

Qualification: CIPD Diploma in Applied Human Resources

Module Name:

Understanding Employment Law

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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:

A handwritten signature in black ink, appearing to read 'Duncan Hook', is written over a light grey rectangular background.

Date: 05/04/2021

LO1. Understand the purpose of employment regulation and the way it is enforced

Employment Law refers to the set of statutes, accepted as law by Parliament; case law, determined by judicial precedent; and codes of practice which serve to ensure a standard of working life for all employees in the UK (Taylor, 2021).

Daniels (2019, p. 3) describes that without these laws, employers are open to exhibit inconsistency, discrimination and unfair dismissal ultimately leading to an unjust workplace without trust or security for its employees.

An important example of these laws is the Social Charter signed by the Labour Government in 1997 as an alliance with our then membership of the European Union (Daniels, 2019, p. 11). This ensured basic employee rights became the standard by law including a basic rate of pay, trade union rights, striking rights and employee voice in decision-making.

These rules also play an important part in protecting the employer. When handling a conduct or capability scenario with an employee there is an element of risk for the employer if the situation is mismanaged (Taylor & Wilkinson, 2016, p. 25). Employment law provides a framework for employers to follow and form workplace policy and procedure. In addition, bodies such as ACAS are available to offer support and advice to both sides of every employment decision (Daniels, 2019, p. 13).

The tribunal system furthers this access to fair judgement of both parties by providing judgement that is intended to be quick and inexpensive for those involved (Daniels, 2019, pp. 20-21); it does not currently cost anything to bring a claim to tribunal and the aim is to resolve each case as early as possible. Although most employment claims will be heard at Employment Tribunal, allegations of a breach in common law such as defamation or negligence can go to the county court while cases such as this that are seeking damages over £15,000 can go to the high court (Taylor, 2021). Most commonly, the tribunal will hear cases of unfair dismissal, sexual discrimination and racial discrimination but they actually have the jurisdiction to cover 80 different pieces of legislation which can affect employees (Daniels, 2019, p. 20).

The person bringing the claim to tribunal, the claimant, will submit the form ET1. In all but rare exceptions such as a delay caused by internal appeal, the ET1 has to be submitted within three months of the incident in question. In cases involving dismissal the three months begins from the day the claimant was dismissed (Daniels, 2019, pp. 24-25). The claimant should inform the Advisory, Conciliation and Arbitration Service (Acas) before lodging the claim for an early conciliation period of six weeks. Acas take an active role in offering conciliation to settle cases out of court in an effort to avoid additional cost for the tribunal system or negative impact for either party (Taylor, 2021).

The respondent, usually the employer, will be sent a copy of the claim along with an ET3 form, which they need to complete with their defence of the claim being made and send back to the Employment Tribunal within 28 days of the sent date (Daniels, 2019, p. 25). The ET3 is also confirmation that the respondent is to take an active role in the tribunal process as without it the case will still continue without their defence.

From this point the process moves to a Preliminary hearing to iron out any points which are unresolved before the main hearing. The Judge can also strike out the case at this stage if there is obviously little chance of success (Daniels, 2019, p. 26).

Assuming the case hasn't been struck out, claim withdrawn or settled through the Acas process, the main Hearing can begin. This hearing is available to be viewed by the public. The Judge and lay members will hear all evidence and then retire to determine a verdict by majority. They will

determine a winning side and outline remedial action which must be taken eg. Compensation (Daniels, 2019, pp. 28-29).

If either side feel that there were aspects of the case which haven't been considered properly then they can ask for 'reconsideration' within 14 days of the verdict (Daniels, 2019, p. 26) or they can appeal the verdict within 42 days which will then be referred to the Employment Appeal Tribunal (EAT). The EAT is there to hear the appellant's claim that the Employment Tribunal Hearing was either 'perverse' or the process was affected by certain circumstances such as bias in the hearing or unheard evidence (Daniels, 2019, p. 32). In severe cases the claim can be further referred to the Court of Appeal or to the Supreme Court, particularly in high profile or claims for higher damages (Taylor, 2021).

LO2. Know how to manage recruitment and selection activities lawfully

Discrimination specifically refers to mistreatment against nine protected characteristics: Gender, Marital status, Pregnancy, Race, Disability, Gender reassignment, Sexuality, Religions or beliefs; and Age (Daniels, 2019, pp. 140-153). Against these characteristics, there are six identified forms of discrimination. Over time, various pieces of legislation have been introduced to tackle these forms of discrimination and in 2010 they were all replaced by the Equality Act 2010 in an effort to streamline and ensure employers can easily follow the law (Daniels, 2019, p. 114).

