

Understanding Employment Law - Unit 5CELW

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By signing below, I confirm that the work/evidence presented is my own, unaided work. I understand the regulations pertaining to candidate malpractice and the action that may be taken as a result.

Signed: Leanne Aitken

Date: 7 February 2019

Question 1

According to Daniels (2019), employment law is primarily governed by civil law, which is founded on the basis of the law of contract, tort and property and impacted by a number of external factors. Employment law comprises statutes which are underpinned by Acts of Parliament and statutory regulations, European directives and common law. These define the parameters within which employees and employers are required to operate when engaging in work and establishes a set of rules that governs this relationship; both parties are obliged to comply with these rules in order to adhere to the legislated minimum requirements laid down by the UK government.

Employment regulation mandates what is required to manage and regulate the employment relationship in a manner that is lawful (Taylor & Woodhams, 2016) and has a significant impact on HRM decisions, policies and practice.

There is, however, a debate stemming from a desire to enhance social justice (Taylor & Woodhams, 2016) which holds that extensive employment law facilitates positive outcomes for employees and the larger economy as it protects employees and minority groups from exploitation, redresses the power balance between employees and their employers and encourages people to remain in the market as opposed to retiring or working abroad.

An opposing view founded on the basis of an economic argument, holds that whilst employees benefit from the protection afforded as outlined above, the cumbersome bureaucratic processes ("red tape") intrinsic to both the regulatory and resultant financial burden placed on employers, serves as a deterrent to multi-national organisations establishing sites in the UK, whilst deterring smaller companies from hiring new people, which contributes to higher unemployment levels and slows economic growth.

The CIPD, however, expressed the view that the UK's employment regulation framework in its current state, is not a barrier to success and provides sufficient flexibility for employers, whilst affording employees the appropriate level of employment protection (CIPDg, 2017).

As referenced above, employment law primarily falls under the remit of Civil law which focuses on dispute resolution between 2 parties, however, there are employment law cases that relate to criminal acts and these cases are usually brought to the Magistrates Court or, in the event of a serious offense, referred directly to the Crown Court. Appeals on the basis of fact are also heard in the Crown Court, whereas appeals on issues of law, are heard in the High Court (Daniels, 2019).

The majority of employment law cases are, however, first heard in an Employment Tribunal. Claimants bringing cases relating to an employment statute right (which include unfair dismissal and discriminatory practice in contravention of the Equality Act 2010), are required to do so within 3 months by informing the Advisory, Conciliation and Arbitration Service ("ACAS") in the first instance. In the event that efforts by ACAS to reach a settlement prove futile, claimants can proceed to lodging a claim with the local employment tribunal office (CIPDf, 2019).

The only basis on which to appeal a decision by an Employment Tribunal judge, is on a point of law. The hierarchy structure mandates that appeals are referred to an Employment Appeal Tribunal (EAT). The EAT is responsible for deciding how new employment statutes will be interpreted and consequently, has the authority to make rulings that impact all employers across the UK. Subsequent appeals are directed to the Court of Appeal and finally to the Supreme Court.

It should be noted, that not every employment-related issue starts in an Employment Tribunal. This is true of wrongful dismissal claims with a value equal to or greater than £25,000, which cannot be brought in an Employment Tribunal.

Additionally, common law based on decisions derived by judges within the Court of Appeal, Supreme Court or the Court of Justice of the European Union (ECJ) create precedents and resulting principles that courts are required to abide by (unless altered by a future statute). Decisions taken in these aforementioned courts are deemed binding and can mandate how the law should be interpreted, for example in the case of *Guisado v Bankia SA and others* (2018) where the ECJ ruled that it was appropriate for a pregnant woman to be included in a collective redundancy (Xpert HR, 2019).

Question 2

According to the The Equality Act 2010 makes it unlawful for employers to discriminate against job applicants as a result of the 9 protected characteristics, namely: Age; disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, ethnicity and natural origin, religion or belief, sex and sexual orientation. Discrimination can be direct (section 13, EqA 2010) where an individual is treated less favourably as a result of a protected characteristics or Indirect (subjected to a provision, criterion or practice (PCP) that applies to all employees but particularly disadvantages a greater number of people sharing the same protected characteristic - section 19, EqA 2010) (Equality and Human Rights Commission, 2011).

