

## Introduction to Unfair Dismissal

Seminar 20<sup>h</sup> October 2010 at 6pm

### THE STATUTORY FRAMEWORK

1. First and foremost, the employer/employee relationship is contractual. That said, it is a special type of contract because it involves a human element and the principle of service. The remedies available to the employee for breach of such a contract lie in damages for wrongful dismissal. Such claims (save in so far as the ET is given jurisdiction up to £25,000) lie in the civil courts.
2. The protection in the employment contract is limited to the notice period. Thus, if the employee is dismissed without notice (a wrongful dismissal), the loss which he would suffer is the net amount he would have received in money or money's worth from his remuneration package for the duration of his notice period. That is the limit of the wrongful dismissal remedy. This is a contractual claim for damages for breach of contract attracting a duty to mitigate.
3. The unfair dismissal remedy is a creature of statute. The main statute is the Employment Rights Act 1996. The jurisdiction is given to Employment Tribunals. They only have such jurisdiction as the statute gives them. The remedy is only available in so far as the statute allows.
4. The protection afforded by the ERA is protection given in addition to that provided in the employee's contract. At common law, an employer can lawfully dismiss an employee with proper notice with impunity. He will have complied with the terms of the employee's contract. The ERA makes such a dismissal, in certain circumstances unfair. It gives to an employee a right not to be unfairly dismissed (s.94). The right is not obtained until the employee has 1 year's continuous service (s.108).

5. The key elements of the jurisdiction are that:-
- (1) the right is given only to an employee (s.230). An independent contractor does not have the statutory protection;
  - (2) the employee must have 1 year's continuous service at the date of his dismissal (known as the Effective Date of Termination ("EDT") s.97);
  - (3) in addition, the remedy is available only if the application is made within 3 months from the EDT (s.111) (There is a limited discretion to extend time).

## **JURISDICTION**

### **Employee**

6. The remedy is available to employees and not the self-employed. The definition of employee is found in s.230(1)

*"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*

Contract of employment (s.230(2)) is defined as

*"a contract of service or apprenticeship, whether express or implied, and (if necessary) whether oral or in writing."*

Section 230 also defines "employer" and "employment" and, for purposes other than unfair dismissal, "worker".

7. The relevant cases have grappled with concepts such as the control test, the organisational test or the economic reality test. What is now adopted is a multi-factorial approach, i.e. look at all the circumstances, take into account control, organisation, economic reality and judge which side of the line the arrangement falls. The following is a sample of those cases often cited:-

Ready Mixed Concrete (South East) Limited v Minister of Pensions [1968] 2 QB 497 (multi-factorial approach)

Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 WLR 1213; 3 All ER 817 (labour carried out "on the lump" held to be an employee)

Massey v Crown Life [1978] IRLR 31; ICR 599 (how the parties label their arrangement; i.e. their choice and intention (which is not decisive))

Lane v Shire Roofing Co (Oxford) Limited [1995] IRLR 493 (which demonstrates the court's willingness to find an employment relationship where a PI claim is involved).

Lee v Chung and Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236; ICR 526 (emphasis on the economic reality test).

8. Amongst the factors to look for are:-
- (1) choice. How have the parties consented to arrange their affairs and label them?
  - (2) pay: PAYE or invoicing (with VAT where appropriate);
  - (3) arrangements for sick and holiday pay;
  - (4) arrangements for taking holidays
  - (5) provision of tools, uniform, equipment etc.
  - (6) control of work, hours location etc.
  - (7) power to discipline and dismiss.
- The use of a substitute or sub-contactor is a contra-indication of employment.
9. There are certain obligations which, it is now relatively well established are the irreducible minimum requirements without which an employer/employee relationship will not exist. Those are the obligation on the part of the employer to provide work, and the obligation on the part of the employee personally to do it when offered (Carmichael v National Power plc [1999] ICR 1226; [2000] IRLR 43 (HL); Younis v Transglobal Projects (2006) UKEAT/504/05 and Wilson v Circular Distributors Ltd [2006] IRLR 38 (EAT)). The obligation of the employee is personally to perform the work, though a limited power of delegation e.g. if a person is ill, may not be fatal (MacFarlane v Glasgow City Council [2001] IRLR 7).
10. In construing the contractual relationship, the courts will look at the reality, and not just the written contractual obligations.
11. An employment relationship will exist where the parties' intention was that the individuals would personally undertake the work, even though their contracts stated that they could provide a substitute. The Tribunal will look beyond the wording of the contract to determine whether a Claimant is an employee or not. In Redrow Homes (Yorkshire) Ltd v Buckborough [2009] IRLR 34 the EAT held that a substitution clause inserted by the employer to allow it to avoid the employee having worker status and therefore an entitlement to paid holidays was a 'sham'. The clause did not reflect the intentions of the parties at the time the contract was entered into as the workers could not substitute others to carry out their work but were obliged, under the contract, personally to perform services for the employer.
12. The courts will be astute to determine whether the written documentation is a sham. In Protectacoat Firthglow v Szilagyi [2009] ICR 835 the CA set out the appropriate test to determine whether a claimant is an employee in a case in which it is alleged that the contractual documentation is a sham:-
- “The question is always what the true legal relationship is between the parties. If there is a contractual document, that is ordinarily where the answer is to be found. But, if it is asserted by either party, or in some cases by a third party, that the document does not represent or describe*

