Thank you for downloading these LP See notes!

Firstly, I must stress that these notes are not intended to provide comprehensive coverage of the typical Employment Law elective for the Legal Practice Course.

They are, however, intended to provide useful overviews, flowcharts and checklists for the most frequently encountered questions, including those requiring students to determine whether a particular person was (a) an employee; (b) dismissed; and (c) either unfairly or wrongly dismissed (or both).

These notes are in ‘beta’ form (particularly in relation to presentation), but have been relied upon previously by students taking the Legal Practice Course. With this in mind, please use alongside your own class notes and exam resources.

NOTE: All Tribunal Awards and Statutory Limits are correct as of 1/2/2010, including new weekly limit on weeks’ pay.

PLEASE NOTE: These notes are for your personal use and are not to be distributed to friends, classmates etc without our prior permission.

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SECTION 1:
Employment Law Basics
Employment Law: Employee, worker or neither?

Definition of ‘employee’ at S230(1) ERA 1996:

“means an individual who has entered into or works under a contract of employment.”

[Contract of employment = contract OF service/apprenticeship] – s230(2)

Employees are also ‘workers’, since they are under a contract of employment

Key question: does the individual work under a contract OF service or FOR services?

Agency workers – can imply contracts of service between agency worker and user on occasions (Dacas v Brook Street [1999])

Business?

Q: Does the purported worker actively market his services as an independent person to the world in general [suggestive of business] or is he recruited by the principal to work for the principal as an integral part of the principal’s operations? (Cotswold Developments Construction)

The definition of worker can therefore include those working under contracts FOR services where they, essentially, perform those services exclusively for the person they contracted with – e.g. a self-employed carpenter contracted to work for 6 months on a project would constitute a ‘worker’.

Rights attaching to status:

Employee status confers rights (once requisite periods of continuous employment fulfilled) to claim for UD and redundancy payments.

Worker status (which includes employees) confers rights under Working Time Directive and National Minimum Wage Regs.

Other – discrimination claims cover slightly wider range still.

Mutuality of obligations

Irreducible minimum

This indicates contract, essentially

In determining whether contract OF service or FOR services consider: (Hall v Wiltshire CC [1998])

1. How the individual is paid? (invoice or payroll?)
2. Does the principal pays tax and NI?
3. Does the principal provides tools and equipment?
4. How integral is the individual to the enterprise?
5. Is the individual paid for sickness/holiday?
6. Is the individual subject to disciplinary/grievance policy?
7. How long is the individual a member of the employer’s pension scheme?
8. Where does economic risk lie?
9. How did parties view relationship at outset?
10. How terminated?

Ready Mixed Concrete [1968]: Multiple factor test

- Contract of employment = contract OF service/apprenticeship – s230(2)

Definition of ‘worker’ at S230(3) ERA 1996:

“means an individual who has entered into or works under:

(a) a contract of employment; or
(b) any other contract, express or implied, whereby the individual undertakes:

- to personally perform the services/work under the contract;
- for the other party, where the individual is not running a business.

Key question: is the individual obliged to personally perform the services AND, if so, is he doing so in running a business?

Contract of Service

1. In consideration of wage, the individual agrees to provide own work/skill in performing service

2. Individual agrees (expressly/impliedly) to subject to the other’s control in a sufficient degree

Other factors:

Individual can opt to send substitute, then unlikely to be contract OF service (Express and Exch [1999])

Although limited power to appoint substitutes not conclusive (Byrne Brothers)

In determining whether contract OF service or FOR services consider: (Hall v Wiltshire CC [1998])

MUTUALITY OF OBLIGATIONS

1. How the individual is paid? (invoice or payroll?)
2. Does the principal pays tax and NI?
3. Does the principal provides tools and equipment?
4. How integral is the individual to the enterprise?
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• **Employment Law: Claims for Breach of Employment Contract and Wrongful Dismissal**

**Definition:** “Where an employer dismisses an employee in circumstances and in a way in which he was not contractually entitled to, then this will give rise to a breach of contract action known as ‘wrongful dismissal’.”

