

Employment Law Seminar 2009

Peter Byrne
Partner and Head of Employment
Law



Topics

- Employment Contracts
- Dispute Resolution
- Redundancy
- TUPE
- Discrimination
- Unfair Dismissal Update



Employment Contracts

- Employment status
- 3 core categories of individuals who work
 - Employees
 - Self Employed
 - Workers



Employment Contracts

- Three key elements to employment status
 - Obligation to provide work personally
 - Archer-Hoblin Contractors Ltd v MacGettigan



Employment Contracts

- Mutuality of Obligation
- Control
- May not be the only determining factor



Employment Contracts

- Agency Workers
 - Employee of the employment business?
 - Employee of the end user?
 - Neither?



Employment Contracts

- Usually two separate contracts
 - Between the individual and the employment business
 - Between the employment business and their client (end user)
 - Never usually between individual and end user



Employment Contracts

- Unless a contract can be *implied* between the end user and the individual, the individual is not able to claim employment rights against the end user



Employment Contracts

- Recent decisions
 - Brook Street and Dacas 2004
 - Cable & Wireless PLC v Muscat 2006
 - James v London Borough of Greenwich 2008



Employment Contracts

- **James** decided in the Court of Appeal
- Guidelines approved regarding implied contracts of employment
- Lengthy passage of time is not enough
- Relationship between individual and agency likely to be “exceptional”



Employment Contracts

- Take care – **Harlow District Council v O'Mahony and APS Recruitment**
- Even if no contract at the outset, conduct of parties did point to the conclusion that a contract was created



Employment Contracts

- **Consistent Group v Kalwak**
 - Economically dependant workers
 - “No obligation to accept work”
 - Was the no obligation clause a sham
 - Held that there was no realistic expectation that it would be acted upon
 - Real relationship was other than that reflected by the document



Employment Contracts

- Protectacoat Firthglow Ltd v Szilaghyi
 - Claimant was engaged by a building firm
 - He was required to sign a “partnership agreement with fellow staff”
 - Respondent then contracted with the partnership



Employment Contracts

- Claimant was paid directly
- No partnership accounts
- Held the agreement was a sham and the Claimant was an employee



Employment Contracts

- HMRC document – False Self Employment in Construction
- Consultation at present, but persuasive
- At least one of the following criteria to be met:-



Employment Contracts

- Provision of plant and equipment
- Provision of materials
- Provision of other workers
- Likely to be more willing to pursue cases in the Tribunal



Employment Contracts

- Recent Cases
 - M&P Steelcraft v Ellis [2008]
 - Status of prisoner
 - Enfield Technical Services Ltd v Payne
 - BF Components Ltd v Grace
 - Illegal contracts
 - Little v BMI Chiltern Hospital
 - Casual workers



Agency Regulations

Amendments effective from April 2008

- Additional Services (transport, accommodation) right to cancel with 5 or 10 days' notice without penalty
- Short assignments – less than 5 days duration – exempt from need to provide detailed information to the hirer and work seeker



Agency Workers

- Entitlement to SSP
 - Not payable to AW whose contract is for three months or less
 - Entitled if work longer than original period and total period exceeds 3 months, or
 - Contract extended for more than 3 months



Agency Workers

- Entitlement to SSP
- Two consecutive contracts with the same agency separated by 8 weeks or less, and one of the following apply
 - Total length of both exceeds 13 weeks
 - Total period worked becomes more than 13 weeks, or



Agency Workers

- Entitlement to SSP
 - The contracts are extended so that together they can run for more than 13 weeks
- Pledge to TUC by Prime minister to fast track Agency Workers Directive
 - Sept 2009



Shareholder/Director

- Is a director who is also a controlling shareholder an employee?
- Would mean entitlement to claim a redundancy payment from the Insolvency Fund if company becomes insolvent



Shareholder/Director

- Secretary of state for **BERR v Neufield** now decided by the court of appeal
- Depends on circumstances, but if not a sham, can be an employee



Holiday Leave

- Decided in 2005 that holiday entitlement could not be taken during sick leave
- Not entitled to pay in lieu of untaken holiday on termination
 - Commissioners of Inland Revenue v Ainsworth



Holiday Leave

- Now have case of **Stringer v HMRC**
 - Holiday entitlement accrues during sickness
 - Entitled to take upon return
 - If leaves, entitled to pay in lieu



