual people. Transgender people, cross dressers (transvestites)

and other groups of 'gender-variant' people.[1] But not all these gain legal protection under the Equality Act.

Transgender protection is available to those who are about to undergo are undergoing or who have undergone gender reassignment surgery the legal definition is contained in s7 EqAct 2010 – note that transvestites or someone who cross dresses are not protected under the Equality Act 2010.

Discrimination on the grounds that someone has been, or will be, in the process of gender reassignment/undergoing a sex change is unlawful. Most of these cases tend to be either about harassment or washroom facilities, and the employer must be careful to ensure that a hostile working environment does not grow up around a transsexual and that it permits use of the assigned sex facilities once any operative procedures are complete. On sick leave, treatment of a GA case will be compared with those who are absent because of sickness or injury in order to determine whether there has been less favourable treatment.

The Gender Recognition Act 2004 was passed to give transsexual people legal recognition in their acquired gender. Legal recognition follows the issue of a full gender recognition certificate by a Gender Recognition panel. The panel has to be satisfied that the applicant:

Has, or has had, gender dysphoria,

Has lived in the acquired gender throughout the preceding two years, and

Intends to continue to live in the acquired gender until death.

On the issue of one of these certificates, the person will be entitled to a new birth certificate reflecting the acquired gender, and will be able to legally marry someone of the opposite sex. For all purposes they will be legally regarded as being of their acquired gender.

Marriage and Civil Partnership

There is no protection for people who co-habit regardless of however long they have been together neither is there any protection for single people or those who are divorced or widowed. It is possible that the fact that these groups are not protected may be challenged as being incompatible with European Convention of Human Rights Article 8 (private and family life). Where protection does exist it is very limited and is generally limited to direct and indirect discrimination in employment and related fields and does not extend to harassment nor is there any protection for discrimination by association. The government's rationale for such limited protection is that there is no evidence to suggest that discrimination occurs outside of the areas currently protected. It could be argued that the limited protection undermines the principle of equality and that it may be incompatible with the ECHR.

Therefore it would appear that it is the fact of being married or in a civil partnership that is important. For example:-

[1] Whittle et al. 2007

Hawkins v Atex Group Ltd [2012] IRLR 807. The female was dismissed because she was married to the CEO of the company – this was prohibited by the company policy. The EAT held however that she was not dismissed because she was married

(remember, being married is a PC) but because she was married to the CEO and the employer successfully argued that she would have been dismissed even if they had been in a 'common law relationship'. Without digging any deeper into this case however it does beg the question as to why she was dismissed and not the CEO?? The legislation however is clear; the protection is available based on the fact of marriage rather than being based on being married to any particular person. This view contrasts with:-

Dunn v Institute of Cemetery and Crematorium Management [2012] All ER (D)173

There have also been cases related to married women being treated less favourably than married men sometimes based on outdated assumptions about the roles of men and women. In **Coleman v Sky Oceanic Ltd** [1981] two competing travel firms employed one member each of what became a married couple. There was concern about confidentiality - whether 'pillow talk' would result in one giving the other information about the rival company. The two companies consulted and decided to dismiss the female worker because the man was assumed to be the breadwinner. In *Chief Constable of Bedfordshire v Graham* [2002] IRLR 239, Inspector Margaret Graham had her promotion rescinded by the Chief Constable because she was married to the Chief Superintendent in the same division. It was considered that there would be difficulties arising from having the couple working together at these levels. The EAT upheld the ET's decision that the complainant was treated less favourably than a single person would have been for reasons connected to her marital status.

Pregnancy and maternity discrimination: Work related cases

Under the Equality Act the dismissal of a female worker related to her pregnancy l is likely to constitute direct sex discrimination. This is due to the fact that only women can become pregnant therefore the discrimination is related to her sex. Article 10(1) of the Pregnant Workers Directive (Directive 92/85/EEC) provides that dismissal should be prohibited during the period from the beginning of the pregnancy to the end of maternity leave. While most of the protected characteristics share a common framework to forbid discrimination in situations of discrimination because the claimant has one or more of the protected characteristics, pregnancy and maternity has its own singular protection which protects the woman from being treated unfavourably during a defined maternity period or arising from the pregnancy. A woman is protected from discrimination from the time that she becomes pregnant until the end of what is known as the 'protected period' which is the period of the pregnancy and any statutory maternity leave to which she is entitled. The protection is only if the employer knows or ought to have known that she is pregnant – *Ramdoolar v Bycity* [2005]. Outside of the protected period, a woman can claim sex discrimination. Although sex discrimination applies to both men and women, a man cannot complain of any special treatment given to women in relation to pregnancy or childbirth.

