

Employment Law

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Date: 19/03/2021

Qualification: CIPD Diploma in Applied Human Resources

Wordcount: 4356

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1. Explain the purpose of employment law and outline the role played by the tribunal and courts system in enforcing employment law.

1.1 Explain the aims and objectives of employment regulation.

1.2 Describe how employment law is enforced through tribunals and the court system.

The aim of employment regulation and law is to enhance social justice, employers are more powerful than employees and can unreasonably exploit this should they wish. (Taylor and Wilkinson, 2016) The law can deter employers from doing this and help balance the power between the employer and employee. It can also encourage people to work in the UK instead of overseas or retiring. Arguments against employment regulation and law are mainly economic, it raises unemployment and slows economic growth, it adds to employer costs and makes them more competitive than commercial rivals in other countries. It can deter inward investment and reduce employment opportunities for minority group.

Sources of law include European Law Directives, Statutes such as acts of Parliaments and statutory regulations and Common Law such as the law of contract and law of negligence, whereby Judges rule on points of principle, which then become precedents which are followed in similar cases. (Taylor and Wilkinson, 2016)

Most UK Law is categorised as civil law, enforced as a result of one party (the claimant) suing another (the respondent) either for compensation or another remedy in a civil court with standard of proof 'on the balance of probabilities'. In one or two areas of employment law, cases are brought before criminal courts, for example when an employer is accused of not complying with health and safety regulations. These are usually decided in the Magistrates or Crown Court (CIPD, 2019) with claimants having up to 6 years to make the claim. The burden of proof nearly always lies entirely with the prosecution, the standard of proof being 'beyond reasonable doubt'. In other words, a criminal court should not convict unless it is certain that the defendant is guilty of the offence of which they are accused.

Depending on what legal matter is to be decided and the level of compensation the claimant is seeking, employment cases can start in either the employment tribunal, the county court, or the high court.

There are over 80 distinct types of claim that can be brought to an employment tribunal, in addition to many more that are employment related but that are heard in the County Courts (Shekleton 2005, cited in Taylor & Wilkinson, 2016) Examples of claims include unfair dismissal, equal pay, National Minimum Wage, redundancy payments.

The process of employment tribunal starts with ACAS early conciliation, the claimant (which can be employees, ex-employees or failed job applicants) contacts ACAS to inform them of their intention, ACAS officials then contact the employer (respondent) with a view of facilitating an out of court settlement. If this fails, the claimant can go ahead and lodge the claim at the local employment tribunal claim office. There are some exemptions from early reconciliation which: If another person has complied with the requirement for the same issue, if the claimant adds relevant proceedings on the same claim form as proceedings which are not relevant proceedings, if the person can prove they sent the form to ACAS but it has not been received, the proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act or section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 or the person is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters. (Gov.uk, 2014e)

A tribunal case is started when a worker's Claim form, known as an ET1, arrives at the tribunal office, this must be within three months of the incident in which the claimant is claiming, minus the time that ACAS have spent looking it to the settlement. The tribunal will then log the claim, send a copy to ACAS, and send a copy to the employer, along with an ET3 form to complete in response. (CIPD, 2021) A hearing will convene and a judge will make a decision. Appeals to decisions can only be made on points of law within 42 days and go to the next hierarchy, the

employment appeals tribunal (EAT) which has responsibility for deciding how new employment statuses will be interpreted and make highly significant rulings that affect all employers in the country. Appeals from the EAT, County Court and High Court are heard by the court of appeal. Cases rarely go further than this but when major issues of public interest are at stake, cases can be appealed to the supreme court. This is the final court of appeal where UK law is concerned however when the case concerns a principle of European law there is possibility of further appeal to the European court of justice. (Taylor and Wilkinson, 2016)

2. Summarise the main principles of recruitment and selection and explain how contracts of employment are established.

2.1 Identify the main discrimination law in relation to principles of discrimination law in relation to recruitment and selection.