**Jurisdictional issues** (breach of employment contract claims, inc WD)

<table>
<thead>
<tr>
<th>Employment Tribunal</th>
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<tbody>
<tr>
<td><strong>Type:</strong> Only breach of contract claims arising from the termination of employment – i.e. wrongful dismissal, not ‘stand and sue’ cases. Employer is able to counterclaim.</td>
</tr>
<tr>
<td><strong>Value:</strong> ET able to award up to £25,000 for breach of contract damages.</td>
</tr>
<tr>
<td><strong>Limitation period:</strong> 3 months from date of actual dismissal/repudiatory act.</td>
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</tbody>
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<tr>
<th>Civil Courts (e.g. High Court)</th>
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<tbody>
<tr>
<td><strong>Type:</strong> Civil Courts can hear claims of breach of employment contract, whether arising from termination or otherwise.</td>
</tr>
<tr>
<td><strong>Value:</strong> No restrictions on damages.</td>
</tr>
<tr>
<td><strong>Limitation period:</strong> 6 years from date on which right of action accrues – i.e. date of dismissal/repudiatory act.</td>
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**Preliminaries:**

1. **Is the relevant individual under a contract OF service?** If not, improper termination will give rise to breach of contract but not ‘wrongful dismissal’ and not within the jurisdiction of the Employment Tribunal.

2. **Is the contract of employment fixed term or of indefinite duration?** Notice is irrelevant consideration for fixed term contract, unless they have break clause.

3. **What notice period has been expressly agreed?** If none, and contract of indefinite duration, then court will imply a period of ‘reasonable notice’.

4. **What is likely to be considered ‘reasonable notice’?** This will depend on seniority and also the employer’s financial position/size (*Clark v Fahrenheit 451*). For a director up to 12 months, unskilled worked more like 1 week.

5. **2 and 3 are subject to statutory minimum notice periods** → lawfulness notice must never be less than this. Either party may waive the right to minimum notice – s86(3) ERA 1996. Statutory notice periods have no bearing on fixed term contracts → if these do not have a break clause, then they are not capable of unilateral termination by notice.

6. **Has a PILON been made?** (payment in lieu of notice)

   If not contractually provided for, and employee is not deemed to have waived his rights to proper notice, then this amounts to technical wrongful dismissal, in that the dismissal was in breach of contract but the compensation received is likely to be very similar to the possible compensation receivable. In fact, it could be more, given that the employee has a duty to mitigate losses.

   If it is contractually provided for, but the employee does not pay the amount on terminating, this is not wrongful dismissal → this is a simple debt action.
Wrongful Dismissal

**DISMISSAL?**

**Actual dismissal?**
- Did emp’ee repudiate the contract by committing act of gross misconduct?

**Constructive dismissal?**
- Consider here whether employee can be said to have repudiated the contract first

**Continuous contracts:**
- Did the employer give notice required under the contract/stat min notice?
- Did employer make a payment in lieu of notice?
- Was there a PILON clause?
- Can the employee be said to have waived right to notice?

**Fixed Term Contracts:**
- Did the employer terminate FTC in accordance with break clause?

**Time limits:**
Claims for wrongful dismissal must be brought within a limitation period:
- 3 months for ET; 6 years for Civil Courts.

**WRONGFUL DISMISSAL** – employer terminated employment in breach of contract
SECTION 3:
Unfair Dismissal
1. In order for an employer to ‘act reasonably’ in treating the reason as sufficient to justify dismissal, he must normally take certain procedural steps relevant to the circumstances established in case law. In addition, he must comply with the relevant codes of practice and his own company manuals (Polkey). If he does not follow a fair procedure then the dismissal cannot be said to have been fair unless following fair procedure would have been ‘utterly futile’. Polkey reductions may be made, however, if following fair procedure can be said to have made no difference on B of P.

3. If fair procedure/’utterly futile’, then determine whether it was in the ‘band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted’ (Iceland Food v. Jones [1993]).

### CONDUCT – [ACAS code followed?]

In order for conduct dismissal to be reasonable:

1. Must have been reasonable to believe, at the time of the dismissal, that the employee was guilty of misconduct; and that

2. The employer must have conducted a reasonable investigation in the circumstances

*BHS v Burchell*

### CAPABILITY/QUALIFICATION – [ACAS code followed?]

Factors considered:

- Whether the employee knew what was required of them.
- Whether the employer took steps to minimise the risk of poor performance.
- Whether there was a proper appraisal of the employee and the problem was identified.
- Whether it provided adequate supervision and encouragement.
- Whether it warned the employee of the consequences of poor performance.
- Whether it gave the employee a chance to improve.
- Whether it considered alternative employment.