According to CIPDe (2018), employers are guilty of direct discrimination when a person is caused a detriment because of a reason related to a protected characteristic. The only defence that employers have is if they can evidence that there is an occupational requirement that justifies why age or a disability impairment prevents people from fulfilling a role that they could otherwise have fulfilled with reasonable adjustments in place.

In a recent direct discrimination case of *James v Coedffranc Community Council*, 2018, the EAT found in favour of the claimant and agreed that the reason he was declined for the position of a park attendant following interview, was on the basis of his age (Xpert HR, 2019).

The case of *Fhima v Traveljigsaw Ltd*, 2015 is an example of indirect discrimination where the claimant cited the reason for her being rejected for a job was on the basis that her religion prevented her from working on a Saturday (XpertHR, 2017).

Indirect discrimination can be deemed legal if employers can evidence that it is a proportionate means of achieving a legitimate aim or, where they take a positive action approach to hiring (if compliant with section 158 and 159 of the EqA 2010).

When advertising a role, employers should ensure that they advertise internally / externally, highlighting that they are an equal opportunities employer and clearly distinguishing between essential and desirable criteria (CIPDe, 2018).

Daniels (2019) states that whilst a conditional offer may be withdrawn, there remains grounds for discrimination if it is withdrawn for a reason relating to a protected characteristic, for example, if an employer cites the reason as being that implementing reasonable adjustments for a disabled candidate is not practical as was the situation that gave rise to a claim in the case of *Kenny v Hampshire Constabulary*, 1999.

According to Taylor & Woodhams (2016), the 5 conditions that should be satisfied in order for a contract of employment to exist are as follows:

- that an unconditional offer has been made;
- that an unconditional acceptance of the offer is in place;
- that an intention exists to form a legal relationship;
- that consideration exists in the form of payment or payment in kind; and
- that there is clarity in respect of the main terms and conditions.

Further regulatory restrictions stipulate an employment contract should not be entered into illegally and that both parties are of sound mind at the point at which the contract is formed. Additional restrictions exist to protect minors from contracts that are not in their best interests.

Prior to initiating a contract, the status of the individual should be determined (eg: employee, worker or self-employed) as this impacts legal rights and entitlement (Acas (c), 2018). A key distinction is whether the contract is formed as a “contract of service” or a “contract for services”. If deemed an employee, then according to sections 1 to 7 of the Employment Rights Act 1996, an employee is entitled to a written statement no later than two months following commencement of employment stipulating the main terms and conditions of the job. There are also implied terms associated with an employment contract as listed below (Daniels, 2019):

<i>Statement of Criteria: Express Terms*</i>	<i>Implied Terms**</i>
Collective agreements (applies to employees covered by agreement) and can be expressly incorporated or implied.	
Names of employer/employee	Relevant statutes automatically form part of employment contract
Employment commencement date	Custom and practice if reasonable and generally applied over a prolonged period
Date when continuous service commenced	An agreed term determined by the courts through case law
Job title and description of duties	Work rules if referenced in the employment contract
Remuneration and timing of payment	
Terms and conditions ie: hours of work, holiday pay, incapacity through sickness	

Place of work and/or requirement to work across locations	
Pension schemes details	
Notice period to terminate employment contract	
Term of employment if not permanent	
Terms and conditions related to working outside the UK for a period in excess of one month	
Details of disciplinary rules	
Details of grievance procedures	

**Note: The government has legislated that effective April 2019, a statement of written particulars is to be extended to workers (UK Parliament, 2018).*

***Note: Employers are bound by implied terms of law including the requirement to pay work and wages – see full response in Q5(c)*

Question 3

(a) According to Taylor & Woodhams (2016), a contract can be changed lawfully when an organisation has sound business reasons for the change, which includes the below:

- Invoking an existing flexibility clause included in the employment contract.
- Advising an employee in writing of contractual changes whilst anticipating that this will be received without a negative response.
- Negotiating changes with a trade union where a collective agreement has been expressly stated in employment contracts.
- Dismissing staff and immediately hiring them under a new contract (last resort).