2.2 Explain how contracts of employment are established.

The law permits people who have a range of protected characteristics to claim compensation when they suffer from direct and indirect unfair discrimination. The Equality Act 2010 protects job applicants and existing workers with the following protected characteristics: Age, Disability, Gender reassignment, marriage and civil partnership, pregnancy and maternity, race, ethnicity and national origin, religion and belief, sex, sexual orientation. Further UK law extends some protection to being ex offenders and union and non union membership. (Taylor & Wilkinson,p29 2016). Direct discrimination occurs at the recruitment stage when an employer fails to shortlist or appoint qualified person purely on the grounds of a protected characteristic. An act of indirect discrimination occurs when an employer has in place 'a rule, criterion or practice' that has an adverse effect on a substantially greater number of people with a protected characteristic than it does others (Taylor & Wilkinson,p29-30 2016) An example of this would be putting a number of years experience required on a job advert, which would indirectly discriminate based on age, as fewer younger people would be able to apply. In very limited circumstances it may be justifiable to use discriminatory criteria If there is objective or a genuine occupational requirement for a person of a certain characteristic to carry out particular duties such as a personal care worker for a female, the advert could state the job is only available to females as permitted under the equality act 2010, or for Health and safety reasons for example, to protect young workers as required by the Young Workers ' Directive 1999. (CIPD,2020e)

UK law currently recognises three main types of employment status: employee, worker and self-employed. A person's employment rights depend on whether they are an employee or worker, and a contract of employment only applies if there is an employee relationship. The tests used to decide whether a person is an employee are: Mutuality of obligation test, does the employer have to provide work, and does the worker have to take the work offered. Control test - does the employer control how the employee does the work? Integration test, how far is the employee

integrated into the employer's organisation? And the multiple test which looks at several factors including substitution. (CIPD,2020g)

The term employee is defined by the Employment Rights Act 1996 as an individual who has entered into or works under a contract of service or apprenticeship, and there is a mixture of 'express' and 'implied' terms. Express terms are stated in writing either in the contract of employment or other organisation documents such as employee handbook or given verbally. Terms can also be implied into contracts for reasons such as the term is Incorporated by collective agreements, workforce agreements, statute and examples include a duty of mutual trust and confidence between the employer and employee, the employer's duty to provide a safe system of work and safe workplace, the right to receive at least the national minimum wage or living wage, a minimum period of notice and equality relating to men and women's pay (all implied by statute). (CIPD,2020g)

A worker is defined by the Employment Rights Act 1996 as 'an individual who either works under a contract of employment or works under any other contract where they agree to personally perform works or services to another party. (Gov.ukc) Workers have less protection than employees but laws in relation to National Minimum Wage, working time and equal pay apply (Daniels,2019, p43)

All employees and workers have a statutory right to a written statement of particulars of employment setting out certain key employment terms on their first day of work. A contract of employment is governed by contract law, which means that there needs to be an offer of employment by the employer, which should be clear and unambiguous and may be conditional, acceptance of that offer by the employee, consideration between the parties, for example the work done by the employee in return for the wages paid by the employer and an intention to create a legally binding arrangement. (CIPD,2020g)

3.An organisation is planning a major reorganisation which will involve moving some staff to other sites and outsourcing a major function to a sub-contractor.

(a) Outline when and how contracts can be changed lawfully

(b) Explain briefly the main requirements of redundancy law

(c) Summarise the main requirements of the law on business transfers.

Contracts can be changed lawfully by going through a period of consultation and agreement with employees, or if for example an agreement is not made but the employee works in accordance with the proposed changes without protesting for a significant amount of time it can be interpreted that the employee has accepted the changes to the contract by their actions. If the employee does not agree or work in accordance with the changes, employers can terminate the contract of employment with notice for 'some other substantial reason' and offer new contracts under the new terms, although this results in a high risk of claims for unfair dismissal by the employee. (Daniels, 2019) Some employment contracts include flexibility clauses that permit the possibility of making the change without agreement. If a change is

made without the agreement of the employee, they could resign and bring an unfair dismissal claim. (CIPD,2020g)

Redundancy is a special form of dismissal which happens when an employer needs to reduce the size of its workforce (CIPD,2020d), there are defined lengths of time that must be spent in collective consultation set out in the Trade Union and Labour Relations (Consolidation) Act 1992 of at least 45 days for organisations with over 100 employees and at least 30 days for those with between 20 and 99 employees. Organisations with less than 20 employees are not covered by the legislation but case law has demonstrated the consultation must be over a reasonable period of time. This consultation over collective redundancies must be with trade union representatives or if the organisation is not unionised with elected employee representatives. Employers intending to make over 20 employees redundant at one establishment is required to use a HR1 form to inform the Secretary of State for Trade and Industry. (Daniels, 2019) At the start of the consultation process the employer is legally obliged to give information on the reason for redundancy, the number of proposed redundancies and job types, total number of employees affected, the proposed methods of selection, and redundancy pay calculation to representatives. (CIPD,2020d) Employees will qualify for redundancy pay if they have worked for two or more years, and it is calculated at a rate of 1.5 weeks' pay for each year of employment for those between age 41 and 64, 1 weeks' pay per year for each those aged between 22 and 40 and 0.5 weeks' pay per year for those under 21 years, notice pay is in addition to this.