Holiday Leave

- Be aware of recent opinion from Advocate General in case of **Schultz-Hoff v Deutsche Rentenversicherung Bund**
 - Entitlement to annual leave or to payment in lieu does accrue during sickness absence



Holiday Leave

- Correct even if absent during whole holiday year
- Statutory leave may be taken at some time in the future
- Contrary to existing “no rollover” provisions



Holiday Leave

- Recent ECJ decision of Pereda
 - Illness while on holiday does not count towards minimum leave entitlement
 - If worker decides to take sick leave in middle of a holiday, he must be granted a replacement holiday period



Protection

- Post termination restrictions
- If no express clause, no protection
- Must protect a legitimate trade interest



Protection

- Factors to be considered
 - The seniority and importance of the employee
 - The business patterns and industry wide position regarding recruiting replacement
 - Industry standard for any restrictions



Protection

- Five types
 - Non competition
 - Non solicitation
 - Non dealing
 - Non enticement
 - Confidential information



Protection

- TFS Derivatives v Morgan
 - What does the covenant mean?
 - Has employer shown it has a legitimate business need which needs protecting
 - Covenant should be no wider than is reasonably necessary for the protection of the interest



Protection

- Intercall Conferencing Services Ltd v Steer
 - 6 month non- compete clause upheld even though no geographical limit because of the worldwide nature of the operation



Protection

- Christie Owen & Davies v Walton
 - A 6 month non-compete restriction was upheld
 - Former employee prevented from the same or very similar field for a competitor



Protection

- WRN v Ayriss [2008]
- 6 month non solicitation and non competition clause unreasonable too wide
- Sought to restrict against all employer's clients and not just those with whom the employee had personal dealings



Protection

- Garden Leave
 - SG&R Valuation Services v Boudrais
 - Two senior execs handed in notice
 - Employer found out they were going to misuse confidential information
 - Put them on garden leave
 - No clause in contract
 - Employees resigned with immediate effect



Protection

- Garden Leave ctd
 - High court held employers entitled to act in this way
 - Clear evidence that the employees had been in breach of their duty of fidelity
 - Therefore, actions of employer was a reasonable response



New Minimums

- National Minimum Wage
 - Age 22 and over - £5.80
 - Age 18 to 21 - £4.83
 - Aged under 18 - £3.57

Effective from 1st October 2009



Minimum Wage

- New method of calculating arrears
 - Arrears to be paid at the current rate, not at the rate in existence when payment should have been made
- Criminal Regime
 - Search and seize
 - Crown Court option if serious
 - Heavier penalties



Stress/Health

- Stress at Work
 - Sutherland v Haddon
- Incapacity caused by Employer
 - McAdie v Royal Bank of Scotland
- Arising out of an investigation
 - Deadman v Bristol City Council
- Personal injury
 - Corr v IBC Vehicles Ltd



Dispute Resolution

Amy Crabtree
Employment Solicitor



Introduction

- Disciplinary situations
 - Misconduct
 - Poor performance – capability?
- Employees grievances
 - Concerns, problems or complaints that employees raise with their employers



Unfair Dismissal

- Section 98 Employment Act 1996
- Onus is on the employer to show the reason for dismissal is potentially fair



Unfair Dismissal

- Potentially fair reasons for dismissal:
 - Capability
 - Conduct
 - Redundancy
 - Retirement
 - Duty/restriction imposed by enactment
 - Some other substantial reason



Unfair Dismissal

- If dismiss for suspected misconduct employer must show:
 - That he had a reasonable belief,
 - Based on reasonable grounds,
 - After a reasonable investigation,
 - Of the guilt of the employee



Where Are We Now?