In terms of recruitment all six forms of discrimination can be relevant in different ways which I will explore here:

- Direct discrimination where the candidate is seen and treated unfavourably when compared to other candidate(s) because of a possessed protected characteristic (ACAS, 2015).
- Associative discrimination is the same treatment but specifically in relation to others the candidate associates with (Daniels, 2019, p. 117). The candidate could be friends with other employees of a certain race and is then treated unfavourably.
- Perceptive discrimination is based on the selecting manager having a mistaken perception that the candidate has a protected characteristic (Daniels, 2019, pp. 117-118). The selecting manager may be under the impression that the candidate is gay and it is still discrimination if he is mistreated regardless of whether he is or not.
- Indirect discrimination occurs when the employer creates a situation seemingly with good intention, which excludes or is detrimental to certain employees or groups (Daniels, 2019, pp. 118-120). This can be most commonly found in recruitment when advertising for jobs or in job specification. If the job calls for candidates to have, for example, a level of experience that can only be gained at a certain age after a number of years of work this is indirectly discriminating against younger individuals who would otherwise apply. When advertising, the employer can specify certain characteristics if they can ensure there is justification for the role and therefore avoid claims of indirect discrimination. These "occupational requirements" (Daniels, 2019, p. 118) may specify a certain gender, for example, as the employee will be required to deliver intimate care.
- Harassment can be claimed when the offence is caused directly relating to the employee's protected characteristics (Daniels, 2019, pp. 122-124). If the selecting manager makes a derogatory comment at interview for example.

- Victimisation in relation to recruitment would be when the candidate finds themselves either being harassed or at detriment after making a claim of discrimination against the Equality Act 2010 (Daniels, 2019, pp. 121-122). An example could be an employee who has made harassment claim being unfairly assessed at interview.

The terms and agreements made between employer and the individual are outlined in the contract of employment. Although this will be referred to as a document, certain industries will not have a written contract; instead relying on verbal agreements backed up by accessible employment terms outlined in a terms and conditions document or employee handbook.

Elements of the contract of employment will establish whether the individual is defined as an employee, worker or self-employed as each will be eligible for certain terms, rights and protection by law (Daniels, 2019, p. 45). Determining this can be achieved by a few different tests against the job role including: 'control test' determining the level that the individual is controlled by the employer, 'organisation test' looking at how integrated the individual is into the workings of the organisation; and the 'mutuality of obligation test' determining how much the employer and individual rely on each other to provide work and complete said work (Suff, 2020).

The contract is made up of implied and express terms:

- The "Express Terms" are those specific to the individual employment in this instance. Although these may be generic to all employees within the organisation, they are presented as unique to this employment in particular. An essential component of the 'Express Terms' is the list of terms outlined in a "written statement of initial employment particulars" (Daniels, 2019, p. 46) which must be provided within two months of employment commencing. This includes all details including pay, annual leave, notice periods, probationary period, non-disclosure agreements and policies that the employee agrees to by accepting the job.
- The "Implied Terms" are those that are specific to this particular employment but are also a product of broader agreements and legislation (Daniels, 2019, p. 46). These will be "collective agreements" made between the employer and the representative trade union for employees of the organisation; and those outlined in existing law (Daniels, 2019, pp. 52-58). The Equality Act 2010, National Minimum Wage Act 1998 and Working Time Regulations 1998 are binding to employers and employees.

LO3. Know how to manage change and reorganisation lawfully

Any changes to an employee's contract must be made with an agreement on both sides, as it is a legal agreement formed when the employee began their job. If changes are made without consent then the employee is eligible to make a claim for damages whether because of them staying in role under the new terms or from them leaving and claiming constructive dismissal (Daniels, 2019, p. 77). As a result of the restructuring this organisation is planning, some staff will need to move their work base and therefore a change to their contract may be necessary.

The main component of the contract change process is in the consultation of affected staff. This is the opportunity an employer has to communicate the proposed changes to representatives with the aim to have agreement on the changes (Daniels, 2019, p. 77). Employers are required to consult for a minimum period before the changes are agreed and implemented from 30 to 45 days minimum dependent on the number of staff affected (Daniels, 2019, p. 77).