Employers are required to adhere to the following consultation process in the first instance (Daniels, 2019):

<i>Number of Employees</i>	<i>Consultation Period</i>	<i>Parties being consulted</i>
100+	45 days	Employee representatives
20 – 99	30 days	Employee representatives
1 – 19	Not fixed	Individual employee

It should be noted that employers are only required to consult on a contract change if there is a detriment to employees' terms and conditions.

(b) Daniels (2019) states that redundancy is deemed one of the five fair reasons for dismissal under section 139(1) of the Employment Rights Act 1996. Employees are deemed redundant if their dismissals relate to one of the following:

- An employer who has ceased or intends to cease to proceed with the business for the purposes of which the employee was employed.
- Where an employer has ceased or intends to cease to continue with the business in the location where the employees were employed.

- Where the particular kind of work that an employee was hired to carry out in a specific location has ceased or diminished.

According to CIPDh (2017), the redundancy process commences with a period of collective consultation as mandated by the Trade Union and Labour Relations (Consolidation Act) 1992, as follows:

<i>Number of Employees</i>	<i>Consultation Period</i>	<i>Parties being consulted</i>
100+	45 days	Trade union representatives / employee representatives
20 – 99	30 days	Trade union representatives / employee representatives
1 – 19	Not fixed but must occur over a reasonable period	Individual employee

Note: Any employees volunteering for redundancy should be included in consultation numbers.

The importance of conducting authentic consultations is highlighted in Daniels (2019) by the rulings in the cases of *Leicestershire County Council v Unison*, 2005 and *King and others v Eaton Ltd*, 1995 where the EAT ruled that consultations must occur when the proposal of redundancy is at the formative stage to allow for meaningful engagement.

CIPDh (2017) states that Section 188(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 mandates that the information provided by the employer when the consultation period commences should include:

- The reason for redundancies;
- number of employees affected and a description of the jobs at risk;
- the total number of employees impacted;
- the procedure to be followed; and
- the method of calculating redundancy settlements (unless aligned to statutory payments).

There is also an obligation on the employer to notify the Secretary of State for Trade and Industry at the point at which the intention is announced to make 20 people or more redundant (Daniels, 2019).

Employers are required to identify the selection pool of employees at risk of redundancy in a manner that is objective and transparent and involving a system that can be used to fairly determine the pool from a group of employees performing similar jobs (Acas (e), 2012).

- (c) The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) outlines the rights and prescribes the process that is required when an economic is acquired by another organisation (whilst retaining its identity), or when a change in service provision occurs (or both) (Taylor & Woodhams, 2016).

When a transfer takes place, ALL the contractual rights of the affected employees are transferred from the transferor to the transferee Daniels (2019) and this includes employment contracts, any collective agreements that are in place, trade union recognition, continuity of service (occupational pension schemes are excluded).

The only permissible exception to varying an employment contract is if an economic, technical or organisational (ETO) reason is responsible for that change Daniels (2019).

There is a shared responsibility for the transferor and transferee to consult with employee representatives and provide information that notifies the representatives that a transfer is occurring, what the reasons for the transfer are, the implications for employees and the measures being taken in respect of the employees (Acas (e), 2012).

There is an obligation for the transferor to provide prescribed information to the transferee at least 28 days prior to the transfer date, namely: names and ages of employee, employees' statements of particulars, details of existing collective agreements and information related to disciplinary action, grievance procedures and legal action that the transferor has initiated against any of the employees within the past two years (Acas (e), 2012).

It is usually unfair to dismiss an employee for a reason linked to the TUPE transfer, however, TUPE does not allow for an employee to object to a transfer unless there is a breach in compliance with these regulations (CIPDa, 2018).

Question 4

- (a) According to section 8 of the Employment Rights Act 1996, employees have the right to an itemised payslip either before or with payment of wages/salary. In April 2019, employers will be required to include the number of hours worked on a payslip and the different rates of pay if applicable to the type of work being carried out (Low Pay Commission, 2018).

