

Employment Law Seminar 2008

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Topics

- Employment Contracts
- Discrimination Update
- Directors
- TUPE
- Dispute Resolution
- 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
 - 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** now 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

- Protectacoat Firthglow Ltd v Szilaghyi (cont.)
 - Claimant was paid directly
 - No partnership accounts
 - Held the agreement was a sham and the Claimant was an employee



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 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



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.



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

- 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

- Schultz- Hoff v Deutsche Rentenversicherung Bund(cont.)
 - 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
 - Not legal authority – yet!



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

- Examples of clauses upheld
 - *Thomas v Farr PLC*
 - 12 month non-solicitation, non-disclosure of confidential information and a non compete clause upheld in insurance broking service



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

- Beckett Investment Management v Hall and others
 - 12 month non- dealing restriction was upheld
 - Did not matter that this was part of a “group structure” of companies and employees did not provide services to employer but to other group companies



Protection

- Confidential Information
- Pennwall Publishing v Ornstein
- Employee stored contacts on employer’s computer
- Further contacts added during employment
- Employee downloaded list upon departure



Protection

- Decided that if a database is created by an employee in the course of employment, contents remain the property of employer
- Implied term allowing employee to remove any information of his own



Protection

- **Crowson Fabrics v Rider**
- Employee copied employer's list of customers
- Held information not confidential so as to justify restrictive covenant
- Considered to be in public domain



Protection

- Employee held in breach of his duty of fidelity
- Note – no restrictive covenants in contract that would have provided further protection



New Minimums

- National Minimum Wage
 - Age 22 and over - £5.73
 - Age 18 to 21 - £4.77
 - Aged under 18 - £3.53
- Effective from 1st October 2008



New Minimums

- Working Time Regulations 1998
- Minimum Holiday Entitlement
 - 5.6 weeks from 1st April 2009
 - Applies pro rata to part timers
 - Transitional arrangements until then means can pay in lieu for additional entitlement over 20 days



Discrimination

Jonathan Holden
Employment Solicitor



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
- Not always as straightforward as it first appears...



Direct Discrimination

B v A

- Male sole practitioner dismissed PA with whom he had been intimately involved, after finding out she had embarked on an affair
- Clearly an unfair dismissal BUT was it also sex discrimination?



Direct Discrimination

- NO....
 - EAT found that reason for dismissal was jealous reaction which was not linked to gender
 - Comparator – homosexual male Employer and Employee – Employee would still have received exactly the same treatment, therefore not *less favourable* treatment on grounds of sex



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
 - St Helens Borough Council v Derbyshire and others
 - Equal Pay claims brought by employees, Council writes to all employees and to Claimants



Victimisation

- Letters warned that if claims succeeded, likely to mean that most of catering staff would lose their job
- House of Lords held this did amount to victimisation – letters had intimidating effect on those who hadn't settled Equal Pay Claims



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
- Due to be heard at Court of Appeal 30th & 31st October



Developments

- Particularly in Disability Discrimination
 - London Borough of Lewisham v Malcolm, HL
 - Coleman v Attridge Law, ECJ
- Also recruitment
 - Centrum v Firma Feryn, ECJ



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



Discrimination by Association

- Is it discrimination to treat someone less favourably because they care for their disabled child?
- Coleman v Attridge Law
 - Claimant herself not disabled but primary carer for her disabled son



Discrimination by Association

- Coleman v Attridge Law (cont.)
 - Alleged less favourable treatment by employers
 - Not allowed to return to existing job on return from maternity leave
 - Refused the flexibility granted to colleagues with non-disabled children
 - Described as 'lazy' when asked for time off



Discrimination by Association

- Coleman v Attridge Law (cont.)
 - Brought claim alleging disability discrimination
 - Referred by Employment Tribunal to European Court of Justice

Discrimination by Association

- Coleman v Attridge Law (cont.)
 - *‘where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination’*