If an agreement between affected individuals and employer cannot be reached, the employer may decide to rethink the strategy or continue with the planned changes with the knowledge that the relocation is fair and proper consultation was provided. In this scenario with a relocation this may lead to a dismissal and so the employer will need to ensure they can justify the business need for the change and show that they had given 'reasonable' time to attend to concerns raised in consultation or face potential claims of unfair dismissal (Daniels, 2019, p. 78).

In this scenario, the outsourcing of work means the requirement for certain jobs is no longer there and the relocation of staff may not be possible. As with changes to contract, collective consultation must be followed with the same periods of 30 or 45 days minimum depending on the number of individuals affected. This consultation must be supported with union or elected employee representation (Daniels, 2019, p. 190) who will be informed of key information at the beginning of the process including: justification for redundancies, number affected, selection methods, ongoing process and pay-out strategy (Daniels, 2019, p. 191).

If the need for the role in question is diminished and only a few of these jobs are to be made redundant, the employer needs to show a fair selection process to avoid a situation that is classed as 'unfair' (Daniels, 2019, p. 193). This must be objective and not based on individual standing or exhibit direct or indirect discrimination.

Employees who are selected for redundancy must be informed by letter and invited to a consultative meeting. The employer may need to hold a few meetings to qualify as reasonable amounts of consultation and it is dependent on how the individual takes the news and whether any questions have been raised (CIPD, 2020).

If the employee whose job is made redundant has been with the organisation for over two years they are entitled to a statutory compensation award. This is calculated as a 'basic award' taking into consideration their tenure in years and their age (Daniels, 2019, p. 178) which is currently a maximum of £16,320 (CIPD, 2021).

In this scenario, by outsourcing a function to a sub-contractor some staff may be transferred to this third party to work in the same role. This type of transfer would be covered under the '2006 TUPE Regulations' (Daniels, 2019, p. 198). Transfer of Undertakings (Protection of Employment) (TUPE) has two possible definitions:

- Change of economic entity – when one company buys another but they keep the staff, function and identity of the sold business with staff continuing in their work under a new umbrella company (Suff, 2020).
- Change of service provision – such as the scenario in question where it's a new company providing the same function and takes on staff to ensure continuation of service (Suff, 2020).

Consultation with union or employee representatives must take place as part of the TUPE process or the employer could be eligible to pay compensation of up to 13 weeks' pay to affected employees (Daniels, 2019, p. 202).

The defining characteristic of TUPE is that employee's terms and conditions remain as they currently are in the contract they hold before transfer (Daniels, 2019, p. 198). The only exceptions that could allow for change or dismissal can be defended as either 'economic', when profitability could be

impacted; 'technical', when equipment or change of process would be needed; or 'organisational', when the structure of the organisation would be affected (ETO). Daniels (2019, p. 198) describes these as difficult to defend and are definitely exceptions to the general rule on TUPE that employees are protected.

LO4. Know how to manage issues relating to pay and working time lawfully

The Working Time Regulations 1998 are a set of minimum requirements for UK employers to follow to promote healthier, supported workforce in turn promoting higher attendance and fewer accidents from overworking (Daniels, 2019).

Workers are entitled to 5.6 weeks or 28 days of paid Annual Leave (Daniels, 2019, p. 88) at either their normal working rate of pay or an average if on a variable rate of pay. This number includes bank holidays.

Workers cannot, without opting out in writing, work over an average of 48 hours per week over a rolling 17-week period (ACAS, 2021). Because it is an average, there is some flexibility if a worker exceeds the 48 hours one week but they must reduce their hours on a following week.

Workers are entitled to rest periods both during their work day, at 20 minutes during a 6 hour shift; and between working shifts, at 11 hours time away from work in every 24 hour period and 24 hours within every 7 days average (Daniels, 2019, p. 91).

The National Minimum Wage Act 1998 enforces employers to pay a minimum amount per hour for everyone working under contract (Daniels, 2019, p. 96). This rate varies from the ages of 16 to 25 and over and reviewed every October and adjusted. Employers falling short of minimum wage are fined a set amount per employee (Daniels, 2019, p. 99).

All employers are required to pay Statutory Sick Pay which activates after an employee has been off sick for four days. This can be claimed by the employee for 28 weeks maximum within a year and not available to employees who don't earn enough to contribute to National Insurance (ACAS, 2021).