- Employment Act 2002 & Employment Act 2002 (Dispute Resolution) Regulations 2004

Replaced by:

- Employment Act 2008
- New ACAS Code of Practice



Statutory Dismissal and Disciplinary Procedures

- Old Standard Procedure (investigation first)
- **Step 1** – invitation to meeting (letter)
- **Step 2** – meeting
- **Step 3** – appeal



Statutory Grievance Procedure

- 3 steps as per DDP
- Employee sets out complaint in writing
- Employer invites employee to a meeting
- Employer reaches a decision and offers an appeal



Transitional provisions

- Old rules continue to apply if employer before 6th April 2009 has:
 - Sent a step 1 letter or
 - Held a step 1 meeting or
 - Dismissed employee



New Rules & ACAS Code

- Failure to follow Code does not make an employer automatically liable to proceedings
- Employment Tribunal will take Code into account
- Tribunals have discretion to adjust awards by 25% where there is an unreasonable failure to follow the code



New Rules & ACAS Code

- Employee can issue ET claim without waiting 28 days after presenting grievance
- No more automatic unfair dismissal (4 week basic award)
 - Return to pre 2004 position of *Polkey v A.E. Dayton Services Ltd*
- Also applies to warnings



Disciplinary Issues

- Complete full investigation
 - interview witnesses
 - gather evidence (documents)
- Standard of proof – reasonable belief



Invitation to Disciplinary Meeting

- Set out allegations
- Right to be accompanied
 - R (on the application of G) v The Governors of X School
 - Kulkarni v Milton Keynes Hospital NHS Trust 2009
- Contemplating dismissal
 - Zimmer v Brezan 2008



Meeting

- Reaffirm right to be accompanied
- Take notes
- Discuss allegations
- Ask relevant questions
- After meeting - consider evidence and reach decision
- Confirm decision in writing and right to appeal



Appeal Process

- Employee confirms wish to appeal in writing
- Employer invites to an appeal meeting (right to be accompanied)
- Convene meeting
- Write to employee confirming outcome



What is a Grievance?

- An employee does not have to make it clear that a grievance is being raised
- The fact that the grievance is contained in a letter of resignation makes no difference at all.
- There is no requirement for an employee to comply with any company or contractual procedure



What is a Grievance?

- Employer merely has to be able to understand the general nature of the complaint – full detail not required
- Employer does not have to be given the chance to respond to the grievance. The procedure only require the employee to set out grievance in writing
- *Shergold v Fieldway Medical Centre* (2005)



What is a Grievance?

- A letter before action from a solicitor can amount to a grievance letter
- It does not matter if headed “without Prejudice”
 - Arnold Clark Automobiles v Stewart (2006)
- Can be much wider
 - Chard v Telewest Communications PLC



Dealing with Grievances

- Hold a formal meeting with the employee without unreasonable delay
- Allow employee to be accompanied
- Investigate and decide on appropriate action
- Communicate decision in writing confirming right to appeal



Grievances: Appeals

- If employee appeals this should be dealt with impartially
- Right to be accompanied
- Outcome should be in writing, this is the final decision



Overlap?

- Where employee raises a grievance during disciplinary process
- May temporarily suspend this in order to deal with the grievance
- If they are related it may be appropriate to deal with both issues concurrently



Time Limits

- Claims must usually be pursued within 3 months of date of termination
- The old rules allowed for extension of time limits if a grievance or appeal ongoing
- New rules – no extension of time



What can Forbes do for you?

- Provide advice
- Draft letters/documents
- Provide Independent Appeal Officer
- Bespoke Training
- Representation at Employment Tribunal



Redundancy Issues

Peter Byrne
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Redundancy

Definition

- Employment Rights Act 1996
Section 139
 - For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to
 - a) the fact that his employer has ceased or intends to cease—



Redundancy

- i. to carry on the business for the purposes of which the employee was employed by him, or
- ii. to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business—
 - i. for employees to carry out work of a particular kind, or



Redundancy

- ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish



Redundancy

- In Summary
- Three situations
 - Closure of the business
 - Closure of the employee's workplace
 - A diminishing need for employees to do the available work



Redundancy

- Potentially Fair reason for dismissal
 - Redundancy will result in the termination of the employee's contract of employment by the employer



Redundancy

- Section 98 Employment Rights Act 1996 defines potentially fair reasons, redundancy being one of them
- If it is a potentially fair reason for dismissal, still have to follow a procedure so that the actual dismissal is fair



Redundancy

- Three main considerations
 - Selection
 - Consultation
 - Suitable alternative employment
- Until completed all stages, only a “risk” of redundancy



Redundancy

- Selection
 - Always consider voluntary redundancy first
 - Just because employee volunteers, employer not obliged to accept
 - Bumping i.e. replaced by another employee who is surplus to requirements within the employer’s business, even though there is no diminution in the particular work carried out by the dismissed employee



Redundancy

- Application of fair criteria
- Objective criteria that are most suitable for the business
- Consult with unions if recognised