Discrimination by Association

- Effects/impact of Coleman?
 - ‘Disability of *his child*’
 - Will it extend to carers, e.g. of elderly relatives?
 - Difficult to say at this stage

Recruitment

- Discriminatory recruitment policy can give rise to claims
- If applicant can show refused job because of particular characteristic, can bring a claim
- Particularly relevant with Age Discrimination – ‘experience’



Recruitment

- **Centrum v Firma Feryn**
 - Belgian Case
 - MD of company made public statement that didn't want to recruit 'immigrants'
 - No single Claimant alleging refused work on grounds of race
 - Does this give rise to a claim?



Recruitment

- Referred to ECJ
 - Decided it was direct discrimination
 - Clearly likely to dissuade certain candidates and hinder access to open labour market
 - Overturns UK position
 - Up to individual nations to decide compensation & enforcement



Age Discrimination

- Age Concern – Heyday Appeal
 - Age Concern brought claim alleging that statutory retirement age of 65 unlawful
 - Referred to ECJ to decide whether UK provision could be justified



Age Discrimination

- Attorney General's opinion
 - Not formal decision of ECJ but usually followed
 - Rule permitting employers to dismiss employees at 65 on grounds of retirement can be 'justified' in principle



Age Discrimination

- No formal decision as yet
- Will still be live issue for courts to determine, but seems likely that it statutory retirement will stand
- Watch this space!



In practice

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



Maternity Rights

- Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment Regulations) 2008
 - Applies to Employees whose EWC is 5th October 2008 onwards
 - Or with expected adoption placement date of 5th October 2008 onwards



Maternity Rights

- Main change in respect of Additional Maternity Leave (“AML”)
 - Additional 26 weeks following immediately after end of Ordinary Maternity Leave



Maternity Rights

- Extends Rights during Additional Maternity Leave
 - Employees now entitled to all benefits would have received if not absent throughout period of AML
 - Other than remuneration, so includes other contractual benefits



Maternity Rights

- Other contractual benefits
 - Private use of company car
 - Mobile telephone
 - Private medical insurance
 - Accrual of contractual annual leave



Maternity Rights

- Could also include non-contractual benefits
 - Discretionary Bonus/Benefits
- Seniority, pension rights etc of Employee returning from AML unaffected by her absence



Directors

Daniel Milnes
Partner and Head of Business Law



Companies Act 2006

- More provisions on directors
- Coming into force 1 October 2008
- Affecting all companies
- Directors are often employees too
- What are the new rules?
- What to do as an employer?



Directors: Eligibility

- Companies required to have at least one director who is a natural person
- Power to order appointments
 - Offence by company and officers not to comply
 - Level 5 fine (£5000) and daily default fine (£500)
- Grace period until 2010 for companies having only corporate directors at 8 November 2006



Directors: Eligibility

- Companies required to have no directors aged under 16
- Existing appointments end automatically on 1 October 2008
- Later appointments void
- Company must update own registers
- Registrar will alter at Companies House



Conflict of Interest

- Duty to avoid conflicts of interest (s175)
- Applies in particular to exploitation of property information or opportunity (whether or not the company could)
- No infringement if:
 - Cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - Authorised by the directors



Conflict of Interest

- Authorisation by directors (s175(5)-(6))
- In a private company there must be no prohibition in the Articles
- In a public company there must be express permission in the Articles
- Authorisation effective only if:
 - Quorum is present, not counting interested directors and
 - Interested directors do not vote or authorisation would have been approved if interested directors had not voted



Conflict of Interest

- Duty not to accept benefits from third parties (s176)
- “conferred by reason of: his being a director or his doing (or not doing) anything as a director”
- No infringement if:
 - Cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - Benefit is from a company providing the director’s service



Conflict of Interest

- Duty to declare interest in proposed transaction or arrangement (s177)
- Declare the nature and extent of interest if directly or indirectly interested and update or correct as required
- Declare before the company enters into the transaction or arrangement



