An Introduction to Employment Law

presented by John Sprack for LawWorks
Employee status: employee

• The test for whether someone is an employee

• Is there a contract with the “employer”? - see s 230(2) ERA

• Is there an obligation on the “employee” to provide work personally?

• Is there mutuality of obligation between the parties?

• Is there control of the “employee” by the “employer”?

• Do the terms of the contract as a whole reflect an employment relationship?

• The final point is a balanced judgment. The preceding four points are “musts”. 
Qualifying for unfair dismissal rights

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

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

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

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

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

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

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

• It helps to determine what is reasonable

• It applies to conduct dismissals, but not redundancy

• Follow its principles where competence or capability is in issue

• Relevant to whether a dismissal is unfair

• And breach may lead to an increase/decrease of up to 25%
Whistleblowing

- Was there a qualifying disclosure? e.g. reasonable belief in failure to comply with a legal obligation

- Is it protected? - was disclosure made in accordance with ss 43C to 43H ERA 1996?

- Was disclosure the principal reason for dismissal?

- Or did it materially influence the employer in imposing a detriment

- A Day One right

- No limit to compensation
Remedies for unfair dismissal

• Reinstatement
• Re-engagement
• Compensation
Compensation - basic award

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

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

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

- Laid down in *Polkey v AE Dayton Services Ltd* [1988] AC 344

- what is the effect of a finding that the employer acted unfairly, but that the adoption of a fair procedure would not have made a difference?

- the dismissal is still unfair

- but compensation may be reduced e g to reflect the percentage chance that the employee would have been dismissed anyway
Contributory conduct

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

- If C receives jobseeker’s allowance or income related employment support allowance, Recoupment Regulations apply

- ET must determine the “prescribed element”

- And R must hold the prescribed element back until the Benefits Agency has reclaimed, then pay C the balance

- recoupment does not apply to a settlement
Discrimination - features

- no service requirement
- no compensation limit
- prospect of damaging publicity
- costs can be considerable
Employment status for discrimination

• Protection against discrimination is wider than for employees. The test is:

• Is there a contract which the person claiming protection works under?

• Is it to provide work or labour?

• Applicants are covered if the job applied for falls under the above definition

• Note that other groups such as agency workers are specifically included
Discrimination- time limits

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

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation
The main forms of discrimination

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

- A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (Equality Act 2010, s 13)

- “because of”

- need for a comparator (may be hypothetical)

- no material difference between claimant and the comparator (s 23)
Indirect discrimination

• involves application of a provision, criterion or practice (PCP) by A to B

• puts those with whom B shares the protected characteristic at a particular disadvantage when compared with those who do not share it

• puts B at that disadvantage

• A cannot show it to be a proportionate means of achieving a legitimate aim
Victimisation

• A victimises B if he subjects B to a detriment because he has done a protected act

• Protected acts include doing anything in connection with the Equality Act

• Also making an allegation that A or another person has contravened the Act

• A false allegation or evidence is not protected if made in bad faith
Harassment

• A harasses B if A

• engages in unwanted conduct

• which is related to a relevant protected characteristic and

• which has the purpose or effect of

• violating B’s dignity or

• creating an intimidating, hostile, degrading, humiliating or offensive environment for B
Employer liability

• Employers are liable for the acts of employees in the course of their employment

• It can include unauthorised acts, and some out of work activity: **CC of Lincolnshire Police v Stubbs [1991] IRLR 81 EAT**

• Employers have a defence if they took “all reasonable steps” to avoid the discrimination

• Individual employees can also be held liable
Disability

• C is disabled if she has

• a physical or mental impairment which has

• an effect upon her ability to carry out normal day-to-day activities which is

• substantial

• long-term (think 12 months) and

• adverse
Forms of disability discrimination

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

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

- In calculating this head of compensation, ETs make use of the **Vento** bands (recently updated)
  - top band £25,700 to £42,00 for most serious cases
  - middle band £8,600 to £25,700 for serious cases not in the top band
  - lower band £900 to £8,600 for less serious cases e.g. one off cases
Procedure in the ETs

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

• via website

• www.johnsprack.co.uk

• or email jmstraining@btinternet.com

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