In *Case C-394/96 Brown v Rentokil Ltd* [1998] IRLR 445 The Court of Justice considered the dismissal of a female employee who was absent through most of her pregnancy and was

dismissed under a provision of the contract of employment which allowed for dismissal after 26 weeks' of continuous absence through sickness. The Court held that Articles 2(1) and 5(1) of the Equal Treatment Directive 'preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy'.

In *P & O Ferries Ltd v Iverson* [1999] ICR 1088, a female was prevented from going to sea once she had reached the 28th week of her pregnancy. Pregnancy was a lawful reason for preventing an employee from going to sea but unlike the other lawful reasons (including sickness) pay continued.

In employment the woman receives two periods of protection. The first is the compulsory maternity leave at which time she is not allowed to work (EqAct s18(3) – this is no less than 2 weeks. The second is from the time that the pregnancy begins and ends. This will be 26 weeks if the woman is only entitled to ordinary maternity leave and 52 weeks if she is also entitled to additional maternity leave.

Race

The EqAct defines Race using the following headings:-

Colour

Race

Nationality

National Origin

Ethnic Origin (this is the most problematic area)

Colour

E.g. *London Borough of Lambeth v CRE* [1990] ICR 768, CA

A racial group may be defined by colour, incorporating people of different ethnic origins.

In *Redfearn v Serco Ltd* [2006] IRLR 623

Redfearn (a white man) was employed as a bus driver for children and adults with special needs – the majority of whom were from the Asian community. Redfearn was elected as a councillor for the BNP and the Union (UNISON) wrote to the council expressing concern. Redfearn was dismissed on the grounds of health and safety as the employer feared that allowing him to continue might put the lives of his passengers in danger as there was concern that stones/bottles etc might be thrown at the bus when Redfearn's political allegiance was discovered. As he had been employed for less than a year and therefore unable to bring a claim of unfair dismissal, Redfearn brought a claim for both direct and indirect race discrimination claiming that he had been dismissed because he was white. His claim was ultimately rejected by the Court of Appeal, which held that discrimination law

should not be used to protect employees from unfavourable treatment for acting in a way that is racially discriminatory. Mr Redfearn's argument that he was dismissed because he was white, and that this was therefore "on racial grounds", was flawed because the dismissal was motivated by his membership of the BNP, rather than the fact that he was white. His complaint was in fact one of discrimination on political grounds, which fell outside anti-discrimination law. Redfearn took his claim to the ECHR claiming that the UK was not protecting his human rights.

In *Redfearn v United Kingdom* [2012] ECHR 1878, the European Court of Human Rights considered whether UK law, which does not extend any specific protection to employees dismissed on the grounds of their political beliefs, was incompatible with the European Convention on Human Rights.

The European Court of Human Rights has held that UK law was in violation of the European Convention on Human Rights because it did not extend specific protection to employees dismissed on the grounds of their political beliefs or affiliation. European Court of Human Rights held that UK law was in violation of the European Convention on Human Rights because it did not extend specific protection to employees dismissed on the grounds of their political beliefs or affiliation. The UK government then had to decide how to afford protection in such cases. It did so by creating an exception to the requirement for a qualifying period for unfair dismissal if it was claimed that the dismissal was as a result of political affiliation.

Race

Seide v Gillette Industries Ltd [1980] IRLR 427, EAT

Someone may be of the Jewish race and/or of the Jewish faith – it is a question of fact.

Nationality

Nationality refers to citizenship. According to the Code of Conduct on Employment (EHRC 2011a), the term nationality describes the legal relationship between a person and the state resulting from birth or naturalisation and it is evidenced by a passport.

National Origins

National Origin refers to historical and/or geographical features that would at some point in time reveal the existence of a nation. Thus, following the Act of Union 1707, the English and the Scots lost their separate nationalities but retained their separate national origins – …… ‘a historic and geographical connection to a nation that existed at some point in time’.

Northern Joint Police Board v Power [1997] IRLR 610, EAT

The claimant, an Englishman, was rejected for a post of Chief Constable in Scotland. Tribunal held that there was no discrimination on the ground of nationality (as they were all British); but held that discrimination against an English person or a Scot (or the Welsh or

Northern Irish) constituted discrimination on the grounds of *national origin* as the home countries had distinct historical and geographical identities.

Confirmed by the Court of Session in *BBC Scotland v Souster* [2001] IRLR 150: the Scots and the English are separate racial groups defined by reference to national origin but not by reference to ethnic origin (e.g. Celt Saxon Dane mix).

See also *Gwynedd County Council v Jones* [1986] ICR 833 EAT (Welsh-speaking, as opposed to Welsh, not a separate racial group).

