

Understanding Employment Law

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Introduction

- LO1: Understand the purpose of employment regulation and the way it is enforced.
- LO6: Know how to manage performance and disciplinary matters lawfully
- LO3: Know how to manage change and reorganisation lawfully



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



The History of the Employment Tribunals

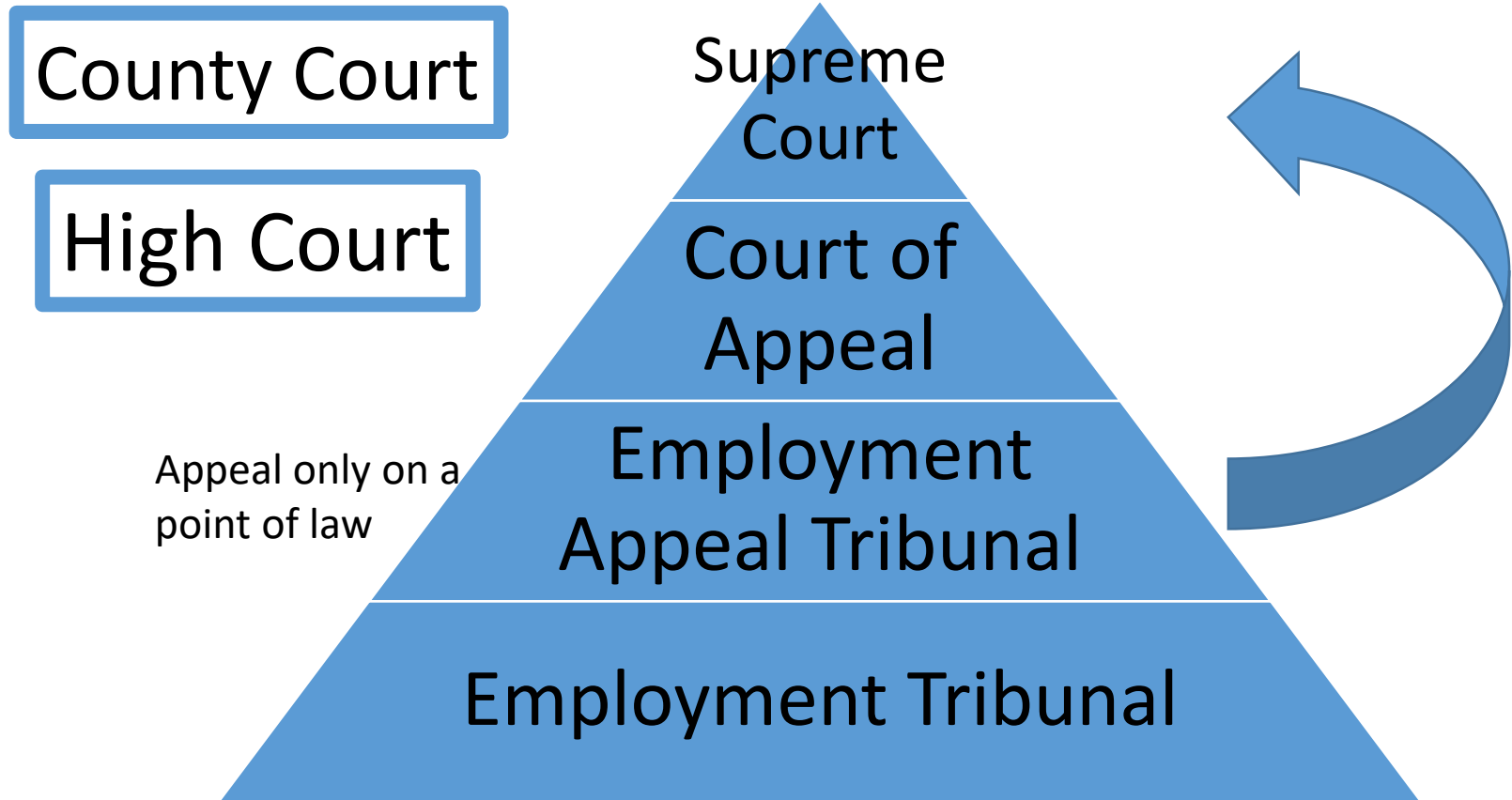
Employment tribunals (before 1998 called “industrial tribunals”) were created in 1964, initially to deal with appeals by employers against industrial training levies.

From that very small beginning their jurisdiction has been greatly extended.