Redundancy

- Selection
- May be an agreed procedure in existence
- Selection Pools must be fairly defined



Redundancy

- Examples of Criteria
 - Attendance Record – avoid allegations of discrimination
 - Disciplinary record
 - Skills
 - Qualifications
 - Performance
 - Capability



Redundancy

- Service/LIFO
 - Check age discrimination issues
- Always use objective assessments and clearly defined criteria from outset



Redundancy

- **Consultation**
- Failure to consult will normally lead to an unfair dismissal
- Warning of **risk** of redundancy is essential prerequisite of the consultation process
- If collective redundancies, statutory duty exists to consult with union or employee representatives



Redundancy

- What to Consult about
 - Reason for proposed redundancy
 - Number and description of employees proposed to be made redundant
 - Total number of employees
 - Proposed selection method
 - Proposed method for carrying out dismissal
 - Proposed method of calculating any non-statutory payments



Redundancy

- Timings
- Consult for reasonable period
- Varies in each individual case
- If 20 or more within 90 days, 30 day minimum
- If 100 or more within 90 days, 90 day minimum
- Must notify Department for Business, Innovation and Skills



Redundancy

- Consultation
- Required to consult in good faith with a view to reaching agreement in relation to ways of
- Avoiding dismissals
- Reducing the number of dismissals
- Mitigating the consequences of dismissals
- May include redeployment or retraining



Redundancy

- **Alternative employment**
- Should be “suitable”
- Refusal to accept by employee means employee loses entitlement to redundancy payment
- Should be comparable in terms of salary, status and involve work that does not devalue previous position in comparison
- Travelling may be an issue – mobility clause?
- Consider redeployment policy and follow it



Redundancy

- Redundancy payment
- Service x age factor x Gross weekly pay
- Service is complete years
- Age factor
 - 21 or under = 0.5
 - 22 to 40 = 1
 - 41 and over 1.5
- Gross pay is actual, capped at £380 per week
- Contractual scheme here is more generous



Redundancy

- Statutory Trial Period
- Must be a difference in the terms of the new employment
- 4 week trial period starts when employee commences new contract
- Can be extended by agreement in writing
- If employee feels unsuitable, must end employment or give notice in the 4 week period
- Otherwise, loses right to claim redundancy



Redundancy

- Does the employee work the notice period
- Is there a PILON Clause?
- Is there a garden leave clause?
- Pension issues
- Watch age discrimination!!
 - London Borough of Tower Hamlets v Wooster
 - Making 49 year old redundant deliberately so as to avoid access to pension at 50 was age discrimination
- Remember contractual notice



The Transfer of Undertakings (Protection of Employment) Regulations 2006

TUPE – Ruth Coffey
Associate Solicitor



When will it affect you?

- Buying a business (or part of)
- Selling a business (or part of)
- Winning / Losing a service contract



Relevant Transfer

Regulation 3(1)

- a) Transfer of undertaking, business or part of situated immediately before in UK & transfer of economic entity – retains identity
- b) Service provision change



What will be relevant transfer?

- Economic entity

“an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary”



What will be relevant transfer?

- Identity of employer will change
- Economic entity transfers and retains identity post transfer
- An identifiable set of resources will be assigned to business or part of and retain identity after transfer



What will be relevant transfer?

- Matter of fact to be decided by Tribunal
- Is pre-transfer operation still being carried on – same or similar activities?
- Is there still a “going concern” post transfer?



Relevant Transfer - Cases

- Spijkers v Gebroeders Benedik Abbatoir [1986]
- Merckx v Ford Motor Co Belgium SA [1997]



Relevant Transfer - Cases

- Fairhurst Ward Abbotts v Botes Building Ltd [2004]
- Compass Group UK and Ireland T/A Scolarest v Burke & others



Service Provision Change

- Award to a contractor
- Re-let to a new contractor
- Brought back “in-house”



Service Provision Change

3 conditions

- Immediately before must be an organised grouping of employees in UK whose principal purpose is to carry out the activities concerned on behalf of the client



Service Provision Change

- Immediately before change, the client must intend the activities will, after change, be carried out transferee other than in connection with a single specific event of short term duration
- Activities must not consist wholly or mainly of supply of goods for client's use



Service Provision Change

Cases

- Hunt v Storm Communications and others 2006
- Royden & others v Barnetts Solicitors 2009
- Metropolitan Resources Ltd v Churchill Dulwich Ltd & others



If TUPE applies

- Automatic transfer of employees
- Automatic transfer of rights and liabilities
- Transfer related changes to terms and conditions may be void
- Dismissals may be automatically unfair



If TUPE applies

What things transfer?