*the true relationship, the court or tribunal has to decide what the true relationship is.*

56. *Tribunals will be well aware that contracts may be partly written and partly oral and that they can also be constituted or evidenced by conduct. While a document which can be shown to be a sham designed to deceive others will be wholly disregarded in deciding what is the true relationship between the parties, it is not only in such a case that its contents cease to be definitive. If the evidence establishes that the true relationship was, and was intended to be, different from what is described in the document, then it is that relationship and not the document or the document alone which defines the contract.*

57. *In a case involving a written contract, the tribunal will ordinarily regard the documents as the starting point and will ask itself what legal rights and obligations the written agreement creates. But it may then have to ask whether the parties ever realistically intended or envisaged that its terms, particularly the essential terms, would be carried out as written. By the essential terms I mean those terms which are central to the nature of the relationship, namely mutuality of obligation: see Carmichael v National Power [1999] ICR 1226) and the obligation of personal performance of the work.”*

## **Continuous Service**

13. An employee does not have the right not to be unfairly dismissed unless and until he has been continuously employed for 1 year. (s.108(1)).
14. The provisions governing the calculation of 1 year’s continuous employment are set out at ss.210ff in the ERA.
15. There is a presumption of continuity (s.210(5)).
16. In general, the period commences when the employee starts work. (It is different for the entitlement to a redundancy payment. In that case, if an employee commences work before his 18<sup>th</sup> birthday, the date of his 18<sup>th</sup> birthday is the starting date (s.211(2)). The continuous period ends when the period is broken in accordance with the ERA (s.211).
17. Continuity is determined week by week (s.210(3)).  
Any week which does not count breaks the continuity (s.210(4)).  
A week counts if it is a week  
*“during the whole or part of which the employee’s relations with his employer are governed by a contract of employment”*.  
(s.212(1))  
A week, for these purposes, ends on a Saturday (s.235(1)).

18. Thus, by way of example, an employee who is dismissed on Monday of 1 week, works elsewhere from that Tuesday until the following Thursday, but then comes back to work for his original employer on the Friday will have continuity of employment (see Carrington v Harwich Dock [1998] IRLR 567 (EAT) doubting the previous rogue EAT case of Roach v CSB (Moulds) Ltd [1991] IRLR 200).
19. Further provisions provide for weeks in which there is no contractual relationship still to count in specific circumstances, where the employee is
  - (1) incapable of work due to sickness or injury (up to a maximum of 26 weeks);
  - (2) absent from work on account of a temporary cessation of work;
  - (3) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in employment of his employer for any purpose.(See s.212(3)).
20. Note the various special circumstances relating to change of employer in s.218, particularly those relating to associated employers (s.218(6)).

### **Procedural time limits**

21. Complaints for unfair dismissal must be presented  
*“before the end of the period of 3 months beginning with the effective date of termination.”*  
(s.111(2)(a)).
22. “Presented” means received by the Tribunal. Since the period is judged in days, provided the application reaches the tribunal prior to midnight on the relevant day, it will be in time. (Note that for the EAT there is 4pm deadline).
23. The day on which the period begins is the first day of the three month period. That day is the EDT (see below). Month means calendar month. Therefore, if the EDT is the 12<sup>th</sup> April, the Application must at the latest be received prior to midnight on the 11<sup>th</sup> July (see University of Cambridge v Murray [1993] ICR 148).
24. There is a very limited discretion in the ET to extend that period, the ERA setting out an alternative time limit:-  
*“Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”*  
(s.111(2)(b) – my emphasis)
25. What is or is not reasonably practicable is a question of fact for the ET. The words “reasonably practicable” are narrowly interpreted (Palmer v Southend-on-Sea BC [1984] IRLR 119; ICR 372 (CA)). For example, postal delays are judged in accordance with expected delivery times (see, inter alia, Consignia plc v Sealy [2002] 3 All ER 801). The

matter is different where the application becomes lost in the post and whether time will be extended will depend on whether all reasonable steps were taken to check safe delivery (Capital Foods retails Ltd v Corrigan [1993] IRLR 430; Camden & Islington Community Services NHS Trust v Kennedy [1996] IRLR 381). For email, in which it was held reasonable to expect an email to arrive in 30-60 minutes, see Initial Electronic Systems Ltd v Advic [2005] IRLR 671 (EAT).