Notable additions were claims for statutory redundancy payments (in 1965), for unfair dismissal (introduced by the Industrial Relations Act 1971), and for various types of discrimination in employment, now brought together in the Equality Act 2010.



The Employment Court Hierarchy

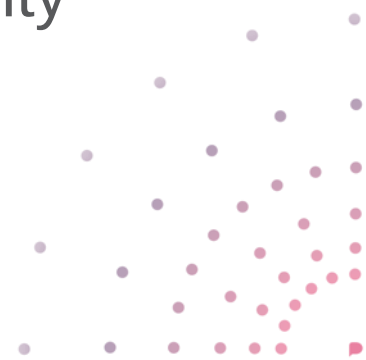


In Favour of Extensive Employment Regulation:

- It balances the power between employers and employees
- It deters employers from exploiting their power unreasonably
- Minority groups need protection and encouragement in order to achieve more equality
- Trade unions would often be powerless without legal support
- It encourages people to work in the UK when they might otherwise choose to retire or work overseas

Against Extensive Employment Regulation:

- It raises unemployment and slows economic growth
- It raises costs for employers and makes our economy less competitive internationally
- It deters inward investment
- It reduces employment opportunities for minority groups



Sources of Employment Law

- Statutes
 - Acts of Parliament
 - Statutory regulations
- European directives
- Common law (i.e. case law)