Employees have the right to be provided with an itemised pay slip outlining gross and net pay totals with any deductions either enforced by law, eg. Tax; or authorised by the employee (Daniels, 2019, pp. 93-94). The authorisation of additional deductions must either be outlined in the employee's contract or agreed in writing after the fact (Daniels, 2019, pp. 93-94).

Pregnant employees are entitled to paid antenatal appointments falling on working days. After the first, the employer is entitled to request proof of appointments (Daniels, 2019, p. 101). It is the employer's responsibility to determine if a risk assessment is required for pregnant employees when they are informed. In certain instances, such as heavily manual roles, this may result in redeployment or suspension on full pay to protect both mother and child (Daniels, 2019, p. 101).

Maternity Leave is comprised of three types of leave that all pregnant employees are entitled to. 'Compulsory maternity leave' is the period after the baby is born that the employee is not allowed to work (Daniels, 2019, p. 101). 'Ordinary maternity leave' is 26 weeks from childbirth and 'Additional maternity leave' picks up after OML as a further 26 weeks (Daniels, 2019, p. 102).

'Statutory Maternity Pay' covers 39 of these weeks. This is paid at two levels: 90% of average pay for the first 6 weeks and then at the lower statutory level for the remainder; currently £151.20 (UK Government, 2021). The employee must be earning enough to make NI contributions, currently

£120 per week (UK Government, 2021), and worked for the employer for 26 weeks on the qualifying week, 15 weeks before expected birth week (Daniels, 2019, p. 104).

'Statutory adoption leave' follows the same model but requires one parent to be classed as the adopter and only they will be eligible (Daniels, 2019, pp. 104-105).

The employee is entitled to return to the job she left after Ordinary Maternity Leave with any benefits that would be attributed to her working this period. Dismissal during maternity leave is classed as unfair and suited for claim at tribunal (Daniels, 2019, p. 103).

New fathers can take two weeks 'Statutory paternity leave' with the same qualifying period of 26 weeks employed at the 15th week before expected birth. This is paid at the lower level of statutory maternity pay although some employers may contribute more (Daniels, 2019, p. 104).

If the new mother or adopter opts to end their leave early, as long as they have completed 'compulsory maternity leave, they can take the remaining as 'Shared Maternity Leave' effectively handing their remaining leave to their partner. This pays as 'Shared Parental Pay' picking up from when 'Statutory Maternity Pay' ends (Daniels, 2019, p. 106).

Employees parents are eligible for a minimum allowance of 18 weeks unpaid 'Parental leave' for each child. This is available for the first 18 years of each child but taken a week at a time with a limit of 4 weeks per year (ACAS, 2021). Time off to provide emergency care or support for anyone else living with the employee or immediate family can be taken as 'Dependent leave'. There isn't a specified limit for this but a reasonable amount is expected to deal with the immediate situation (Daniels, 2019, p. 107)

LO5. Know how to ensure staff are treated lawfully at work

The main piece of legislation is the Health and Safety and Work Act (HASAWA) 1974 but there are 9 other pieces which make up health and safety law (Daniels, 2019, pp. 247-248).

While there is shared responsibility for health and safety the HASAWA says that it's the employer with their duty of care to ensure they provide a safe, properly maintained place to work, safe system of work where practices aren't endangering employees, provide proper safety equipment, and ensure employees are acting in a safe manner around others (Daniels, 2019, pp. 249-250). The employer is also responsible for appropriate management of employee stress at work. The employee needs to communicate with the employer to explain their stress levels or it is held as unforeseeable if the employee becomes unwell (Daniels, 2019, pp. 251-252).

It is also the employer's responsibility to ensure that there are plans in place to maintain health and safety rules. This should include written statements visible to staff outlining health and safety rules, representatives either appointed or elected, committees to assess the current measures in place; and working with the Health and Safety Executive (HSE) (Daniels, 2019, pp. 256-257).

According to the HASAWA, employees also have a responsibility for their own and others health and safety by both by appropriately and safely; and cooperating with the employer when they issue guidance or introduce new rules (Daniels, 2019, pp. 250-251).

In addition to protecting against discrimination, the Equality Act 2010 also support equality and diversity in organisations (Daniels, 2019, p. 114). The Equality Act 2010 outlines measures an employer can take to ensure a non-discriminatory process while also accessing the right talent for the job.

There may also be situations where employing individuals with certain characteristics may be favourable in promoting diversity if that particular group has low representation within the organisation. In the case the employer can take “positive action” (Daniels, 2019, p. 128) by encouraging certain groups with their advertising. For example, an employer seeking to employ within a certain age group can advertise within areas more commonly accessed by said group such as certain social media platforms.