- Terms and Conditions
- Continuity
- Statutory and civil claims
- Special provisions for public sector re liability for claims following transfer - jointly and severally liable



Variation of Terms & TUPE

- General position – transfer on pre-existing terms and conditions
- Now provision to agree contractual variations in the context of a transfer
- Depends on the sole or principal reason for the change
- Will need an ETO reason to be valid



Variation of Terms & TUPE

Can an employee “cherry pick” terms?

- Regent Security Services Ltd v Power 2007

Cannot create new rights

- Jackson v Computershare Investor 2007



ETO

- ETO – Economic, technical or organisational entailing changes in the workforce
- Understood that changes etc. means there must be some structural change in the workforce
- Can be change of duties, e.g. manager no longer required to manage, or move a secretary to a sales role



Transfer Related Dismissals

Reg 7(1) Automatically unfair if sole or principal reason is:-

- a) Transfer itself
- b) A reason connected with the transfer that is not an ETO reason entailing changes in the workforce



Transfer Related Dismissals

- Reason – transfer – Automatically Unfair
- Connected with transfer but no ETO – Automatically unfair
- Connected with transfer and there is an ETO
- Potentially fair
- Unconnected with transfer – potentially fair



Transfer Related Dismissals

- Transferor not entitled to rely on future transferee's ETO reason for dismissal
- *Hynd v Armstrong & others 2007*
- Dismissal can be connected to transfer even if no particular transferee identified at time of dismissal
- *CAB Automotive Ltd v Blake & others (2008)*



Transfer Related Dismissals

- Decision of person effecting pre-transfer dismissals must be scrutinised
- *Dynamex Friction Ltd & another v Amicus & others 2008*
- Right to object to transfer
- *New ISG Ltd v Vernon & Others (2007)*
- *Hay v Hanson (1996)*
- *Sec of State v Cook (1997)*



Insolvency & TUPE

Reg 8(7)

- Where the transferor is subject to bankruptcy or analogous insolvency proceedings with a view to liquidation of the assets Regs 4 & 7 (transfer of contracts & dismissal) don't apply
- *Oakland v Wellwood (Yorkshire) Ltd* 2008 EAT & NOW CA



Employee Liability Information

- Identity and age of employees assigned to business being transferred
- Particulars of employment
- Information re disciplinary & grievances within last 2 years
- Information re any court/tribunal case, claim or action (brought or aware of)
- Collective agreements



Employee Liability Information

Reg 11

- Need for Transferor to give employment information re terms and conditions to transferee.
- Failure to do so can lead to claim to tribunal not less than £500 per employee



Information & Consultation

Reg 13

- Duty to inform & consult
- Joint & several liability – 13 weeks' pay

Consult about:

- Fact of transfer, date and reasons
- Legal, economic & social implications
- Measures envisaged or no measures



Pension Rights & TUPE

- Since April 2005, a minimum amount of protection applies to employees
- Membership of a defined benefit scheme upon transfer leads to at least 6% of pensionable pay by way of contribution to employee,
- Where member is required to contribute, maximum will be 6%



Pension Rights & TUPE

- Or transferee matches member contributions to the scheme up to a maximum of 6%
- Where a money purchase scheme exists, where the employer must match the employee's contributions, maximum is 6%



Pension Rights & TUPE

- Where a stakeholder scheme exists, match member contributions up to maximum of 6%
- Note Public sector pressure from statutory guidance



Commercial Tools

- Compromise Agreements (between the employee and his former employer will not protect the transferee from claims)
- Indemnities/Warranties & other terms in sale/purchase/lease agreements



What Can Forbes Do For Your Business & TUPE?

- Provide advice on obligations
- Provide draft documents including consultation letters
- Draft sale/purchase/lease agreement
- Draft Compromise Agreements
- Represent you at Tribunal/court



Discrimination Update

Jonathan Holden
Employment Solicitor



Discrimination

*'I have a dream that my four little children
will one day live in a nation where they will
not be judged by the colour of their skin
but by the content of their character'*

Martin Luther King Jr., 28th August 1963



Discrimination

- Parliament has the same dream...
 - 18 EC directives
 - 11 Acts of Parliament
 - 56 Statutory Instruments
 - 11 Statutory Codes of Practice
 - Case Law....?