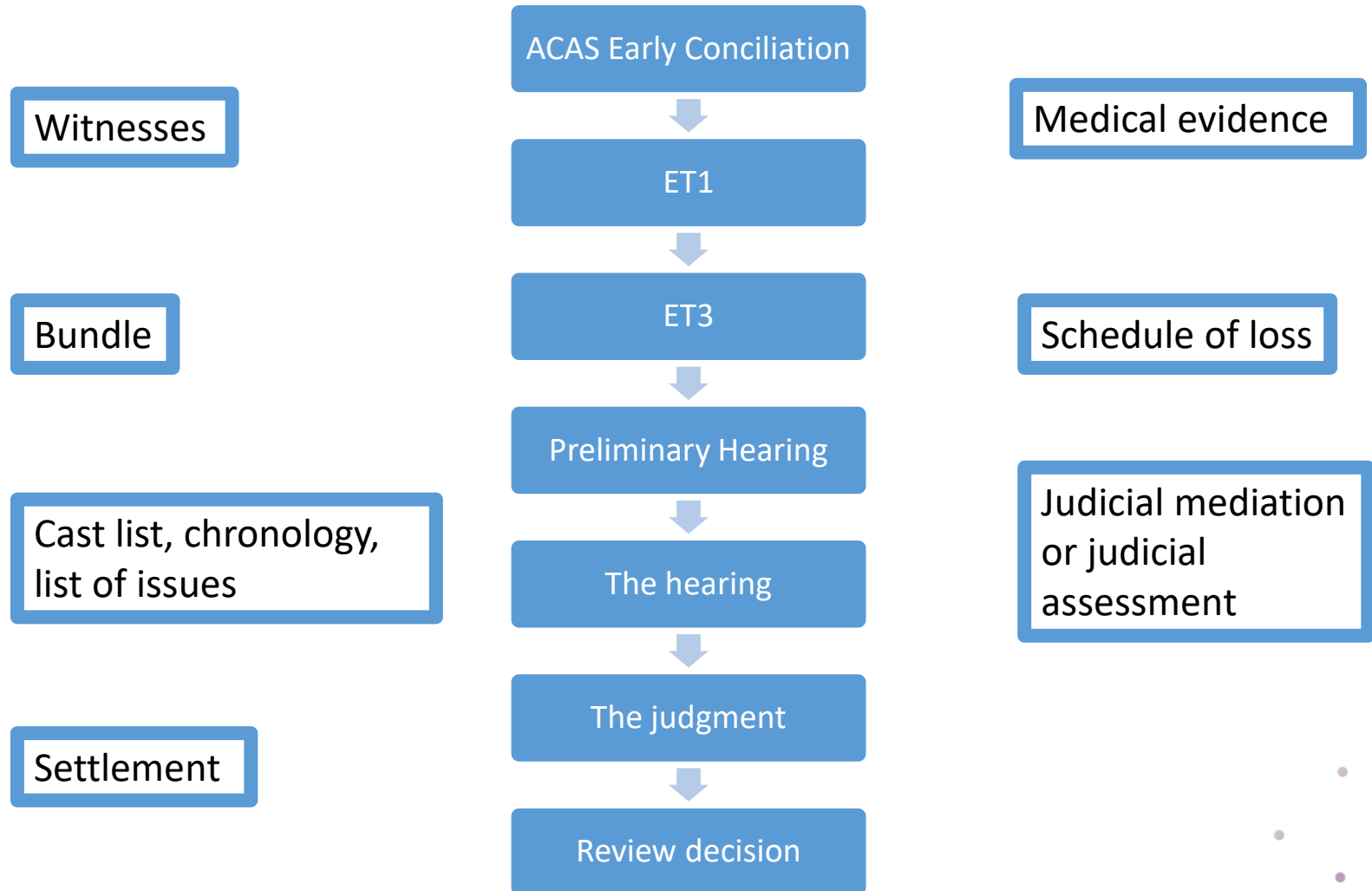


Doctrine of precedent

- Binding – i.e. decisions of CA, SC and CJEU
- Persuasive – i.e. decisions of EAT



Process of Employment Tribunals



MCQ's

1. Which of the following Courts can set a Binding Precedent?

- a. Court of Appeal
- b. Employment Tribunal
- c. Employment Appeal Tribunal
- d. Supreme Court

2. What is the person who brings a claim to the Employment Tribunal called?

- a. Respondent
- b. Claimant
- c. Appellant
- d. Applicant

3. What is the person who defends a claim in the Employment Tribunal called?

- a. Respondent
- b. Claimant
- c. Appellant
- d. Applicant

4. What is the person who brings a claim in an Appeal Court called?

- a. Respondent
- b. Claimant
- c. Appellant
- d. Applicant

5. What were Employment Tribunals first called?

- a. Employment Courts
- b. Employment Appeal Tribunal
- c. Industrial Tribunal
- d. Donovan Tribunals

6. What form is used to bring a claim to the Employment Tribunal?

- a. ET1
- b. ET2
- c. ET3
- d. ET4



LO6: Know how to manage performance and disciplinary matters lawfully



What is a dismissal?

- Contract is terminated by employer with/without notice
- A fixed term contract is not renewed
- The employee terminates the contract when he is entitled to terminate the contract without notice because of the employer's conduct (constructive dismissal)
- Section 95 ERA 1996

Wrongful dismissal

- Termination in breach of contract (usually notice)
- Statutory notice/contractual notice/PILON
- Damages to put the employee in the position they would have been in



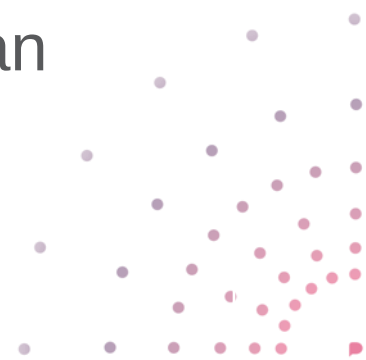
Wrongful dismissal

	Wrongful dismissal	Unfair dismissal
Basis	Based on breach of contract	Based on statute and the concept of fairness
Right to claim	No qualifying period required to make a claim	Unless the reason for dismissal is automatically unfair, one year's (two years if the employee started work on or after 6 April 2012) continuous service is required to make a claim
Time limit	Claim must be made within six years of the dismissal	Claim must be made within three months of the dismissal
Damages	No limit to damages that can be awarded	Maximum compensatory award currently (as of April 2015) £83,682 or the employee's annual salary, whichever is lower
Court	Only dismissal claims for damages less than £25,000 are heard in the employment tribunal; other claims are heard in the County Court or the High Court – although an employee claiming for damages less than £25,000 can be heard at these courts if he/she so elects	All claims heard in the employment tribunal
Future loss	Future loss is not considered	Future loss may be considered when compensation is being calculated
Remedy	The remedy is damages	The remedy can be re-instatement, re-engagement or compensation