### **Age Limits**

26. Until 1.10.06, an application could not be maintained if the employee was beyond retirement age (s.109 has been repealed). Retirement age was defined as either
- (1) the normal retiring age (where the undertaking has a normal retiring age for that position and it was the same for both men and women), or
  - (2) the age of 65.

Retirement is now governed by the Employment Equality (Age) Regulations 2006, which make discrimination on grounds of age unlawful and ss.98ZA to 98ZF of the ERA 1996. The concepts of normal retirement age and retirement at 65 are retained. A consultation procedure is prescribed for those the employer wishes to take retirement and for those who wish to work beyond 65 (sch.6 of the Regulations). The general test of fairness in s.98(4) does not apply to retirement dismissals. Their fairness is to be determined solely by reference to s.98ZG. An employee is to be regarded as unfairly dismissed if the employer does not comply with that procedure.

### **Contractual Jurisdiction**

27. The ET has jurisdiction in contractual matters. There is a cap on awards of £25,000. Unless a contractual claim (e.g. for pay in lieu of notice) is under the cap, it is advisable to bring it separately in the civil courts. It is not possible to bring a contractual claim in the ET, recover £25,000 and seek the balance in the civil courts. Once determined, the cause of action merges with the judgment and can not be re-litigated in a different jurisdiction.

### **Procedure**

28. ET Procedure is governed by the Employment Tribunals Rules of Procedure which are contained in Sch.1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. They import many of the concepts of the CPR including adherence to the overriding objective (reg.3).

## **TERMINATION**

## What is dismissal?

29. For the purposes of the ERA, dismissal is defined in s.95. Three instances of dismissal are recognised:-
- (1) Termination of the employment contract by the employer (with or without notice);
  - (2) Expiry of a limited term contract without its being renewed under the same contract;
  - (3) Termination by the employee in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct (constructive dismissal).
30. Note that termination by the employer without giving notice will also amount to a breach of contract and therefore wrongful dismissal unless the summary dismissal is justified, e.g. following disciplinary action. The correct legal analysis of such a dismissal is that the dismissal is the employer's acceptance of the employee's repudiatory breach of contract.
31. There is some uncertainty in the law as to whether an employment contract, involving as it does personal relationships and service, provides an exception to the usual rule requiring a repudiatory breach to be accepted before the contract is brought to an end. A summary dismissal without cause would be a repudiatory breach. However, an employee dismissed in this way would not find it possible in practical terms to decline to accept the breach and continue to turn up for work. He is effectively forced to accept the employer's breach. Compare, however, Rigby v Ferodo [1987] IRLR 516 (HL). In that case, the employer unilaterally reduced the wages of the whole workforce. They continued to work, receiving the lower pay, but continually voicing their objections. The claim was made by a widow on behalf of the estate of an employee who had died. She successfully claimed arrears of wages. The HL decided that her deceased husband may have waived his right to repudiate, but had not waived the breach, leaving open the remedy in damages.
32. In strict contract law, a dismissal, once uttered or a resignation, once accepted, becomes binding. The doctrine is ameliorated to a certain extent in relation to unfair dismissal. The ET recognises that words can be spoken in the heat of the moment and, provided withdrawn almost immediately when tempers have cooled, they might not be interpreted as a dismissal or resignation (see Martin v Yeomans Aggregates Ltd [1983] IRLR 49 in relation to withdrawal of a dismissal, and Sothorn v Franks Charlesly & Co. [1981] IRLR 278 (CA), Kwik-Fit (GB) Ltd v Lineham [1992] IRLR 156 in relation to resignation).
33. Words of dismissal must be clear and unambiguous. The ET will look at the context and the nature of the workplace, and at what was said and determine, objectively, what the words meant (see Sovereign House Security Services Ltd v Savage [1989] IRLR 115 (CA)).