It is unlawful to process a deduction from an employee's wages unless it is authorised by statute, provided for in the employment contract or agreed by the employee in writing. Employees can make a claim to the Employment Tribunal if their employer has failed to comply with the above (Daniels, 2019).

Payment in lieu of notice is not deemed as an unlawful deduction as wages are defined as payment for work carried out during employment. This was the ruling laid down in case of *Delaney v Staples*, 1992 in Daniels (2019).

The National Minimum Wage (NMW) Act mandates that workers receive a minimum hourly rate of pay. This is set over 5 levels (age and/or terms of apprenticeships are the determinants of the bands). These are set to rise in April 2019, with the hourly rate for over 25's rising to £8.21 per hour (Low Pay Commission, 2018).

It is not obligatory for employers to offer a sick-pay scheme, however, Statutory Sick Pay (SSP) is mandatory and eligible employees are entitled to 28 weeks in any 12 month

period (providing they have been off ill for four or more consecutive calendar days and their average earnings are equal to the lower earnings limit (Taylor & Woodhams, 2016).

Daniels (2019) states that the Working Time Regulations 1998 minimum standards in respect of working time, breaks, night work and annual leave are as follows:

<i>Working Time</i>	<i>Annual Leave</i>	<i>Rest periods</i>	<i>Eligibility / Terms</i>
Fixed Hours Variable Hours	28 days (including public holidays)	Adults: Minimum 20 minute break every 6 hours / young workers: 30 Minutes every 4.5 hours.	If variable hours, workers receive an average of the previous 12 weeks worked as one week's holiday pay
Max 48 hours per week averaged over 17 weeks		Adults: 11 hours in every 24 hour period / 12 hours for young workers.	Employees can elect to opt out of the restriction in writing
Night work (usually 11.00pm to 6.00am) – not less than 7 hours in length		24 hours in every 7 day period (averaged over 14 days) / young workers: 48 Hours in a 7 day period.	Night worker defined as working at least 3 hours between the hours of midnight to 5.00am

- (b) The table below outlines the major maternity, paternity and other family friendly employment rights for people working under a contract of service:

<i>Type of leave</i>	<i>Eligibility / Terms</i>	<i>Rights</i>
Compulsory Maternity Leave	2 Weeks post childbirth / 4 weeks for factory workers forms part of OML.	Time off for antenatal appointments. Appropriate alternative employment following a risk assessment. Statutory contractual holiday accrual. Continuity of service. Permitted to work for 10 "Keeping in touch" (KIT) days without losing maternity pay entitlement. To return to substantive post. Statutory Maternity Pay (SMP).
Ordinary Maternity Leave (OML)	26 Weeks irrespective of length of service.	
Additional Maternity Leave	26 Weeks commencing immediately when OML ends irrespective of length of service. For SMP, employee must have been employed for 26 continuous weeks prior to the 15 th week before her expected week of confinement (EWC).	

Statutory Paternity Leave (SPL)	For SPL, employee must have been employed for 26 continuous weeks at the 15th week before the baby's birth. To be taken within 56 days of birth of child. Employee should be father of child or husband / partner of mother. Hold responsibility for the upbringing of the child. The above applies to partners of an adopter.	Paid paternity leave at the lower rate of SMP. To return to substantive post.
Statutory Adoption Leave (SAL)	This mirrors maternity leave, however, it can only be claimed by one person in relation to each child. Parents in surrogacy arrangements qualify for SAL and pay; and SPL and pay if they meet the standard qualifying conditions.	
Shared Parental Leave (SPL)	This option can be taken instead of SML or SPL (however, the compulsory maternity leave component cannot be shared). This leave can be taken as continuous or discontinuous leave. Parents receive shared parental pay per couple. Eligibility is subject to a "continuity test" as well as being eligible for one of the above and having a shared responsibility for raising the child.	
Parental Leave	One year's continuous service.	Up to 18 weeks per child. Applicable to first 18 years of a child's life. To return to the same (or another suitable) job.
Flexible Working Requests	26 Weeks continuous service.	Employers are required to consider requests in a reasonable manner by meeting the employee, considering advantages and disadvantages and offering a right of appeal.