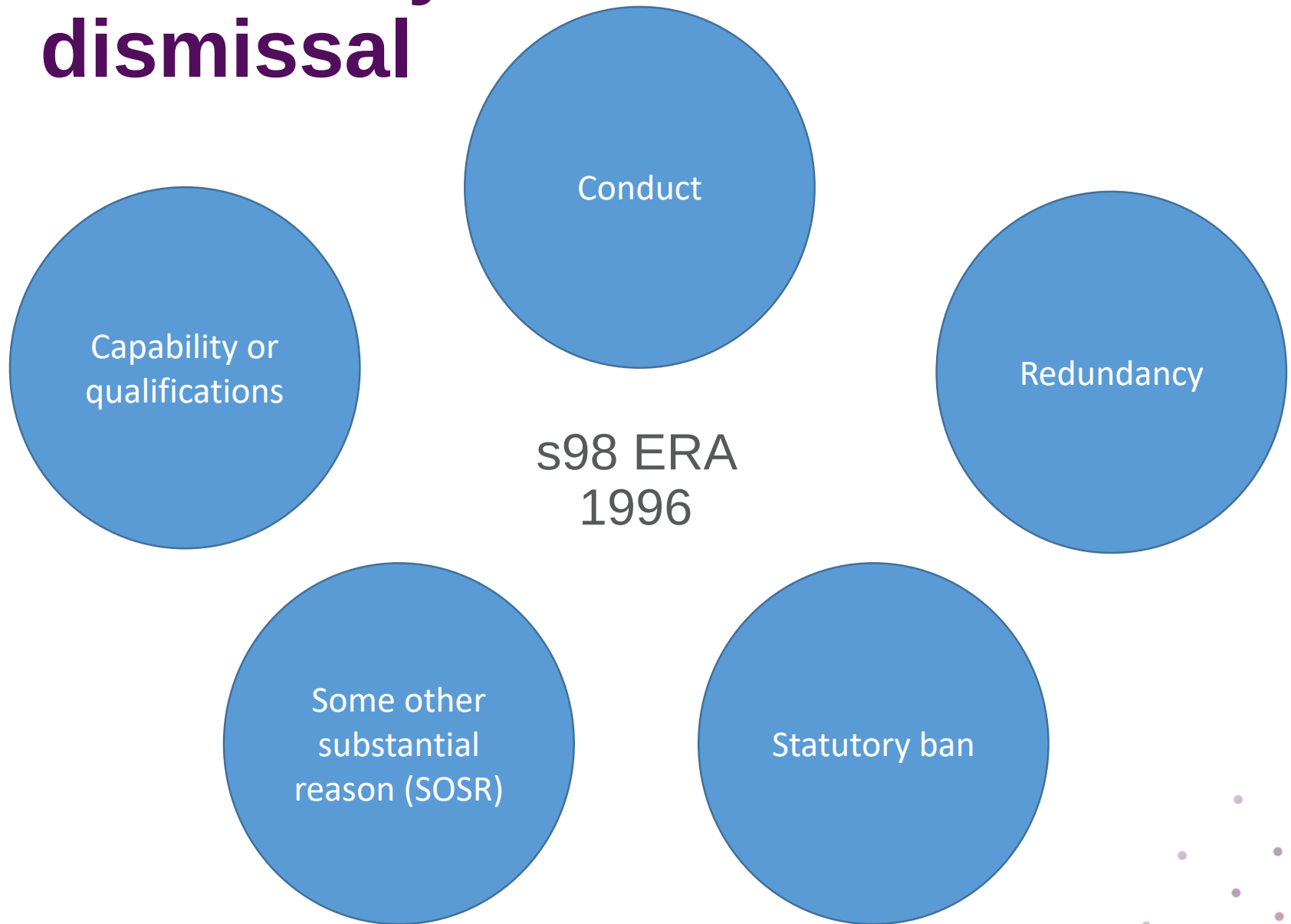


Eligibility to make a claim of UDL

- Generally speaking the following cannot bring claims of UDL:
 - Non-employees
 - Where work has not been done in the UK or there is insufficient connection to the UK
 - Those with less than 2 years continuous service (note exceptions)
 - Working under an illegal contract
 - Those in the police/armed forces/fisherman
 - Section 94 ERA 1996



Potentially fair reasons for dismissal



Capability or qualifications

- Capability “skill, aptitude, health or any other physical or mental quality”
- Qualifications “any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee holds”
- Ill health (*BS v Dundee City Council (2013)* *CSIH19*):
 - Would a reasonable employer have waited longer?
 - Is the employer able and is it reasonable to wait longer
 - Consultation
 - Medical evidence
 - Reasonable attempts to understand medical condition and long term prognosis
- Section 98(2)(a) ERA 1996

Conduct - Reasonableness

The statutory test: section 98(4) of ERA 1996

"The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

shall be determined in accordance with equity and the substantial merits of the case."