## **Constructive dismissal**

34. The third category imports the common law relating to constructive dismissal into the ERA. Here, what the employee is saying is that the employer is in repudiatory breach of contract and the employee is accepting that breach by resigning. Thus, where an employee is relying on a constructive dismissal, he has to go as far as to show that the employer is in repudiatory breach of contract. He must leave in response to the breach.
35. Note that s.95(1)(c), which deals with constructive dismissal, refers to the right of the employee to terminate without notice. This again is reference to the obligation on an employee claiming constructive dismissal to have resigned as a result of the employer's repudiation. If he delays, he may lose the right to resign and claim constructive dismissal. (Note, though, that it is possible to waive or lose the right to resign, but still to claim damages for the breach of contract (Rigby v Ferodo [1987] IRLR 516).
36. Examples of conduct which may amount to constructive dismissal include:-
- (1) failing to pay wages. A more fundamental breach might be difficult to imagine;
  - (2) reduction in job status
  - (3) change in job content
  - (4) unilateral reduction in wages
  - (5) unilateral change of place of work
  - (6) unilateral change in working hours
  - (7) breach of the implied term of trust and confidence.
- Note that an accumulation of more minor matters may amount to a repudiatory breach, where that accumulation undermines the relationship of trust and confidence. The 'final straw' might not be a repudiatory breach and might not even be a breach of contract, but it must contribute something to the accumulated history (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ.1493; [2005] ICR 481).

## **EFFECTIVE DATE OF TERMINATION**

37. This is one of the key concepts in the ERA since it is relevant to both continuous service and the 3 month time limit. It is defined in s.97 as follows:-
- (1) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or the employee, means the date on which the notice expires;
  - (2) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,
  - (3) in relation to an employee who is employed under a limited term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect

Note that where no notice period is prescribed, there is an implied term that reasonable notice will be given. The period will vary with the type of employment and will often exceed the minimum prescribed period.

38. Note the provisions in s.97(2) in relation to notice. For the purposes of determining whether an employee has 1 year's continuous service (s.108) and the amount of the basic award (s.119), if less than the prescribed minimum period of notice was given (s.86), the effective date of termination is to be calculated with reference to the minimum prescribed period of notice, i.e. as if that minimum period of notice had been given.
39. The minimum periods of notice to be given by employers are prescribed by s.86 as follows:-
  - (1) for employees with less than 2 years' service, one week;
  - (2) for employees with 2 or more years' service, one week's notice for each completed year of service up to a maximum of 12 weeks.
  - (3) For employees with 12 or more years' service, 12 weeks.
40. The minimum period of notice to be given by an employee who has been employed for more than one month is one week.
41. Those prescribed minimum periods are given contractual effect by s.86(3).
42. Note also that the employee has specific rights during his notice period (s.87), though not if the contractual notice given is at least a week longer than the statutory minimum (s.87(4)).

### **UNFAIR DISMISSAL**

43. An employee with continuous service of 1 year or more can not fairly be dismissed save in specific circumstances. There is a two stage test to determining fairness. First, the employer must show that the dismissal was for one of the reasons permitted by the ERA. Second, the tribunal must decide whether in light of that reason, the dismissal was fair or unfair. The burden of proof lies on the employer to show what the reason for the dismissal was. In determining whether or not the dismissal was fair, the burden of proof is neutral.

### **Permitted Reasons**

44. In order for an employer to demonstrate that a dismissal is fair, the employer must first demonstrate (s.98(1))
  - (1) what was the reason (or, if more than one, the principal reason) for the dismissal, and

- (2) that it is one of the reasons permitted by the ERA (see s.98(2)) or some other substantial reason of a kind such as to justify the dismissal of an employee.
45. A reason is permitted (s.98(2)) if it:-
- (1) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
  - (2) relates to the conduct of the employee;
  - (3) is that the employee was redundant;
  - (4) is that the employee could not continue to work in that position which he held without contravention of a duty (either on his part or on that of his employer) or restriction imposed by or under an enactment;
  - (5) retirement (but remember that the question of fairness is not determined in accordance with s.98(4)).
46. Do not forget ‘Some other Substantial Reason’ (“SOSR”) in s.98(1), the catch all category for dismissals which are not specifically categorised in s.98(2). It is relatively rare, and ought specifically to be pleaded if to be relied on. Examples might include: a business reorganisation short of redundancy; or dismissing one spouse as a result of having dismissed the other for misusing confidential information; or an economic, technical or organisation reason following a TUPE transfer; dismissal for out of work activities incompatible with the job (e.g. Pay v Lancashire Probation Services [2004] ICR 187 (EAT)).