Ethnic Origins – Ethnic Minority Group

This term is not defined in the EqAct 2010

Mandla v Dowell Lee & anor [1983] 2 AC 548, HL (per Lord Fraser) adopted a flexible approach, concluding that there are 2 essential conditions for an ethnic group:

> *a) A **long shared history** of which the group is conscious as a distinguishing factor, the memory of which it keeps alive; and*
>
> *b) It must have **a cultural tradition of its own**, which is often, though not necessarily, associated with religious observance.*

Other characteristics, which could be expected to be displayed, are:

> c) Either a common geographical origin or descent from a smaller number of common ancestors;
>
> *d) A common language not necessarily peculiar to the group;*
>
> *e) A common literature peculiar to the group;*
>
> f) A common religion different from that of neighbouring groups, or the community surrounding it; and
>
> g) Being a minority, a repressed or dominant group, for instance, the Saxons and Normans, after the conquest.

R. (on the application of E) v JFS Governing Body v Office of the Schools Adjudicator, Supreme Court - 16 December 2009.

The Governing Body of JFS appealed against a decision that its admissions policy had directly racially discriminated against a child by refusing him entry to the school.

The father of the child was Jewish by descent and the child's mother had converted to Judaism through a non-orthodox synagogue. The school's admissions policy was to give preference to children whose status as Jews was recognised by the Office of the Chief Rabbi (OCR), which represented orthodox Jews. The OCR required that the child's mother

be Jewish either by matrilineal descent (describes the line of genealogical relationship or descent that follows the female side of a family) or by conversion under orthodox auspices, or that the child had converted. As the mother's conversion was not recognised by the OCR and the child had not undertaken to convert to orthodox Judaism, the school refused his admission.

The governing body of the school argued that (1) the matrilineal test was based on religious law and the discrimination the school had applied religious discrimination (which could be justified) not racial discrimination under RR Act. (2) Although there was a Jewish ethnic group as defined by the criteria set out in Mandla, the matrilineal test described a group that overlapped with, but was not identical to, the ethnic group.
Appeal dismissed. (1) The argument that the matrilineal test derived from religious law, and what had motivated the school was compliance with that law, was invalid. (2) The motive of the discriminator for applying the discriminatory criteria was irrelevant. A person who discriminated on the ground of race, as defined by the Act, could not argue that the ground of discrimination was one mandated by religion.

The Court contended that although there was a difficulty in distinguishing between ethnic and religious status, a woman converting to Judaism acquired both Jewish religious status and Jewish ethnic status within the Mandla definition.

See Commission for Racial Equality v Dutton *[1989] QB 783, CA (with regard to gypsies).*

Caste

The government has yet to decide whether it will implement s9(5) EqAct which relates to Caste. Government research (Government Equalities Office 2010) indicates that the term 'caste' is used to identify a number of different systems used to label those perceived as more or less worthy in a particular racial (ethnic group). Varna is a Hindu religious caste, Jati is an occupational caste system and Biraderi is often referred to as a clan system. The research appears to indicate evidence of workplace bullying discrimination in the supply of goods and services and pupil/pupil bullying in education. It is anticipated that caste will appear as an aspect of race by 2015 however in *Tirkey v Chandok* (unreported case number 3400174/2013) it was held that caste was included in the definition of race.

See also *Begraj v Heer Manak Solicitors* [2015]

Religion or Belief

It is unlawful to discriminate against workers because of religion or similar belief. The law applies, as do all the discrimination rules, to recruitment, terms and conditions, promotions, transfers, dismissals and training, and therefore both to current, prospective and former workers.

The employer must not discriminate directly by, for example, refusing to recruit or dismissing anyone on the grounds of their religion or belief, apply some rule or procedure to them which is indirectly discriminatory unless it can be justified. Workers must not be harassed or

victimised because of their religion. Any recognised religion, religious belief or philosophical beliefs are protected. Atheists, spiritualism, environmentalism and beliefs about animal rights are also potentially covered.

Williams v South Central Ltd is an Employment Tribunal case (ET case 2306989/03) which assists in deciding what values constitute a religion. In this case, tribunal rejected Williams' claim that his loyalty as a US citizen required him to wear a badge of the US flag and that this amounted to a religious belief.

The tribunal in *Hussain v BB Supersave* (ET case 1806638/04) examined the boundary between religious beliefs themselves and the cultural practices associated with a religion. In this case, Hussain, a Muslim, had requested time off work to fulfil his duties following the death of his grandmother. The tribunal decided to adopt a broad definition of religion: to avoid 'unnecessary complications and endless debate'. It was held that if someone genuinely believes that their faith requires certain behaviour, this is sufficient to make it part of their religion. However, his claim failed only because he was unable to show that his employer would have treated a non-Muslim any differently. Remember though that these are tribunal cases and cannot be relied on.

What about special requests which are related to religion?