Conflict of Interest

- No requirement to declare if:
 - not aware (means nothing of which “ought reasonably to be aware”)
 - cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - other directors already aware or ought to be or
 - relates to service contract and already addressed



Conflict of Interest

- Duty to declare interest in existing transaction or arrangement (s182)
- Declare the nature and extent of interest if directly or indirectly interested and update or correct as required
- Declare as soon as reasonably practicable
- No requirement to declare if:
 - already declared under s177 or
 - as for s177



Conflict of Interest

- Offence of not declaring interest in existing transaction or arrangement (s183)
 - Unlimited fine in Crown Court, Maximum Fine in Magistrates (£5000)
- Notice of declaration in writing (s184)
 - Hard copy – only electronic if agreed
 - Treated as in minutes of next meeting
- General Notice (s185)
 - Must give nature and extent of interest in other entity or connection to person
 - Must be given at or brought to attention of a board meeting



Impact on Employment

- Appointing replacement Directors
 - Contractual obligation to accept appointment?
 - Matching obligation to give it up?
- Policy on Directors' Conflicts of Interest
 - Board approval acceptable?
 - Amend constitution if not
- Record Decisions on Directors' conflicts
 - Legal requirement for Board Minutes (s248)
 - Failure = Offence by every officer in default (248(3))



Impact on Employment

- Third Party Benefits
 - Banned completely by contract?
 - Reporting requirement?
 - Pre-approval?
- Is it gross misconduct to:
 - Have a conflict of interest?
 - Take a third party benefit?
 - Fail to give notice?
 - Fail to update notice?



The Transfer of Undertakings (Protection of Employment) Regulations 2006

TUPE

Peter Byrne



TUPE

- Application
- Will apply to the transfer of an undertaking or business in the UK immediately before transfer
- Must be a transfer of an economic entity that retains its identity
- Can apply to part of a business
- Service provision change included



TUPE

- Service Provision change
- Relevant upon:-
 - Award to a contractor
 - Re-let to a new contractor
 - Brought back "in-house"



TUPE

- Service Provision change - 3 conditions
- Immediately before the change there must be an organised grouping of employees in UK whose principal purpose is to carry out the activities concerned on behalf of the client



TUPE

- Immediately before the change, the client must intend that the activities will, after the change, be carried out by the transferee other than in connection with a single specific event of short term duration



TUPE

- The activities must not consist wholly or mainly of the supply of goods for the client's use.
- e.g. if contractor supplied sandwiches for client to sell, TUPE does not apply. If contractor runs the canteen as well, may fall outside this exclusion



TUPE

- If TUPE applies:-
 - There is an automatic transfer of employees
 - There is an automatic transfer of rights and liabilities
 - Transfer related changes to terms and conditions may be void
 - Dismissals may be automatically unfair



TUPE

- Pension Rights
 - 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%



TUPE

- Pension Rights
 - 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%



TUPE

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



TUPE

- What other 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



TUPE

- Varying Terms and Conditions
- 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



TUPE

- 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



TUPE

- 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



TUPE

- Where transfer involves a substantial change in working conditions to the employee's material detriment, the employee can treat himself as dismissed i.e. constructive unfair dismissal.



TUPE

- Liability
- Transfers to the transferee upon transfer
- If employee resigns post transfer, liability rests with transferee for constructive unfair dismissal claim



TUPE

- Note a compromise agreement between the employee and his former employer will not protect the transferee from claims
- Need for indemnities very real between transferor and transferee



TUPE

- Information and consultation obligations pre transfer
- Must inform employees of “measures”
- Failure to do so can lead to claim for Protective Award



TUPE

- 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



TUPE

- Recent Decisions
 - *Compass Group v Burke*
 - School kitchen closed for refurbishment
 - During work, contractor provided cold meals
 - Before work, hot meals provided
 - When re-opened, new contractor provided hot food
 - Held was a stable economic entity and TUPE applied



TUPE

- Recent Decisions
- Hunt v Storm Communications and others
 - Service provision change
 - Client changed PR agency
 - Claimant worked 70% of time on this contract
 - Employee held to be an "organised grouping"
 - TUPE applied
 - Awaiting appeal but bad news for those providing professional services



Dispute Resolution

Ruth Coffey
Employment Solicitor



Where Are We Now?