Types of Discrimination

- Age
 - The Employment Equality (Age) Regulations 2006
- Disability
 - Disability Discrimination Act 1995



Types of Discrimination

- Sex
 - Sex Discrimination Act 1975
- Race
 - Race Relations Act 1976
- Sexual Orientation
 - The Employment Equality (Sexual Orientation) Regulations 2003



Types of Discrimination

- Religious Belief
 - The Employment Equality (Religion or Belief) Regulations 2003
- Fixed Term Employees
 - The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002



Types of Discrimination

- Part Time Workers
 - Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000



Forms of Discrimination

- Direct
- Indirect
- Harassment
- Victimisation



Direct Discrimination

- X treats Y less favourably on grounds of a particular characteristic
 - E.g. Woman denied promotion because management team think it more likely she'll have more time off due to family commitments
- Is motive relevant?



Direct Discrimination

Amnesty International v. Ahmed

- Claimant of Sudanese origin
- Applied for promotion to “Sudan researcher”
- Amnesty refused
 - Claimant’s ethnic origin would affect Amnesty’s perceived impartiality and therefore, effectiveness
 - No motive to discriminate



Direct Discrimination

- EAT Held :
 - Direct discrimination
 - Ultimate question was ground of treatment complained of
 - Amnesty’s decision solely based on Claimant’s ethnic origins
 - Motive irrelevant



Indirect Discrimination

- Provision, Criterion or Practice that disproportionately affects one group more than another
- E.g. Requirement that all Employees must be at least 6 feet tall



Victimisation

- Less favourable treatment because employee has taken action on discriminatory grounds
- E.g. Denying someone a promotion because supported colleague with a complaint of discrimination
- Potentially quite wide scope



Victimisation

- Rank Nemo v Coutinho
 - Mr Coutinho won ET claim of race discrimination and unfair dismissal
 - Compensation in excess of £72,000.00
 - Rank Nemo didn't pay
 - Mr Coutinho said failure to pay 'retaliation' for bringing and winning claim



Victimisation

- Rank Nemo v Coutinho
 - ET struck out claim on basis not a valid claim
 - Court of Appeal said could, in theory, be victimisation
 - Remitted to fresh ET to decide on facts whether victimisation took place



Harassment

- Unwanted course of conduct
- On grounds of characteristic
- Has purpose or effect of
 - Violating Dignity
 - Creating intimidating, hostile, degrading, humiliating or offensive environment
 - English v. Thomas Sanderson Blinds



Harassment

- Claimant subjected to 'banter' of homophobic nature
- Basis was that he had been to Boarding School and lived in Brighton
- Accepted by both parties that he was not homosexual



Harassment

- Brought claim for harassment by virtue of Sexual Orientation Regulations
- Unsuccessful – EAT ruled that banter not on grounds of Claimants sexual orientation
- BUT...



Harassment

- Court of Appeal disagreed
- 2:1 majority
- Found was discrimination on grounds of sexual orientation
- Should focus on basis for harassment rather than attributes of particular victim



Developments

- Particularly in Disability Discrimination (again!)
 - London Borough of Lewisham v. Malcolm, HL
- Also developments in Age Discrimination
 - Heyday
 - Seldon v. Clarkson-Wright & oths.



Disability Discrimination

- London Borough of Lewisham
 - Complete overhaul of disability-related discrimination
 - Makes it much harder for Claimants to succeed in claim under DDA
 - Person can now only be liable if they know individual disabled



Disability Discrimination

- Confirmed in Employment Law context
- Child Support Agency v. Truman
- Stockton-on-Tees BC v. Aylott
 - Makes it clear more difficult for Claimant's to prove disability-related discrimination



Disability Discrimination

- But – decision in Malcom mitigated in relation to reasonable adjustments
 - Fareham College v. Walters
 - If at point at which Employer considering dismissal there was a reasonable adjustment which would have avoided dismissal, dismissal *itself* is unlawful discrimination



Disability Discrimination

- Proving disability
- 'Long-term' – normally 12 months or more
 - Mc Dougall v. Richmond College, CA
 - When deciding whether impairment has long-term effect, Court should only look at information available to Employer at time of making decision



Disability Discrimination

- Proving disability
- Meaning of 'likely'
 - Used in Schedule e.g. likely to be at least 12 months
 - SCA Packaging v. Boyle, HL
 - 'Could well happen' **not** 'more likely than not'
 - Lower than 51% chance?