Conduct

"Burchell" Test

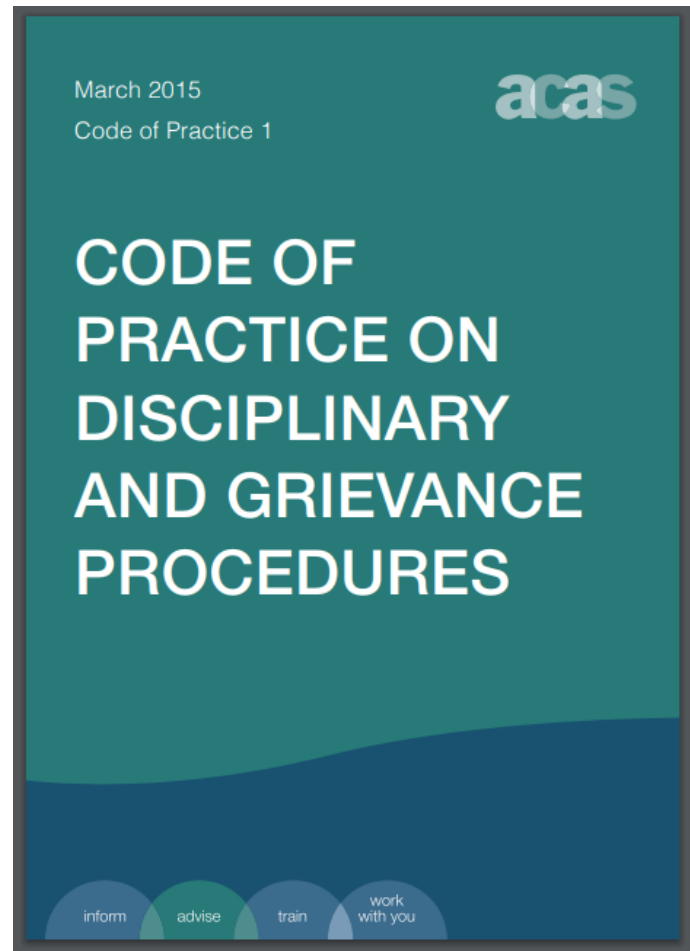


Burden of proof

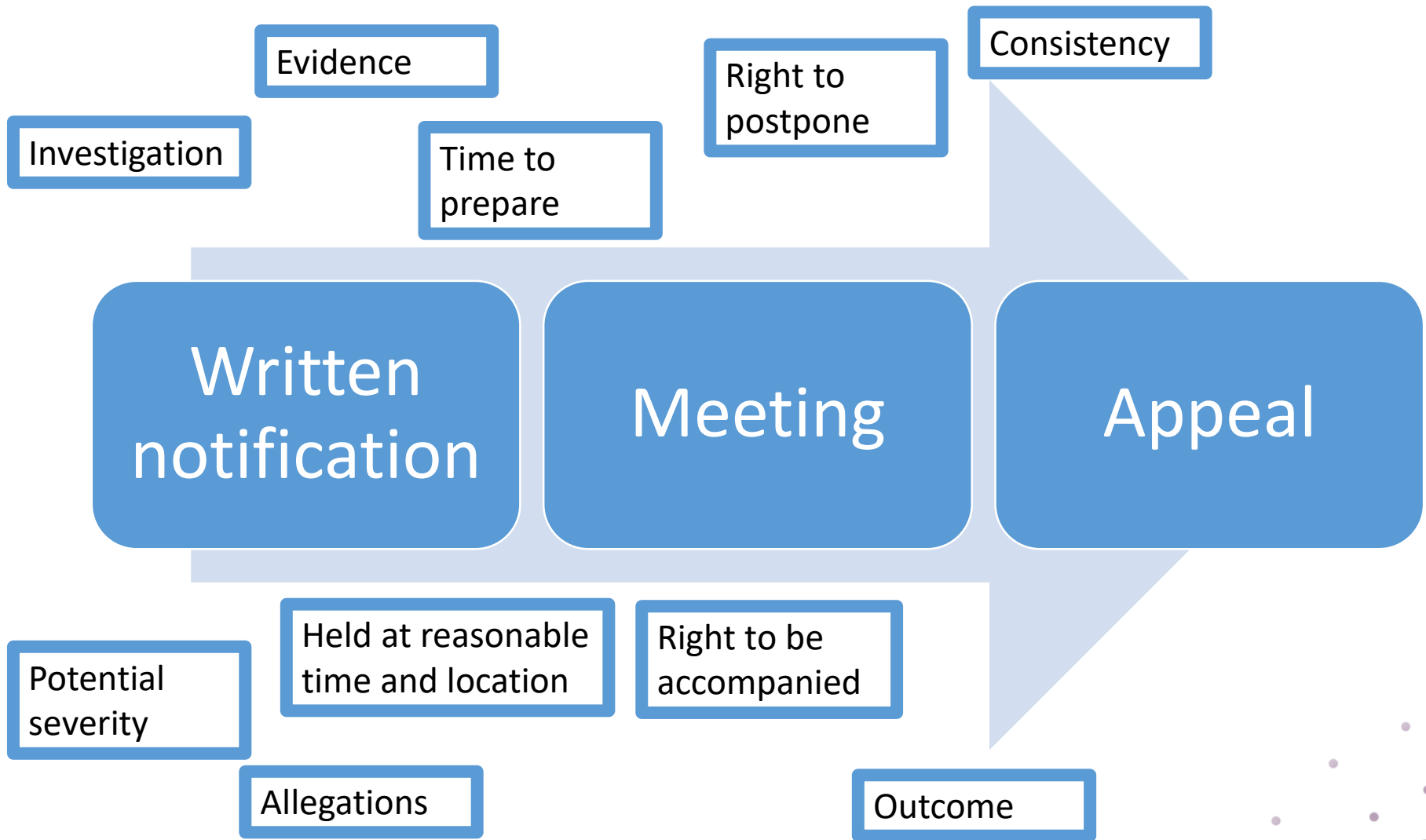
- Criminal court: beyond reasonable doubt
- Civil court: on the balance of probabilities
- Employment tribunal conduct dismissal: “*Burchell*” test