The Transfer of Undertakings (Protection of Employment) Regulations 2006, cover the transfer of an undertaking, or part of one, from one business to another such as mergers, contracting out of services, changing contractors, sales of businesses by sale of assets or a change of licensee or franchisee. TUPE protects employees by entitling them to the same terms and conditions, with continuity of employment, as they had before the transfer. The transferor must conduct a consultation with employees at the earliest feasible time, employers must provide the information to employee representatives long enough before the relevant transfer, employers (transfers and transferees) who do fail to consult properly can be required to pay staff up to 13 weeks' pay in compensation. Trade union, employee representatives or elected representatives must be informed that a transfer is to take place, why, when it is expected to happen, implications for the employees and the measures that the current and new employer expects to take in relation to the employees (CIPD, 2020f). All employee terms and conditions must stay the same when transferring, and employees are protected against harmonisation by adapting the terms of those transferring to those of existing staff, this is unlawful unless:

- Reason for variation is completely unrelated to transfer
- Variation is favourable to the employee
- An economic, technical or organisational reason entailing changes in the workforce and both parties agree.
- When the terms of the employment contract permit variation, for example a mobility clause, some insolvency situations.
- If there has been a collective agreement that incorporates terms and conditions, those may be varied after more than a year from the transfer, as

long as the employee's terms are no less favourable overall than they were before the variation. (CIPD,2018)

Employees who object to the transfer do not transfer and instead their contracts of employment terminate on the transfer date. It is automatically unfair to dismiss employees because of a TUPE transfer. Employees need two-years' service to bring a claim and the main defence for employers is that if the employer can show an economic, technical or organisational (ETO) reason entailing changes in the workforce, the dismissal will not be automatically unfair. Similarly, to this, the incoming new employer can't make transferred employees redundant either, only if there is a genuine redundancy situation *and* an ETO reason involving changes to the workforce can redundancies be made after the transfer. (CIPD,2018)

4 Summarise:

(a) the major statutory rights employees have in relation to pay, holidays and working time and,

(b) the major maternity, paternity and other family-friendly employment rights

Employers must guarantee payments of wages and are required to pay current National Minimum Wage and National Living Wage (for those aged over 25, or 23 after 1st April 2021) set by the government and usually increased each October. All employees have the right to an itemised pay statement and only lawful deductions can be made from wages.

The Working Time Regulations give workers the right to a limit of 48 hours work per week (can be opted out of) 28 days' paid annual leave each year, 20 minutes rest if working six hours or more ,11 hours rest in any one 24 hour period, 24 hours rest in any seven day period or averaged over 14 days, night workers are limited to eight hours work in any one 24 hour period and have the right to free regular health checks, and special provisions that restrict the working time of 16-18 year old workers. (Taylor and Wilkinson,2016 p37)

Statutory sick pay is payable for employees who are continuously sick for 4 or more Calander days, first three days are waiting days and unpaid, after this it is paid at £95.85 per week, on days on which the employee would normally work, for a maximum of 28 weeks in any 12-month period. (Gov.Uk (a), accessed 10.03.21)

Equal pay law stipulates men and women should be paid the same for doing like work, work which is rated as equivalent and work of equal value, provided they work for the same employer, same group of companies or covered by the same industry level collective agreement. (Taylor and Wilkinson,2016 p35)

Pregnant employees have a statutory right to paid time off during working hours for antenatal care. Maternity leave is entitled to those with 26 weeks continuous employment with the employer up to and including the 15th week before the expected week of confinement, and average earnings of at least the lower earnings limit for National Insurance during the eight-week period ending with the 15th week before the expected week of confinement. SMP is payable for 39 weeks, on return from

ordinary maternity leave (26 weeks or less) employees are entitled to return to the same job employed in before the absence, after 26 weeks they are entitled to return to a suitable and appropriate different job with terms and conditions no less favourable. If a mother curtails her maternity leave / pay before using full entitlement, statutory shared parental pay can be claimed for the remainder, which enables eligible mothers, fathers and adoptors to share up to 50 weeks of leave and up to 37 weeks of pay flexibly, during the baby's first year. Eligibility for statutory shared parental pay is that the partner must have earned an average salary of the lower earnings limit of £116 for the 8 weeks prior to the EWC.