Disability Discrimination

- 'Day-to-day activities'
- Chief Constable of Dumfries & Galloway v. Adams
 - Refers to activities found in a range of employment situations
 - Doesn't cover a specialised skill



Age Discrimination

- Heyday Appeal
- Is mandatory retirement age of 65 for employees legal?
 - ECJ – might be – in principle capable of justification
 - Referred to High Court to consider whether capable of objective justification



Age Discrimination

- **Seldon v. Clarkson-Wright**
 - Partner compulsorily retired at age 65
 - No exemption for compulsory retirement for partners (unlike employees)
 - EAT said that assumption there could be tail-off in performance at 65 was discriminatory
 - Subject to Appeal



Age Discrimination

- **Chief Constable of West Yorks. v Homer, EAT**
 - Requirement for police officer to have law degree to qualify for particular grade **not** discrimination
 - No more difficult for older person to obtain law degree than a younger one



Religious Belief

- **Chondol v Liverpool City Council**
 - Complaint about Mr Chondol from service user
 - *“He was talking about God and church and crap like that”*
 - Dismissed – brought claim of discrimination and unfair dismissal
 - Not discrimination – dismissal on grounds of inappropriate behaviour rather than Mr Chondol’s religious belief



Equality Bill

- Published 27th April 2009
- Highlights:
 - Reverses Malcolm
 - Outlaws clauses in Employment Contracts imposing secrecy preventing Employees from discussing pay packages
 - Outlaws discrimination by association



Equality Bill

- Highlights (cont.):
 - Clause allowing Secretary of State to order Employers of 250 + to publish information about pay disparities between male and female employees
 - Allows positive discrimination in recruitment
 - Presently still at Committee stage



In Practice

- Prevention better (and cheaper) than the cure!
- Compensation unlimited in discrimination cases
 - Awareness
 - Training
 - Dignity at Work Policy



Changes Relating to Dismissals

Peter Byrne

Partner and Head of Employment Law



Unfair Dismissal

- Termination of contract by the Employer with or without notice
- Expiry of Fixed Term contract without renewal on same terms
- Resignation of Employee with or without notice in circumstances where he is so entitled due to the Employer's conduct (Constructive Dismissal)



Unfair Dismissal

- Onus on the employer to show reason for dismissal is potentially fair
- Section 98 Employment Rights Act 1996:
 - Capability or qualification
 - Conduct
 - Redundancy
 - Duty/restriction imposed by enactment
 - Some other substantial reason



Unfair Dismissal

- If Employer successful at the first stage, must then consider whether the employer acted reasonably in dismissing the employee for that reason
- Must be within the band of reasonable responses



Unfair Dismissal

- Frequent cases heard by tribunal
- Relatively rare for a single act of misconduct to warrant dismissal
- Examples
 - Refusal to obey a lawful order
 - Breach of Discipline
 - Criminal offences committed away from work
 - Dishonesty
 - Sexual offences



Unfair Dismissal

- There must be a full investigation of the conduct
- There must be a letter written to employee detailing the allegations and inviting them to attend a meeting
- The letter must have sufficient detail so that the employee knows the basis of any allegations



Unfair Dismissal

- If dismissal is being considered, employee should clearly be told in the invite that this is a risk
- Always have right to be accompanied by work colleague or trade union representative
- If agreed procedure not followed likely to be unfair dismissal



Unfair Dismissal

- Gross Misconduct
- Conduct so serious as to justify dismissal without notice
- Examples
 - Unprovoked physical violence
 - Theft
 - Improper personal behaviour
 - Gross insubordination



Unfair Dismissal

- Gross Misconduct
- Burden of Proof-Reason for dismissal
- *Kuzel V Roche Products Ltd*
- Employer has to show the reason or principal reason for dismissal is one of the potentially fair reasons in the Employment Rights Act 1996
- Tribunal can find that the true reason is not one advanced by either side