Note: A pregnancy related dismissal qualifies is automatically unfair

Question 5

- (a) Daniels (2019) outlines there primary health and safety responsibilities of employers and employees in the workplace according to the Health and Safety at Work Act (HASAWA) 1974. HASAWA focuses on a broad spectrum of general issues, however, this is underpinned by other pieces of legislation that retains a specific focus as follows:

Statute	Purpose
Workplace (Health, Safety and Welfare) Regulations 1992	Ensure work, equipment, systems are maintained and in good repair.
Personal Protective Equipment Regulations 1992	Provide necessary protective equipment, keep it in a good state of repair and train staff in the appropriate use of it.
Health and Safety (Display Screen Equipment) Regulations 1992	Employees take regular breaks, have workstations designed in an optimal way, provide eye tests.
Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 1995	Requires that an injury at work or death be reported, plus any incidents that lead to absences in excess of 7 days and the occurrence of certain diseases.
Manual Handling Operations Regulations 1998	Employers ensure employees are trained in correct way to lift and move heavy objects and minimise / eliminate manual handling where possible.
Provisions and Use of Work Equipment Regulations 1998	Appropriate equipment is supplied at work (focus on fires / explosions) and train employees in its use.
Management of Health and Safety at Work Regulations 1999	Utilise risk assessments to improve health and safety by considering risks within the organisation and devising a means to mitigate or eliminate them.
Control of Substances Hazardous to Health (COSHH) Regulations (amended 2002)	Potentially hazardous materials are stored correctly and have risk assessments in place for use.

Employees too have a duty of care as laid out in Section 7 of HASAWA, namely:

- Co-operate with employer to enable health and safety requirements to be met;
- use any personal protective equipment, store it correctly and report any defect;
- comply with relevant systems mandated by employer iro manual handling; and
- to inform the employer of any serious and imminent dangers to health and safety,

The employer's duty of care extends to other aspects of health and safety and to succeed in a claim for tort of negligence, employees should be able to prove that the employer owed the employee a duty of care that was breached and the employee suffered damage as a result. If a health and safety breach results in resignation, a constructive dismissal claim could be brought or in severe cases, an employer prosecuted under HASAWA could incur a penalty of a fine or imprisonment (Daniels, 2019).

There are a number of mechanisms to support the enforcement of good standards of health and safety including the appointment of safety representatives, consult with their employees. The HSE's key role is to enforce HASAWA and inspectors are given the rights

to carry out inspections at employers deemed high risk or with a poor record of compliance with health and safety regulation (Daniels, 2019).

- (b) The first piece of legislation relating to issues of discrimination was the Equal Pay Act in 1970 which was followed by the introduction of the Sex Discrimination Act 1975 and the Race Relations Act 1976. It was some 20 years later before the Disability Discrimination Act 1995 was introduced and then December 2003 saw the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion and Belief) Regulations 2003 introduced with the Employment Equality (Age) Regulations in 2006 being the final piece of legislation before the introduction of the Equality Act 2010 which saw the previous legislation repealed. The Equality Act 2010 outlines what employers and employees should do in order to comply with equality legislation and create a fair working environment (Acas (d), 2017). The protected characteristics covered under the Equality Act 2010 are: age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) and sexual orientation) and protection is extended against four types of discrimination (namely, direct and indirect discrimination, harassment and harassment). The 2nd key piece of legislation is the Human Rights Act 1998 which came into force in October 2000 and serves to incorporate into UK law, the human rights contained in the European Convention for Human Rights.
- (c) The employer has a duty to manage employees in accordance with the duties implied by law. A key requirement for both employer and employee is the duty to maintain the relationship of trust and confidence which is viewed as being at the heart of the employment relationship and a number of cases – further duties as follows:
- To pay wages and provide work;
 - To provide fair references;
 - To maintain a duty of care for the health and safety of their employees;
 - To indemnify employees against losses incurred in the course of employment.
 - Bring matters to the attention of employees;
 - To provided effective support against bullying the workplace;
 - To respect the privacy of employees (in line with GDPR recommendations);
 - To deal with grievances effectively.