- Employment Act 2002
- Employment Act 2002 (Dispute Resolution) Regulations 2004
- ACAS code of Practice



Statutory DDP

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



Modified Procedure

- Used only in limited circumstances
- **Step 1** – statement of grounds for action
- **Step 2** – appeal



Statutory GP

- Standard Procedure
 - 3 steps as per DDP
- Modified Procedure
 - 2 steps as per DDP



Pitfalls

- **Failure to follow DDP**
 - automatically unfair dismissal
 - uplift of 10-50% compensation plus 4 weeks minimum basic award



Pitfalls cont.

- **Failure to follow SGP**
 - claim presented to Tribunal (28 days)
 - uplift of 10-50% compensation



Problems

- **Satellite litigation**
 - Shergold v Fieldway Medical Centre (2005)
 - Canary Wharf Management v Edebi (2006)
 - City of Bradford v Pratt (2007)



The Need for Change?

- “Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain” March 2007
- “Success at Work: Resolving Disputes in the Workplace – A Consultation” March 2007



Where Are We Going?

- Employment Bill
- (Employment Act 2008)
- ACAS Draft Code of Practice



Proposed Changes

- Repeal of s.29-33 & Schedules 2 to 4 of the EA 2002
- Uplifts/reductions of 10-50% to go
- No statutory bar to Claimant for not submitting grievance



Proposed Changes cont.

- Implied term in contracts that employer and employee comply with SGP and DDP goes
- Adjustment of time limits – no more



Proposed Changes cont.

- No more automatic unfair dismissal for failure to follow procedure
- If employer would have dismissed anyway now question for remedy



What's New?

- New Code of Practice
 - inserts s.207A Trade Union Labour Relations (Consolidation Act) 1992
 - failure to comply can result in increase/reduction to awards of no more than 25%



What's New?

- **Determination of proceedings without a hearing**

Only where:

- a) Parties agree, or
- b) Each party has right to request a hearing



What's New?

- **Compensation for financial loss**

- additional compensation for financial loss
- "attributable to"
 - **unlawful deductions (s.24 ERA 1996)**
 - **redundancy payments (s.163 ERA 1996)**



Timescale

- **April 2009?**
- It is generally thought the new provisions will be introduced in April.
- However, the Bill is still progressing through Parliament.



Action

- There are no transitional arrangements as yet.
- DO follow the DDP and SGP for now.
- DO check the position by April



How can we help?

- Updates by newsletter & website
- Advice
- Bespoke in-house training for your staff



Unfair Dismissal

Recent decisions that may affect
your business

Peter Byrne



Unfair Dismissal

- Termination of contract by the Employer with Termination 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

- In dismissals for suspected misconduct, it is necessary for the employer to show
 - that he had a genuine belief,
 - based upon reasonable grounds,
 - after a reasonable investigation,
 - of the guilt of the employee



Unfair Dismissal

- Standard of proof required during the investigation
 - The balance of probabilities
 - Note – not beyond reasonable doubt



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 Whitegryll 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

- Sinclair v Wandsworth Council (cont.)
- 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

- Sandhu v Jan de Rijk Transport Ltd (cont.)
- 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

- 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
- Abbey National v Fairbrother, but see GMB Union v Brown
- Need to apply the “band of reasonable responses” approach



Unfair Dismissal

- Compensation Levels
- Statutory maximum week's pay = £330
- Limit on Compensatory Award = £63K
- Maximum basic award = £9900 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