## **Fairness**

47. Once a permitted reason is demonstrated, the tribunal then goes on to consider fairness. Section 98(4) provides that:-
- “the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
- (a) *depends on whether in the circumstances (having regard to the size and administrative resources of the employer) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, and*
  - (b) *shall be determined in accordance with equity and the substantial merits of the case.”*
48. That determination is sufficiently widely drawn to include not only the substantial merits of the situation, but its procedural aspects as well. The tribunal looks to ensure that the employer, on whom the onus is put to take the lead in ensuring that dismissals are handled in accordance with good industrial relations, has taken the necessary steps to safeguard the employee’s rights.
49. It is important to note that the ET’s function is to ensure that the employer has acted fairly, not to ensure that the employer got the decision right. To any given situation, there

might be a range of responses that the employer could adopt. Provided that the action taken in any given case falls within that range of responses, the employer will not be held to have acted unfairly. It is not the function of the ET to substitute its own view of what was the correct response for that of the employer. (The challenge to the orthodox “range of reasonable responses” test by the EAT decision in Haddon v Van de bergh Foods Ltd [1999] IRLR 672 has been quashed by the CA in Whitbread plc v John Hall [2001] IRLR 275).

50. The ET’s function, therefore, is to examine the conduct of the employer in reaching the decision to dismiss at the time when it was taken. The following principles arise:-
- (1) As far as evidence is concerned, the ET will look only at evidence available to the employer at the time it took the decision to dismiss. Anything subsequently discovered by the employer is irrelevant to the decision the employer took at the time and can not be used to justify it (though see its relevance to contributory fault below).
  - (2) The ET will determine whether the employer had properly investigated the situation, i.e. had taken such steps as it ought to have fully appraised itself of all of the relevant facts by the time it took the decision to dismiss (see Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23; ICR 111);
  - (3) Included within that will be the extent to which it allowed the employee to have his say, e.g. at a disciplinary hearing, or during consultation for a redundancy, or when investigating sickness absence.
  - (4) Steps alternative to dismissal ought to be considered.
  - (5) The ET will determine whether the dismissal was within the reasonable range of responses open to the employer.
51. The EAT emphasised in West London Mental Health NHS Trust v Sarkar [2009] All ER (D) 298 (Mar) that s 98(4) ERTsA requires all the circumstances of a case to be taken into account so that an employee can be fairly dismissed for misconduct, notwithstanding that the same misconduct was the subject of an earlier unsuccessful attempt at conciliation under which the potential sanctions fell short of dismissal.
52. Reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures will always assist as providing a benchmark for appropriate conduct. (Note that for now at least, there are obligatory statutory grievance and disciplinary procedures which provide minimum standards of procedure to which must be adhered to).

### **Capability**

53. This is likely to arise in two circumstances, competence and ill health.
54. Normally, an employer will not be able to dismiss for incompetence unless he has given the employee every chance to achieve the required level of capability, particularly in the case of a long serving employee. The exception will be where an employee is so

incompetent that to keep him on more in hope than expectation of improvement would amount to an unnecessary burden on the business. Exhortation, encouragement and training ought to be in evidence before the employer starts to go down the disciplinary route of warnings and finally dismissal. It is one thing to warn an employee that he need to pull his socks up; it is quite another to say to him that if he does not improve, he will be dismissed.

55. It is vital where an employer is going to dismiss on the grounds of ill health that he is properly informed. Therefore, consultation is a must if there is to be a fair ill-health dismissal. Note that the onus is on the employer to seek information, not to wait for it to be volunteered. The working environment or the particular need for robust employees (e.g. oil rig workers) are relevant considerations. Potential alternative employment ought to be explored as an alternative to dismissal.
56. Note the potential overlap with disability discrimination where lack of capability was caused by ill health.
57. It is necessary for the practitioner (and ideally the employer) to be familiar with the Access to Medical Records Act 1988. This governs the appropriate procedures for seeking the employee's medical records or a report from his/her medical practitioners.

## **Conduct**

58. This is perhaps the most controversial and oft-litigated of reasons. Dismissal is the ultimate sanction. Thus, it will be considered only in the case of serious or gross misconduct, or where the employee has exhausted the employer's disciplinary procedures (which might include informal warning, formal oral warning, written warning, final written warning, dismissal).
59. The leading case is British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303 (EAT). A 3-stage test was propounded:
  - (1) the employer must establish that he genuinely believed that the employee was guilty of misconduct;
  - (2) that belief must be based on reasonable grounds;
  - (3) the employer must have investigated the matter reasonably.See also Sainsbury's v Hitt [2003] IRLR 23 in relation to the necessity to abide by a fair procedure at all stages of the disciplinary process and investigation.
60. A fair procedure would usually involve application of the principles of natural justice:-
  - (1) the nature of the accusation ought to be known to the accused;
  - (2) he ought to have an opportunity to state his case;
  - (3) the decision making body must act in good faith.That said, an internal disciplinary investigation and hearing is not akin to a court of law. For example, there is no absolute requirement to allow cross-examination of witnesses.