Question 6

According to Gov.UK, an employer requires a good reason for issuing a sanction of dismissal and the company's policy and process should be adhered to. Employment tribunals consider the Acas Code of Practice: Disciplinary and Grievance Procedure in regards to dismissals, when considering cases and can adjust awards by up to 25% for an unreasonable failure to comply with any provision within the Code (Acas (a), 2015).

- (a) The Employment Rights Act 1996 defines capability as the skill, aptitude, health or any other mental quality of the employee. According to Taylor & Woodhams (2016), the law in terms of dismissal for poor performance is managed similarly to ordinary misconduct in that a formal hearing is arranged and the employee is warned formally about poor

performance and then given a period of time in which to improve (ideally with support in place to facilitate the achievement of performance targets). Performance is then reviewed and a hearing convened to determine whether to dismiss, issue a further warning or take no further action. If absence is driving poor performance and no underlying medical condition has been identified, employees should be given specified attendance targets and a hearing convened if attendance does not improve (again with the right to appeal the outcome).

(b) According to Croner (2018), Case Law defines misconduct as behaviour that is unacceptable in the work place but that doesn't necessarily damage the reputation of the organisation. The government defines gross misconduct as theft, physical violence, gross negligence or serious insubordination. (Acas (a), 2015) advises that disciplinary processes should be conducted by employers in a manner that is fair as follows:

- Prompt action in dealing with issues.
- Acting consistently.
- If suspension on full pay is deemed necessary, this should be kept as brief as possible and the employee advised that it is not a disciplinary measure.
- Conducting an investigation to establish the facts of the case.
- If the outcome following investigation is that there is a case to answer, then the report and all accompanying documents to be used in the hearing should accompany the letter inviting the employee to this meeting.
- Allowing employees to be accompanied to any formal meeting and permitting a postponement to another date within 5 working days of the original meeting if the companion is unable to attend on that occasion.
- Providing employees with an opportunity to state their case, answer any allegations, put forward mitigation and call witnesses.
- If an employee is persistently unwilling to attend, a decision could be made based on the evidence available.
- Appropriate disciplinary action could be a first or final written warning which should be communicated in writing to an employee with notice as to how long the warning will remain current (6 months and 12 months respectively).
- In cases of gross misconduct, the sanction could be either summary dismissal (without notice) or dismissal with notice, however, the 3 step process of investigation, hearing and rights of appeal should still apply.
- Allowing the right to appeal the decision. This could be on either one (or both) of two grounds, namely: that the decision was unfair or that the process was not adhered to.

In cases where misconduct is alleged, section (98)4 of the Employment Rights Act 1996 sets out the principles that employers should adhere to in order to fairly dismiss an employee. When considering this, employment tribunals apply the Burchell test (British Home Stores Ltd v Burchell, 1978) which asks if the employer holds a reasonable belief that the misconduct occurred, whether there are grounds to support this belief and had

the employer carried out a reasonable amount of investigation before reaching this conclusion (Medhurst, 2018).

- (c) A grievance is defined as formal notice of employee dissatisfaction expressed through an identified procedure. These tend to be in relation to working practice/conditions or relationships with colleagues. Acas (b) (2015) advises that employers attempt to resolve grievances informally in the first instance or if that fails, to arrange a formal meeting swiftly and conduct an investigation. Employees will have the right to be accompanied and right to appeal against any decision.

Grievances raised concurrently whilst an investigation into misconduct is underway or raised in response to a sanction that is issued can be based on the last straw principle, wherein an employee can claim that the last act by an employer constituted the “last straw” and triggered a resignation and constructive dismissal claim. Worthley (2018) highlights the case of *Kaur v Leeds Teaching Hospitals NHS Trust*, 2018 where the Court of Appeal determined that the appellant’s employers had properly followed a process in rejecting her appeal against a final written warning (which she deemed as the last straw in a series of acts, which taken together, amounted to a breach of the implied term of trust and confidence) and ruled that this did not constitute a repudiatory breach of contract. This case now raises questions for employment tribunals when faced with similar claims based on this “last straw principle”.

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