Unfair Dismissal

- Relying on Expired Warnings
- *Diosynth Ltd v Thomson*
- *Airbus UK Ltd v Webb*
- Misconduct subject to an expired warning does not cease to be relevant to an employer's response to later misconduct
- Note in *AUK v Webb*, the misconduct was in itself gross misconduct whereas in *D v T* it was not



Unfair Dismissal

- *Corus UK Ltd v Mainwaring*
- Reasonable for an employer to rely on an Occupational Health Physician rather than consulting the employee's consultant
- Must consider the overall procedure for fairness, including any appeal



Unfair Dismissal

- Dismissal at the request of a third party
- *Greenwood v Whiteghyll Plastics Ltd*
- Complaints from client about employee's performance
- Refused to work with him
- Must consider the injustice to the employee before deciding the dismissal was fair



Unfair Dismissal

- Considerations
 - Length of Service
 - Quality of employee's work
 - Difficulties the employee may face in getting new employment
 - Are there any steps than can be taken to remove or alleviate the injustice?



Unfair Dismissal

- Alcohol abuse
- Sinclair v Wandsworth Council
- Employee admitted drinking on duty
- Serious offence but referred to OH
- Employee refused to seek specialist support
- Disciplined and final written warning issued but not told must seek treatment



Unfair Dismissal

- Employee sent home unfit a few weeks later
- Disciplined again and dismissed
- Procedure was not followed properly
- Therefore unfair dismissal
- Otherwise, fair response
- Compensation reduced for contributory fault



Unfair Dismissal

- Reasonableness in ill health dismissals
- *First West Yorkshire Ltd v Haigh*
- Considered extent to which an employer required to consider availability of ill health retirement benefits before dismissing on capability grounds
- Enhanced ill health retirement pension could be available if permanent incapacity



Unfair Dismissal

- Dismissal or Resignation?
- *Sandhu v Jan de Rijk Transport Ltd*
- Employee agreed a severance package with employers in a meeting
- Told by employer at that meeting that his contract was to end
- No advanced warning about the nature of the meeting, but told at the meeting that there were allegations of misconduct



Unfair Dismissal

- Court of Appeal held was a dismissal
- No meaningful negotiation between the parties
- Lack of opportunity to take advice
- No time to reflect
- Claimant only trying to get the best from his inevitable dismissal



Unfair Dismissal

- **Abbycars (West Horndon) v Ford**
 - Employee resigned, claiming 8 allegedly fundamental breaches of contract
 - ET upheld 2
 - EAT held that was enough to justify his resignation
 - Did not have to establish all 8



Unfair Dismissal

- Constructive dismissal
- Suspension giving rise to claim
- **Camden & Islington Mental Health Trust v Atkinson**
- Claim for CUD succeeded after the employer failed to lift a suspension arising out of allegations of serious misconduct and the employee resigned
- Breach of contractual procedure



Unfair Dismissal

- Constructive dismissal
- Grievances and the way they are handled
- **Bournemouth University v Buckland**
- Previous need to apply the “band of reasonable responses” approach at an early stage changed



Unfair Dismissal

- (1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the test is has the employer, without reasonable and proper cause conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them



Unfair Dismissal

- (2) If acceptance of that breach entitled the employee to leave, he has been constructively dismissed
- (3) It is open to the employer to show that such dismissal was for a potentially fair reason



Unfair Dismissal

- (4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair



Unfair Dismissal

- Time Limits are critical
- Unfair dismissal claim submitted electronically 88 seconds late was out of time
 - *Beasley v National Grid*
- Nine seconds late is too late
 - *Miller v Community Trust Links Ltd*
- Same principle applies to Responses
- More discretion in Discrimination cases



Unfair Dismissal

- Compensation Levels
- Statutory maximum week's pay = £350
 - Redundancy £380 from October 2009
- Limit on Compensatory Award = £66.2K
- Maximum basic award = £10500 but dependant on service and age of employee



Unfair Dismissal

- What is included in the Compensatory Award?
 - Immediate loss of earnings
 - Future loss of earnings
 - Loss of benefits in kind
 - Loss of pension rights
 - Loss of statutory rights
- Always subject to a duty for employee to mitigate his loss



Questions?



The logo for 'forbessolicitors.' features a stylized orange icon of two figures standing side-by-side, followed by the text 'forbessolicitors.' in a lowercase, sans-serif font.