One would expect witness statements to be disclosed, or at least the content of the evidence relied to put to the employee.

61. Factors which often crop up include:-

- (1) Consistency of treatment. Offenders, without more, ought to be treated similarly for similar misdemeanours;
- (2) Check disciplinary provisions in the contract (They ought to be there (s.3)). If followed (and assuming them to be appropriate and to comply with the minimum standard prescribed by statute (see below)), it is unlikely that a dismissal will be held to be procedurally unfair.
- (3) Long serving employees are likely to be entitled to greater consideration than short serving ones. An example lies in relation to their honesty where there is a conflict of evidence. A long-serving and trustworthy employee might expect his long and honest service to weigh in his favour.
- (4) Warnings can be crucial. However, attention must be paid to the content and context of the warning to ensure that it was sufficient to make the employee realise its import. A warning which historically has been ignored is unlikely to be sufficient to justify a dismissal. A change of policy and the consequences of ignoring it must be made clear. Essentially it must be clear not only what the warning is, but the consequences of disobedience.
- (5) The nature of the offence. Examples of conduct likely to be regarded as gross misconduct include refusal to obey an order, offences of dishonesty, breach of disciplinary standards. The contract may specify what misconduct will be regarded as giving rise to a risk of dismissal.
- (6) Right of Appeal. Denial of such a right may make the dismissal unfair. However, a first hearing for a senior employee might be carried out by the most senior employee. To whom would one appeal?
- (7) An appeal can correct procedural irregularities on 1<sup>st</sup> hearing provided that it is a full re-hearing and is itself conducted fairly.

## **Redundancy**

62. The definition of redundancy is contained in s.139:-

*“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to*

- (a) *the fact that his employer has ceased or intends to cease*
  - (i) *to carry on the business or the purposes of which the employee was employed by him, or*
  - (ii) *to carry on that business in the place where the employee was so employed, or*
- (b) *the fact that the requirements of the business*
  - (i) *for employees to carry out work of a particular kind, or*

(ii) *for employees to carry out work of a particular kind in the pace where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”*

Remember that it is the post and not the individual that is being made redundant. The employer may require 2 instead of 4 van drivers, therefore 2 driving positions become redundant.

63. The procedure for a fair redundancy
- (1) depends on the nature of the business, both as it was prior to redundancy and how it is to be following the redundancies, and
  - (2) involves an early exchange of information.
- The leading case is Williams v Compair Maxam Limited [1982] IRLR 83. Although the guidelines set out in that case are more appropriate to large-scale unionised employers and do not sit so happily with smaller more focused workplaces.
64. The principles are:-
- (1) to give as much warning as possible of impending redundancies;
  - (2) to consult with the union, including as to selection criteria;
  - (3) to seek to establish criteria that are as objective as possible;
  - (4) to ensure that selection is made fairly in accordance with the criteria;
  - (5) to seek to offer alternative employment.
65. The decision to make redundancies in general can not be challenged. The employer ought to provide some evidence of the reasons for redundancies, whether economic or organisational or whatever.
66. It will be incumbent on the employer to explain why the posts chosen were redundant. Evidence ought also to be led of the making of and reasons for those decisions.
67. Once it is established which posts are to go, there may be several candidates for redundancy. There are two elements to the selection of individuals for redundancy. First, there is the selection of the pool of candidates. Then there is the selection of individuals from that pool. The latter involves the evolution of a set of selection criteria and then its application to the members of the pool. The former may not materialise if there is a single or a limited number of redundancies.
68. Considerations in relation to individual consultation will include:-
- (1) the skills required of the workers in the “new” workplace;
  - (2) length of service (LIFO);
  - (3) attendance (though the reasons for sickness absence must be investigated. Disability discrimination might also raise its head);
  - (4) the personal characteristics and situation of the employees;

69. Consultation is a key ingredient in a fair redundancy
- (1) Note the mandatory consultation with both individuals and their representatives required for multiple redundancies (20 or more within 90 days - s.188 TULRA. There is also an obligation to notify BERR (s.193)).
  - (2) Generally consultation is required with both individuals and representatives. It should be undertaken at an early stage. It is not required before an individual is identified as a potential candidate for redundancy.
- See the judgment of Peter Clark in Mugford v Midland Bank plc [1997] IRLR 208; ICR 399 (EAT) in which he summarises the principles of good consultation.
70. Redeployment elsewhere in the organisation, associated organisations or elsewhere ought to be considered. The offer of suitable alternative employment which is unreasonably refused will be an answer to a claim for unfair dismissal.