ACAS Code of practice



What does the Code say



Warnings

- Verbal (not covered by ACAS Code)
- Formal written (6 months)
- Final written (12 months)
- Dismissal (with notice)



Gross misconduct

- Summary dismissal
- No notice or warnings
- Disciplinary process still needs to be followed



MCQ's

1. Which of the following could potentially be gross misconduct?

- a. Untidy uniform
- b. Stealing
- c. Lateness
- d. Poor quality work

2. Which of the following is not an automatically unfair reason for dismissal?

- a. Stealing
- b. Pregnancy
- c. Trade Union membership
- d. Transfer of undertaking

3. Which of the following would not result in a dismissal due to a statutory ban?

- a. A retail employee stealing from the employer
- b. Work permit expiring
- c. A driver losing his licence
- d. A teacher being placed on the sex offenders register

4. Which of the following can make a claim of unfair dismissal?

- a. A self-employed person
- b. Someone with 6 months

- c. employment
- d. A worker
- Someone who started work on 6 April 2012 and has 2 years' service

5. Which of the following is not a potentially fair reason for dismissal?

- a. Capability
- b. Retirement
- c. Redundancy
- d. Conduct

6. What procedures must be followed in the case of a dismissal?

- a. Acas Code of Practice: Disciplinary and Grievance Procedures
- b. Statutory Dismissals Procedure
- c. Statutory Disciplinary Procedure
- d. Statutory Grievance Procedure

7. How long would Acas recommend that a final written warning remains on an employee's record?

- a. 3 months
- b. 6 months
- c. 9 months
- d. 12 months

Constructive dismissal

- Employee must show:
 - Fundamental breach of the contract on the part of the employer
 - The breach caused him to resign
 - There was no significant delay in resigning
 - *Western Excavating (ECC) Ltd v Sharp (1978)*
IRLR 27
 - Can be as a result of one incident or resignation after a series of breaches (the final straw)