At the selection stage, the employer is also entitled to select the candidate which caters for this requirement as the deciding factor between two equally matched candidates if one is the age group currently underrepresented in the organisation.

Equal Pay between women and men is covered under the Equality Act 2010 and encompasses both pay and any other terms of conditions made under contract that benefit one sex over the other. The legislation covers situations where conditions are favourable for one employee between two jobs which are: ‘like work’, ‘work rated as equivalent’ or ‘work of equal value’ (Daniels, 2019, p. 129). To help this process, under the Equality Act 2010 it became unlawful for pay to remain secret if a claim of discrimination was being made (Daniels, 2019, p. 128).

The ‘Implied Terms’ of the contract include various duties which the employer and employee are bound to which ensure proper treatment of staff (Daniels, 2019, pp. 52-58). These expectations are implied into the contract and include: the legal requirement to pay employees, the duty to maintain equality between male and female terms, the employers obligation to provide work, the duty of care that an employer has to employee’s safety and wellbeing, including bullying and grievance claims; and the right to a paid notice period (Suff, 2020).

LO6. Know how to manage performance and disciplinary matters lawfully

The right to not be unfairly dismissed is a component of the Employment Rights Act 1996. Outlined in this are a some reasons which can be considered ‘fair’ but must follow specific process and criteria to be considered as such. (Daniels, 2019, pp. 162-163) In the definition of worker, self-employed or employee, only employees can make a claim of unfair dismissal (Suff, 2020).

A dismissal under capability can be classed as fair but the employer needs to show that they have made every attempt to help the employee avoid dismissal in the process. Capability defines the employee’s “skill, aptitude, health” (Employment Rights Act, 1996) or other qualities including qualifications which would enable the individual to work in their job. If the issue is skill level, then the employer needs to demonstrate that training and support was provided. They must also show a dialogue between employer and employee explaining the requirement and the likely consequence of failing to improve i.e. Dismissal (Daniels, 2019, p. 163).

In health related capability cases, particularly in those involving long periods of absence, again the employer must be shown to follow a clear process that is consistent and that the employee can understand at each stage (Suff, 2020). There must be consultation between employer and employee

and a demonstration of the employer being 'reasonable' in accommodating the health of the individual or allowing time for recovery. As health situations vary there must be a clear understanding by the employer of the illness in question and the impact this is having on the employee including the longer term prognosis . (Daniels, 2019, pp. 163-164).

Similarly to capability there is a specific process that employers must follow when dismissing an employee for reasons of misconduct. This is outlined in the "ACAS Code of Practice on disciplinary and grievance procedures" (ACAS, 2015) and describes the minimum the employer should be implementing in misconduct investigations and disciplinary.

The employer needs to be able to show that the alleged misconduct has been investigated promptly and thoroughly to a level that allowed them to make an informed reasonable decision to dismiss the employee (Daniels, 2019, p. 166). The process they follow must also be consistent to standard practice for the employer, i.e. following the organisations own Disciplinary procedure. The code of practice also extends to the level of information that the employee is provided with regarding the disciplinary process including the content of invite letters and informing them of the consequences of the alleged misconduct. They must also be provided sufficient notice of the disciplinary meeting to organise themselves and be afforded the right to be accompanied in the meeting (ACAS, 2015).

At tribunal, the aim is to determine if the employers process or response has been sufficient and not to question the guilt or innocence of the employee. If the employer has failed to follow the code of practice then the compensatory award for the employee can be raised by up to 25% (ACAS, 2015).

The same code of practice is also followed for grievance cases and must be followed to avoid successful claims raised at tribunal (ACAS, 2015). The Grievance procedure enables the employee to inform their employer to deal with a situation before claiming at tribunal and the employer should handle appropriately. After the employer receives the letter of a grievance they must investigate the claims made and meet with the employee raising the grievance. After making a decision on whether action needs to be taken then they need to inform the employee and it is then the employee's decision on whether to appeal with a more senior manager, accept the action taken or make a claim at employment tribunal (ACAS, 2015).

If the employee feels that their grievance has not been handled appropriately to the code and the ongoing situation leads them to leave the organisation then they may be successful in bringing a claim of 'constructive dismissal'. The right to a fair grievance procedure would be considered an implied term in the contract which, in not following the Acas code, the employer has breached (Daniels, 2019, p. 174).

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