In order to qualify for Paternity leave the employee must have been continuously employed by their employer for no less than 26 weeks ending with the Qualifying Week, be either the child's father, the spouse, civil partner or partner of the child's mother, have responsibility for the child's upbringing and give the employer the required notice. Entitlement is 1 or 2 weeks leave within 56 days of child's birth at either £151.20 a week or 90% of their average weekly earnings (whichever is lower) (GOV.UKb). The contract of employment continues throughout the leave, and employees are entitled to the same terms conditions and benefits.

Statutory parental leave is unpaid leave available to some working parents of children up to 18 years, of up to 18 weeks in blocks of weeks and no more than four weeks per year. To be eligible employees must have been continuously employed for a period of no less than one year and have or expect to have responsibility for a child.

Statutory adoption leave rights include up to 52 weeks adoption leave, split into 26 weeks ordinary and 26 weeks additional. Statutory adoption pay for up to 39 weeks at the same rate as maternity pay and the same rights on returning.

Flexible working may be requested to reduce or vary working hours or days worked, or to work from a different location such as home. To be eligible the person must be an employee, have worked for the employer continuously for 26 weeks and not have made a flexible working request during the last 12 months. Employers must either accept, offer a trial period or reject on the grounds of burden of additional cost, detrimental effect on ability to meet customer demand, inability to reorganise work amongst existing staff, detrimental impact on quality or performance, insufficiency of work during the periods of proposed work or planned changes. (Taylor and Wilkinson, 2016 p40)

Other statutory rights include unpaid time off for family emergencies and the right to take four months unpaid parental leave.

5 Summarise:

(a) the major requirements of health and safety law

(b) key legislation supporting equality and diversity in the workplace

(c) the concept of implied duties in relation to employee management at work

The Health and Safety at Work Act (HASAWA) 1974 states that the employer has a duty to ensure, as far as reasonably practical, the health, safety and welfare at work of all employees, and includes safe and adequate plant equipment, safe premises and/or place of work, competent and safe fellow employees and a safe system of work. Section 7 and 12.1 of the HASAWA states employees have a duty to take reasonable care for the health and safety of themselves and others, to cooperate with their employer as is necessary, to use any PPE equipment provided, ensure it is stored correctly, follow appropriate systems of work during manual handling operations and inform the employer of any serious imminent dangers, or shortcomings in the employer's protection arrangements to health and safety. (Daniels, p250-251 2019) The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (known as RIDDOR) require employers to report fatal accidents, major injury or conditions which require medical treatment, and dangerous occurrences to the HSE or the local council immediately. Other matters should be reported quickly, by telephone preferably, followed by a written report within ten days. These are:

- Accidents that prevent a worker from doing their normal work for more than seven days.
- Certain work-related diseases (poisoning, lung diseases, infections and other conditions must be reported when linked to specified types of work).
- Certain gas incidents. (CIPD, 2020h)

The occupational use of nanomaterials is regulated under the Control of Substances Hazardous to Health 2002 (known as COSHH). COSHH is the law that requires employers to control substances that are hazardous to health and includes nanomaterials. (Gov.uk,2002)

The Equality Act 2010 was brought in to replace previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations (GOV.UK, 2020d). It supports equality and diversity in the workplace and cites 9 protected characteristics against discrimination: Age, Disability defined as “physical or mental impairment that has a substantial and long-term adverse effect of a person’s ability to carry out normal day-to-day activities”, Gender reassignment, marriage and civil partnership, pregnancy and maternity, race, ethnicity and national origin, religion and belief, sex, sexual orientation. The Act defines five main types of discrimination, direct (when an individual is treated less favourably than another individual), indirect (when a condition, rule, policy or practice in a company applies to everyone but particularly disadvantages people who share a protected characteristic), harassment (unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual) victimisation (when an individual is treated less favourably because they made, tried to make or supported a complaint of discrimination under the Equality Act) and failure to make reasonable adjustments (by an employer). (ACAS,2021) Further UK law extends some protection to being ex-offenders and union and non-union membership.