Automatically unfair dismissal

- Situations in which there is no requirement for two year qualifying period

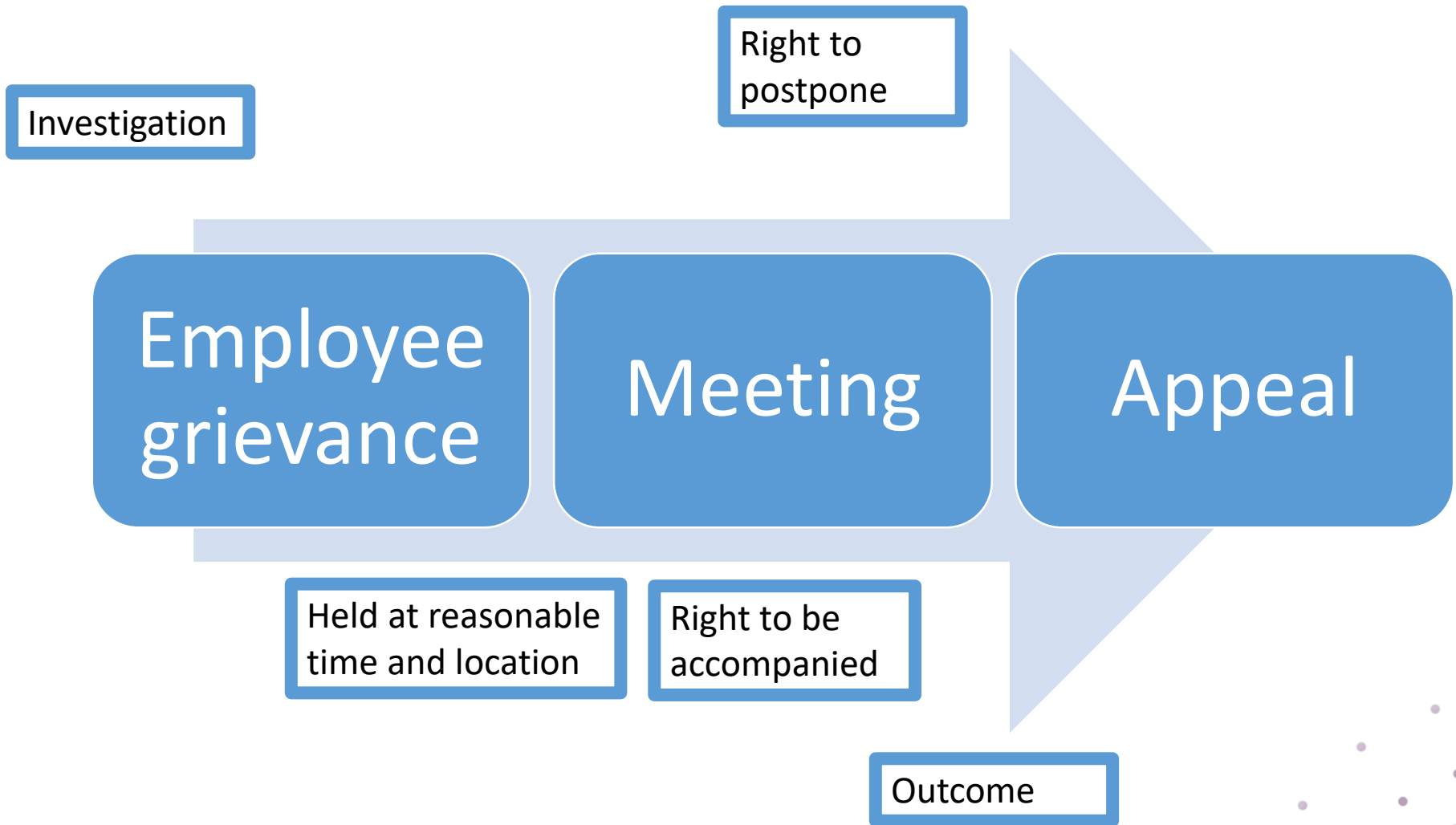


Remedies

- Declaration
- Re-engagement – return to same employer but different job
- Re-instatement – return to same employer in same job
- Additional award for employer failing to carry out re-engagement/instatement (26 weeks' pay)
- Compensation



Grievance



Whistleblowing/Public Interest Disclosures

- Public Interest Disclosure Act 1998
- There must be a qualifying disclosure
 - A criminal offence.
 - Breach of any legal obligation.
 - Miscarriage of justice.
 - Danger to the health and safety of any individual.
 - Damage to the environment.
 - The deliberate concealing of information about any of the above.
- Made in public interest
- With reasonable belief



Whistleblower protection

- Dismissal – automatically unfair, no qualifying period
- Detriment – treated less favourably on the ground they have made protected disclosure.
- Vicarious and personal liability
- Injury to feelings compensation



Group Exercise

Case studies



LO3: Know how to manage change and reorganisation lawfully



Varying a contract of employment

- Employer cannot unilaterally vary a contract without facing claims of constructive dismissal or damages for loss while still in employment
- The employer will not need to vary the contract if:
 - The existing terms of the contract are sufficiently broad to accommodate the proposals
 - There is already an express contractual right for the employer to vary the contract in the proposed way
 - The contract gives the employer a general power to vary its terms.