### **Automatically Unfair Reasons**

71. The ERA makes dismissal for certain reasons automatically unfair, including:-
- (1) relating to pregnancy and childbirth (s.99);
  - (2) relating to parental leave (s.99);
  - (3) Health and safety reasons (s.100)
  - (4) Whistleblowing (s.103A)
  - (5) Victimisation (asserting of a statutory right) (s.104)
  - (6) Seeking flexible working.

### **PROCEDURES**

72. Over a year ago, on 6 April 2009 the Employment Act 2008 repealed S.98A ERA, so that the procedural fairness of a dismissal no longer depends on compliance with the statutory DDPs.
73. The Government undertook to review the operation of statutory DDPs and their impact after two years. The review concluded that the processes tended to lead to disputes becoming formalised. The Government therefore decided to repeal the statutory procedures
74. Instead, tribunals are now required to have regard to the new Code in their assessment of the fairness of dismissals in the workplace. Further guidance is contained in "Discipline and grievance at work: the Acas guide (88 pages). There is no obligation on the Tribunal to have regard to this guidance.

75. The Code was issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and came into force at the same time as the Employment Act 2008, 6 April 2009.
76. An enhanced ACAS Helpline has now been introduced. There is a new free ACAS conciliation service, available through the Helpline, to help resolve workplace problems. There is also a revised non-statutory guide providing information on handling discipline and grievance. A joint leaflet has also been produced by BERR, the CIPD and ACAS to inform employers about the changes. For further information on the Act see the ACAS website <http://www.acas.org.uk/>.
77. In reality, with the exception of the ability of a tribunal to increase awards by up to 25%, the area of unfair dismissals has returned to where it was in 2004. The Code emphasises the importance of timelines and consistency, of reasonable investigations, of transparency, and of the right to appeal.

#### **The ACAS Code:**

78. The revised ACAS Code of Practice (the code) will govern grievances, disciplinary proceedings and dismissals in place of the statutory procedures. The new ACAS Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry.
79. In relation to disciplinary proceedings and dismissals, the Code recommends that:
- The employer should establish the facts of the case in hand.
  - The employer should inform the employee of the problem.
  - The employer should hold a meeting with the employee to discuss the problem.
  - The employer should tell the employee that they may be accompanied at the meeting.
  - After the meeting the employer should decide on appropriate action.
  - The employer should provide the employee with the opportunity to appeal.

Are all post April 2009 cases **governed** by the new ACAS Code?

80. As noted above, the new ACAS Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts.
81. The SDDP and SGPs will remain for a while longer. They will continue to apply to disputes where the 'trigger event' occurs before the cut-off dates set out in The Employment Act 2008 (Commencement No.1, Transitional Provisions and Savings)

Order 2008 SI 2008/3232. If the 'trigger event' occurs on or before 5 April 2009 the old statutory procedures will apply. In a dismissal case the Step 1 letter or Step 2 meeting will count as a trigger event.

What happens if the **ACAS** Code is not followed?

82. The Employment Act 2008 states that if either party unreasonably fails to follow the code then, at relevant subsequent tribunal proceedings, an award to the claimant may be reduced or increased by up to 25% depending on who is at fault.
83. This discretionary power to reduce or increase the award applies to unfair dismissal claims.

### **REMEDIES**

84. The first and foremost remedy available to the ET is to order reinstatement or re-engagement. The Applicant, whether or not he has sought such a remedy in his ET1, must be asked if that is what he seeks. Neither remedy is common. Reinstatement is an order that the employer treat the employee as if he has not been dismissed and involves giving the applicant his old job back with all relevant back pay and accumulated rights (s.114). Re-engagement involves giving the employee an equivalent job (s.115).
85. The remedy most usually sought and awarded is monetary compensation. The ET award is divided in two:-
  - (1) a basic award; and
  - (2) a compensatory award.The basic award is essentially punitive and gives the employee the equivalent of statutory redundancy pay. The compensatory award is, as it says, compensatory. It gives the employee an award on account of his loss.

### **Basic Award**

86. The calculation of the basic award is set out in s.119. It is the same as the statutory redundancy pay. One determines the length of the employee's service backwards from the EDT. One then calculates the number of full years he has worked (up to a maximum of 20 (s.119(3))). Then an amount is allowed for each full year of employment as follows:-
  - (1) one and a half week's pay for each year in which the employee was not below the age of 42;
  - (2) one week's pay not within (1) in which the employee was not below the age of 22;
  - (3) half a week's pay for an employee who was not within (1) or (2).