### REDUNDANCY DISMISSALS

A redundancy dismissal will not normally be considered to have been reasonable unless the employer has first:

1. Warned and consulted any affected employees (or their representatives)

2. Adopted a fair basis in selecting those to be made redundant

3. Taken reasonable steps to avoid redundancies by redeploying individuals elsewhere.

*Polkey v A E Dayton Services [1987]*

### SOME OTHER SUBSTANTIAL REASON (SOSR)

Factors for ET to consider whether the employer took following steps:

- Investigating the situation.
- Consulting with the employee.
- Warning the employee of the risk of dismissal.
- Giving the employee an opportunity to state their case.
- Exploring alternatives to dismissal. (Personality)
- Balancing the needs of the employer and employee. (Business Reorganisation)

IN ALL CASES – Polkey and Fair Procedure

The requirement to ‘act reasonably’ incorporates the need to follow a fair procedure (Polkey).

Fair procedure requires employer to follow steps in other boxes plus, for conduct/cap dismissals, ACAS.

Polkey says – where fair procedure NOT followed:

1. But ‘fair procedure’ would have been utterly futile → i.e. definitely come to the same result, then still open to ET to find fair dismissal where ‘band of reasonable responses’ test met

2. But employer can show >50% likelihood that fair procedure would have resulted in same decision, then unfair dismissal

### RETIREMENT DISMISSALS

Different test for ‘fairness’ – retirement dismissal will be automatically unfair where employer has not complied with certain statutory procedures – see p.149. Test for fairness = s.98ZG.
UNFAIR DISMISSAL – REMEDIES AND COMPENSATION

Remedies:

1. Order for reinstatement [but only where employee so wishes – s112(3)]
2. Order for re-engagement [but only where employee so wishes – s112(3)]
3. Compensation (where no order made) – s118: (1) Basic Award (2) Compensatory Award

Orders for reinstatement/reengagement only awarded in 0.1% of all cases of UD.

Basic Award

1. Work out EDT

EDT = date termination takes effect (with or without notice) + statutory notice period (where notice not given) – s97(2).

2. Award relevant amount of pay for each year of employment – working backwards to a maximum of 20 years (age 60 to age 40)

For each year employee ≥41 years’ old 41.2 weeks’ pay
For each year employee ≥22 years’ old <41 22.5 weeks’ pay
For each year employee < 22 years’ old 0.5 week’s pay

Week’s pay = at EDT, gross weekly pay, maximum £380 (effective 1st February 2010)

Maximum basic award = £11,400 (30 weeks x £380).

3. Deductions

a. Contributory fault - May be reduced by ‘such sum as is just and equitable having regard to applicant’s conduct before dismissal’ – s122

b. Redundancy - Redundancy payments (statutory or otherwise) should be deducted from basic award – s122. [only applies where ‘real’ reason for dismissal found to have been redundancy]
Compensatory Award

Designed to compensate for employee’s loss.

Types of loss

Only financial loss recoverable → loss arising from psychiatric harm (i.e. breach of implied duty of mutual trust and confidence) only recoverable from breach of contract claims where breach occurred during the normal course of employment, and not the manner of dismissal (Eastwood v Magnox; Johnson v Unisys)

Heads of loss

1. Loss of NET earnings from EDT to date of tribunal / date upon which higher paid employment found. (Whelan)
   [Number of weeks from EDT x net weekly basic pay]

2. Loss of NET future earnings from date of tribunal until employee finds new employment
   - Only relevant where not already employed in better paid job
   - Where in worse paid job, ET will award difference between such job and tribunal salary if appropriate
   - Where no job, ET will consider the likelihood of securing new employment/timeframe.