Implementing a change

- Obtain express agreement and consent by going through consultation (see consultation timescales for redundancy)
- Unilaterally change the contract and use employees conduct as implied agreement
- Dismiss for SOSR with notice and re-engage on new terms



Redundancy

- Employer has ceased, or intends to cease, to carry on the business for the purposes for which the employee was employed
- Employer has ceased, or intends to cease, to carry on that business in the place where the employees were employed (note mobility clause)
- The requirement of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were employed, has ceased or diminished or is expected to
- S139 ERA 1996



Consultation

- 100+ employees = 45 day consultation + HR1
- 20-99 employees = 30 day consultation + HR1
- Consultation with TU or elected representatives
- Failure to do so = protective award and reasonableness?

TULCRA 1992

- <20 –?



What information must be given to staff?

- Reason for redundancy
- Number and description of each type
- Total number of redundancies
- Proposed selection method
- Procedure
- Redundancy pay calculation



Redundancy pay

- >2 years
- 1.5 weeks pay for each year of employment between the ages of 41 and 64
- 1 week's pay for each year when the employee was between 22 and 40
- 0.5 week's pay for year under 21 years of age
- + notice pay



TUPE – when does it apply?

- Transfer of an economic entity that retains its identity i.e. pub being sold and buyer will continue to run it as a pub
- Change in service provider
 - Activities carried out by 1 person and transfer to another person (outsourcing)
 - Activities are currently carried out by one contractor and transferred to another contractor (second + generation outsourcing)
 - An organisation decides to carry out activities itself that are currently being done by a contractor (insourcing)



TUPE – when does it not apply?

- One off single event or event of short duration
- Where the customer changes
- Where there is no economic entity change e.g. just a sale of assets
- Transfer of shares



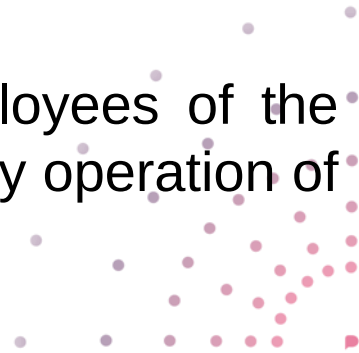
Automatic transfer principle

The contracts of employment of those employees employed by the seller/outgoing provider and "assigned to the organised grouping of resources or employees that is subject to the relevant transfer" automatically transfer to the buyer/new service provider on their existing terms.

The transferee effectively steps into the transferor's shoes with regard to the transferring employees.

All of the transferor's rights, powers, duties and liabilities under or in connection with the transferring employees' contracts and collective agreements pass to the transferee and any acts or omissions of the transferor before the transfer are treated as having been done by the transferee.

Employees who object to the transfer do not become employees of the transferee. Instead, their contracts of employment terminate by operation of law on the transfer date. There is no dismissal.



Consultation

- With relevant employee representatives (<10 employees themselves)
- Information:
 - That a transfer is taking place
 - The reason for the transfer and when it is expected
 - The legal, social and economic implications for the employees
 - The measures that are envisaged
- Failure to inform and consult = 13 weeks' pay per affected employee



MCQ's

1. What is the minimum consultation period if there are to be 20-99 redundancies?

- a. There is no minimum
- b. 30 days
- c. 45 days
- d. 90 days

2. Which of the following is not an example of a transfer of a service provision?

- a. An organisation sells part of its business
- b. A service provided by contractor A transfers to transfer B
- c. An employer decides to ask another organisation to provide its catering
- d. An employer decides to stop using a contractor to do its catering and do it itself

3. What is the maximum compensation awarded if there is no consultation in a transfer situation?

- a. 6 weeks
- b. 12 weeks
- c. 13 weeks
- d. 15 weeks

4. Who is the transferor?

- a. The old employer, who is selling a business
- b. The new employer, who is taking over the business
- c. The employee who transfers
- d. The employees who do not transfer



Contractual variation

- Void unless it is for “an ETO reason entailing changes in the workforce”
 - Economic – e.g. reasons relating to profitability
 - Technical – e.g. reasons relating to a change in production processes
 - Organisational e.g. change in management structure
- Changes include the place where employees work the work they carry out.

Dismissal

- Dismissal automatically unfair if the sole or principal reason for the dismissal is the transfer itself.
- Resignations in response to breach of contract or substantial change in working conditions to employees material detriment = deemed dismissals.
- If employees are dismissed immediately before the transfer for a reason relating to the transfer = unfair



Group Exercise

Case studies



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