87. Taking as an example a 45 year old whose birthday is 1<sup>st</sup> January 1959 and who was dismissed on 1.5.04 and who started work on 1.2.00.
- (1) he has 14 full year's service;
  - (2) of those 14 years service,
    - (a) for 4 of them he was 41 or over and entitled to 1½ weeks' purchase, a total of 6 weeks;
    - (b) for the remaining 10 he was over 21 and entitled to 1 week's purchase, a total of 10 weeks.
  - (3) Thus, he is entitled to 16 weeks' pay.

Pay is gross pay and is subject to a maximum weekly amount, from 1<sup>st</sup> October 2009, £380, s.227 ERA 1996. This maximum weekly amount was not increased in February 2010. The previous maximum was £330. The minimum is 4 weeks' gross pay, s. 120.

### **Compensatory Award**

88. The assessment of the compensatory award is carried out in accordance with s.123 which provides:-

*"... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

The award is designed to compensate the employee for the loss he sustains as a result of the dismissal to the extent that it is just and equitable. There may be circumstances where it is just and equitable that the employee receive nothing (e.g. where the employer discovers subsequent to an unfair dismissal that the employee had, in fact, been systematically defrauding the company).

89. The compensatory award will cover such matters as:-

- (1) loss of pay
- (2) loss of ancillary benefits such as car, cheap mortgage, health cover, etc.
- (3) loss of pension rights.

Note that earnings received by the dismissed employee during what would have been his notice period are not to be taken into account when assessing the compensatory award (see Langley v Burlo [2006] EXCA Civ.1778; [2007] IRLR 145 (CA)).

Ex gratia payments made by the employer to the employee, or payments in lieu of notice are to be taken into account.

It has been confirmed by the HL in Dunnachie v Kingston-upon-Hull CC [2004] IRLR 727 84 that an award can not be made for injury to feelings as a result of the manner of the dismissal. 'Loss' in s.123 is restricted to financial loss.

Note that earnings received by the dismissed employee during what would have been his notice period are not to be taken into account when assessing the compensatory award. Ex gratia payments made by the employer to the employee, or payments in lieu of notice are to be taken into account. Note that the correct measure of damages in an *actual* dismissal case (absent gross misconduct) is what the employee would have earned during her notice period, Langley v Burlo [2006] EWCA Civ.1778; [2007] IRLR 145 (CA). This principle does not apply in a constructive dismissal case (where an employee has accepted a repudiatory breach by the employer), Bell v Stuart Peters Ltd [2009] EWCA Civ 938.

90. It has been confirmed by the HL in Dunnachie v Kingston-upon-Hull CC [2004] IRLR 727 84 that an award can not be made for injury to feelings as a result of the manner of the dismissal. ‘Loss’ in s.123 is restricted to financial loss.  
Note also that a conventional sum for loss of statutory rights (i.e. the fact that it will take the employee a year in his new employment before he again obtains the right not to be unfairly dismissed) is awarded, currently in the region of £350.
91. There is a ceiling on the amount that can be awarded. Previously this was £66,200 (up from £63,000) for dismissals with an EDT after 1<sup>st</sup> February 2009, Employment Rights (Increase of Limits) Order 2008, SI 2008/3055. This ceiling was reduced (for the first time ever) from £66,200 to £65,300 – from 1 February 2010.

### **Contributory Fault**

92. In relation to both the basic and compensatory award, there are provisions for them to be reduced on grounds of contributory fault of the employee. They are not identical.

#### **Basic Award**

“122(2) *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*”

#### **Compensatory Award (s.123)**

“(6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the award by such proportion as it considers just and equitable having regard to that finding.*”

A reduction of the compensatory award requires that the dismissal was caused or contributed to by the employee. There is not a similar provision in relation to reduction of the basic award. In most cases, a similar reduction would be applied.

93. It is of use to note the potential overlap between a compensatory award and damages for wrongful dismissal. There is a danger of double recovery if an applicant pursues both remedies. The problem is best illustrated in the case of a high earning employee.

An employee receives remuneration worth £15,000 per month net. He has a 3 month notice period. Following a wrongful and unfair dismissal, he is unable to find work for 10 months. His loss is therefore £150,000.

His contractual claim for wrongful dismissal is worth £45,000

His compensatory loss is £150,000, but is subject to a maximum of £63,000.

If he brings an ET claim and is awarded £63,000, he recovers substantially less than his total loss. What he needs to do is recover his £45,000 notice pay in the civil courts, then claim in the ET for his continuing loss beyond the notice period. That will be £105,000, in respect of which he will receive the maximum award of £63,000. His total recovery will therefore be £105,000.

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