3. Loss of commission OR contractual bonus to date of tribunal + other fringe benefits – NET

4. Loss of pension rights – both to date of tribunal and future.

5. Loss of statutory rights = £250.

6. ‘Premium’ for delay in payment – equivalent to interest

7. Expenses in looking for work.

8. ACAS code uplift of up to 25% where employer has unreasonably not fully complied with ACAS code (conduct/capability cases only)

9. Award for failure to provide written (s1) particulars of employment = 2 to 4 weeks’ gross pay, as ET finds ‘just and equitable’ (subject to maximum week’s pay £380)

TOTAL LOSS = £X

Deductions

1. Sums obtained through mitigation (e.g. other work)

2. Sums to be deducted for failure to mitigate (i.e. could be reasonably expected)
   - Employee must take reasonable steps to find alternative employment.
   - Deductions may be made for failure to seek alternative employment or unreasonable decline of offer of employment
   - Not unreasonable where job not appropriate for employee – e.g. from highly skilled, professional role to low skilled labour! Particularly relevant for senior employees.
SECTION 4: Redundancy
Statutory Redundancy Payments (SRPs)
Once established that:
1. Redundancy situation arose.
2. Employee dismissed wholly/mainly for that reason.

Consider whether redundancy payment is due.

2. Has employer offered the employee re-engagement or renewal of his contract? S141 ERA 1996

Re-engagement means same employer, different terms.
Renewal means same employer, same job

Only valid offer if for s141 purposes (i.e. avoiding RP) if:
a. made before existing contract comes to an end (dismissed!)
b. to take effect within 4 weeks (the ‘trial’ period)
c. made by employer/associated employer.
If not, then no offer made for s141 purposes.

3. Is the offer of employment suitable in relation to that employee?

If no, then no RP due.

4. Did the employee unreasonably decline the offer?

If yes, then no RP due.

5. Did the employee unreasonably terminate the trial period?

If yes, then no RP due.

Employee’s offer suitable?
- Must be suitable for the particular employee.
- Key factors: nature of duties, status, hours, place of work.
- Question to be asked: Is the offer for employment substantively equivalent to the old one?
- Personal, domestic situation not taken into account here → just similarities of the two jobs.

Employee’s decline of offer unreasonable?
- The test is subjective in the sense that it takes account of the employee’s personal circumstances – e.g. financial, domestic situation.

Employee’s termination of trial period unreasonable?
- Trial period is to allow both employer and employee opportunity to determine whether employee is suited to the new job.
- If employee terminates after completion of 4 week trial period, there is no right to RP (Optical Express v. Williams). An employee must exercise right to terminate trial period whilst it is ongoing, not after, if they want to claim RP.

NOTES ON REDUNDANCY PAYMENT FLOWCHART

Redundancy payments only due where dismissal is by reason of redundancy.

Dismissals are only by reason of redundancy where:

1. There is a redundancy situation (business cessation; movement of workplace; reduction in requirements for workers of a particular kind); AND

2. The dismissal is wholly/mainly attributable to the redundancy situation.

Bumping – Consider in employee redundancy

Scenario

A does work of kind X. B does work of kind Y.

Need for work of kind X diminished.

B dismissed and A moves to doing work Y

Is this redundancy situation?

Yes, because need for work of kind X diminished and B’s redundancy was wholly attributable to that state of affairs – essentially whether the dismissed employee does the work of the kind which the business now has less of (supported in Safeway Stores v Burrell, and Murray v Foyle Meats).

Transfer of undertaking

Redundancy situation but no dismissal because of the operation of reg 4(1) of the TUPE regs 2006, which provides that contract continues and there is no dismissal.

CALCULATING STATUTORY REDUNDANCY PAYMENT

1. Work out relevant date

Relevant Date = date termination takes effect (with or without notice) + stat minimum notice period (where notice not given) – s145 ERA 1996.

2. Award relevant amount of pay for each year of continuous employment at certain age – working backwards to a maximum of 20 years (e.g. age 60 to age 40)

For each year employee ≥ 41 years old 1.5 week’s pay

For each year employee ≥ 22 years old < 41 year’s old 1 week’s pay

For each year employee < 22 year’s old 0.5 week’s pay

Week’s pay = at Relevant Date, gross weekly pay, up to maximum of £380 (from 1/2/2010)

Maximum statutory redundancy payment = £11,400 (i.e. 20 years of service maximum x 1.5 weeks’ pay = 30 weeks’ pay @ maximum of £380 per week)
SECTION 5:

Direct & Indirect Discrimination

Disability Discrimination Act (DDA) 1995