Where a worker makes a request based on some religious observance e.g. prayer room, time off to go to mosque, Friday afternoons off, particular holidays or extended holidays the employer should listen carefully, consider the consequences for the business and grant them if practicable. If it is not possible, then s/he should explain carefully to the employee why, on good business grounds, his/her request cannot be granted, and this should always be documented. An employer is not under a specific obligation to make changes to accommodate an employee's religion.

Sex

S11(a) of the EqAct 2010 makes it clear that the section applies equally to men as it does to women. This is important as most cases relate to the discrimination of women.

Eversheds v DeBelin [2011] IRLR 448 – the employer was in the process of making redundancies and identified two employees whose positions were liable to be made redundant. One employee was male and the other was female who, at the time of the decision was absent on maternity leave. The employer adopted a points scheme to identify which post was to be made redundant and as the male was in employment, based his score on work actually done whereas as the female was absent on maternity leave, he based her score on the maximum available. The result was that the male scored less than the female and as a result was made redundant. The mail claimed sex discrimination and unfair dismissal. Given the protection available for pregnant women and women on maternity leave (discussed below), the employer argued that he had fulfilled his responsibility to the female employee. The EAT held that despite the fact that legislation gave pregnant women and women on maternity leave special protection, any action taken must be a proportionate means of achieving a legitimate aim and that in this case the treatment given to the absent

female employee was disproportionate and amounted to direct sex discrimination against the male employee.

In *Nelson v Newry and Mourne DC* [2009] IRLR 548, the male claimed direct sex discrimination when two council employees, one male and one female, were investigated for misusing council property. The disciplinary process was conducted in a different manner for each and the male was given a much more severe sanction than the female.

Chief Constable of Bedfordshire Police v Graham *[2002] IRLR 239*

Ms Graham was an inspector in Bedfordshire Police and married a Chief Inspector in the same force. Ms Graham applied for and was given a post as Area Inspection within the same division as her husband however the Chief Constable blocked the promotion because he said that it would be inappropriate as her husband worked in the same division. Once reason given was that if criminal proceedings were ever to be started against her husband, as his wife should could not be forced to give evidence against her husband. The second reason given was that the Chief Constable thought that other staff might find it difficult to raise any negative issues concerning the husband to Ms Graham. The ET considered whether this was discrimination because of marital status. The EAT agreed with the ET that the employer's concerns were speculative and many other forces employed married couples. She had been treated less favourably than a non-married female applicant.

Sexual orientation

Discrimination on the grounds of sexual orientation is unlawful ie less favourable treatment on the grounds of homosexuality, lesbianism and bi-sexuality.

The cases have largely been on the subject of homophobic abuse and the extent to which the employers have been responsible for encouraging it or permitting it, or failing to have a policy dealing with it. The main issue for employers to be aware of here is 'banter' of a homophobic nature. It is critical that employers take action to tackle any such issue within their workforce, or there that they may be liable to the affected worker.

As with other areas of sex discrimination, discrimination is prohibited in the recruitment process, in arrangements to offer employment, in terms offered for employment and terms not being offered employment. Also in respect to access to opportunities, transfer or training or receiving any other benefits or by dismissing or by subjecting to any other detriment s39.EqAct 2010 applies. Direct discrimination is protected in the same way as with other characteristics as is indirect discrimination. In relation to direct discrimination however, protection also covers less overt treatment and there have been a number of cases before tribunals where assumptions about an individual's sexual orientation have been made and have been held to be discriminatory.

In *McCarthy v The Secretary of State for Work and Pensions* (Job Centre Plus 13th July 2009: ET 2406308/7)

Following an allegation of a possible inappropriate relationship between the claimant and a young client by a third party, the tribunal found that the investigation process 'was

intrinsically affected by the respondent's knowledge of the claimant's sexual orientation and by assumptions made by mangers, arising from their knowledge about the claimant's conduct'. The tribunal came to the conclusion that the investigating officer was clearly aware that the claimant discussed his sexual orientation and his sex life openly at the office. The tribunal decided that the decision to conduct the investigation contrary to the respondent's established procedure, against advice and contrary to the rules of natural justice, together with the investigating officer's 'misinterpretation of the initial concern', were evidence of less favourable treatment on grounds of sexual orientation.

Burden of Proof

Remember all that an employee has to establish is that there is a prima facie (on the face of it) case of discrimination. In the absence of any alternative explanation s136(2) explains that the court is entitled to assume that the employer has discriminated against the employee. We call this a 'reversal of the burden of proof'.

There are no notes for Lectures 11 and 12:

Lecture 11 will address problem question technique and referencing. Written guidance on this can be found in the course handbook on Moodle.

Lecture 12 will be a revision lecture covering the content necessary to answer the Coursework 2 problem question.

Both of these Lectures will provide important guidance which will help you get a good mark, I would strongly recommend you attend.