There are obligations on the employee and the employer by law, which are implied into the contract of employment. Duties on the employer are to pay wages, to provide work, to provide references, to take reasonable care for health and safety of employees, to indemnify the employee against all liabilities and losses incurred in the course of employment such as expenses incurred when travelling on company business, to take reasonable steps to bring to the attention of employee's rights which they would not ordinarily be aware, to give effective support against bullying at work, to respect the privacy of the employee, deal effectively with grievances and to take care not to damage the relationship of trust and confidence that should exist between an employer and employee. (Daniels,2019 p52-56)

6 Explain briefly the main requirements of unfair dismissal law in respect of:
(a) capability
(b) misconduct
(c) grievance

Unfair dismissal law is based on employees having the right to be treated fairly and to a 'fair' dismissal. Employers must adhere to Acas Code of Practice on disciplinary and grievance procedures as a minimum (ACAS,2015)

a UK employer must show that it was due either capability or qualifications, conduct, illegality or contravention of a statutory duty, some other substantial reason, or redundancy and they have acted fairly and reasonably in carrying out the dismissal.

Dismissals for capability usually fall into three categories Qualifications, defined as lacking any kind of degree, diploma or other academic, technical or professional qualification relevant to the position. Incompetence or poor performance where the employee is incapable of delivering work to the required standard, usually through no fault of their own. Illness, for example, where an employee's long-term prognosis makes it impossible for them to perform their duties. Prior to dismissing an employee for capability, a fair procedure highlighting poor performance and giving the employee the opportunity to improve their performance with training and support should be followed and the employer must be consistent in the way it manages the performance of employees who carry out similar or the same duties. Employers must show that poor work performance was the reason for the dismissal and that it reasonably believed the employee was incompetent with evidence of the employee's failings and the steps taken to try to bring performance to the standards required within agreed timescales, this can include investigations, meeting notes, warnings.(CIPD, 2020c). Employees have a statutory right to be accompanied by a companion to a disciplinary hearing. Where warnings are issued first written warnings stay on record for 6 months and final written warnings for 12 months. Employees also have the right to appeal the outcome of the disciplinary hearing and need to be advised of this by the employer (ACAS,2015)

Cases for dismissals on the grounds of misconduct hinge on whether the employers actions met the test of reasonableness established in Section 98 of the Employment Rights Act 1996 (Taylor & Wilkinson, 2016) and two previous cases *British Home*

Stores (BHS) v Burchell and *Iceland Frozen Foods v Jones* which added the following: That the employer holds a genuine belief that the reason given for the dismissal was in fact the reason, show the belief was on reasonable grounds and have carried out a full and thorough investigation and whether a reasonable employer would have dismissed the employee for that misconduct. (People Management, 2019) Examples of misconduct include poor timekeeping or bad language. If an employee with a previously flawless employment record is dismissed for a single minor act of misconduct, the employer risks an unfair dismissal claim (CIPD, 2020C). Gross Misconduct can result in instant dismissal with no notice or warnings or pay in lieu of notice, but the disciplinary process still needs to be followed, examples of this include theft and falsification of records. (Daniels, 2019)

Potential outcomes for disciplinaries include no outcome, verbal which is not covered by the ACAS code, first written warning (active for 6 months), final written warning (active for 12 months) and Dismissal (with notice or pay in lieu of notice). (ACAS, 2015)

Employee grievances must be dealt with in the same fair manner as disciplinaries, following the ACAS code of practice (2015) with the employee setting out the nature of the grievance in writing if it cannot be resolved informally, the employer should then set up a prompt formal meeting to discuss and allow the employee to be accompanied, an investigation should be completed and a decision made and communicated to the employee with information of their right to appeal if they are not content with the action taken, appeals should be dealt with impartially by a manager who has not previously been involved in the case. (ACAS, 2015)

If an employee feels they have no choice but to resign because of something their employer has done, they might be able to claim for constructive unfair dismissal which is when an employer has seriously breached their employment contract, examples of this include being bullied or discriminated against, or regularly not being paid the agreed amount with no good reason (ACAS, 2015).