

Business law

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MGM412

Lecture 8



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The most important main themes of the lecture:

- 1- The contract of employment.
- 2- Statutory rights of the employee.
- 3- ACAS grievance procedure.
- 4- Unfair and wrongful dismissal.

1-The contract of employment:

1- Written statement of employment particulars:

-Section 1 of the Employment Rights Act 1996 (ERA 1996) requires an employer to provide all employees with a written statement of employment particulars. The statement, which has to be provided within two months of the employment beginning, must contain the following particulars:

- (i) The names of the employer and the employee.
- (ii) The date on which the employment began.
- (iii) The date on which the employee's period of continuous employment began, taking into account whether any previous employment is to count as continuous employment.

1- Written statement of employment particulars:

- (iv) The scale or rate of pay and the method of calculation.
- (v) The intervals at which payment is made (weekly, monthly, etc.).
- (vi) Any terms and conditions relating to hours of work.
- (vii) Any terms and conditions relating to holiday entitlement, sick pay or pensions.
- (viii) The length of notice which either party needs to give to end the employment.
- (ix) The job title of the employee, or a brief description of his duties.
- x) Where the employment is not intended to be permanent, the period for which it is expected to continue or, of it is for a fixed term, the date on which the term is to end.
- (xi) The place of work.

1- Written statement of employment particulars:

xii) Any trade union agreements which directly affect the terms and conditions of the employment.

(xiii) Where the employee is required to work outside the UK for a period of more than one month, the period for which he is to work outside the UK, the currency in which he is to be paid while working outside the UK and any additional salary or benefits to be paid on account of his being required to work outside the UK.

- The written particulars are very strong evidence of the terms of the contract of employment. However, they are not the contract itself as this will already have been formed by the time the statement is provided. An employee who has not been given the particulars within the specified time period may complain to an employment tribunal. The tribunal will make a minimum award of two weeks' pay and a maximum award of four weeks' pay and order that particulars are given. For these purposes, the week's pay is capped at the limit of £380 which applies when calculating a redundancy payment.

2-Itemised pay statements:

Section 8(1) ERA 1996 requires employers to provide a written itemised pay statement when wages or salary are paid. Section 8(2) provides that this statement must contain particulars of:

- (i) the gross amount of the wages or salary;
- (ii) the amount of any deductions from the gross amount and the purposes for which they are made;
- (iii) the net amount of wages or salary payable; and
- (iv) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

3-Implied obligations of the parties:

Certain terms are implied into contracts of employment. Some of these impose obligations on the employee and some impose obligations on the employer:

1-Obligations imposed on the employee:

The obligations imposed on the employee are as follows:

- (i) To show mutual respect to the employer.
- (ii) To faithfully serve the employer.
- (iii) To obey lawful and reasonable orders.
- (iv) To use reasonable care and skill.
- (v) Not to accept bribes.
- (vi) Not to reveal confidential information.

1-Obligations imposed on the employee:

-However, as regards the duty not to disclose confidential information, the Public Interest Disclosure Act 1998 protects ‘whistleblower’ employees who disclose certain information, such as that a crime is being committed or health and safety procedures ignored. Such whistleblower employees must not suffer a detriment because of what they have done, and any dismissal in consequence of what they have done will be automatically unfair.

Employees

do not have a duty to disclose their own shortcomings. However, some employees, particularly those who are responsible for others, may have a duty to disclose the shortcomings of others.

2-Implied obligations of the employer:

-The implied obligations of the employer are as follows:

- (i) To show mutual respect to the employee.
- (ii) To provide work, or pay the employee if there is no work.
- (iii) To pay wages.
- (iv) Not to reveal confidential information.
- (v) To indemnify employees for expenses and costs reasonably incurred.
- (vi) To insure the employee.
- (vii) To take reasonable care and skill in preparing a reference. (However, an employer has no duty to provide a reference.)

1-The contract of employment:

2-Implied obligations of the employer:

-It is possible that terms can be implied into a contract of employment by custom and practice, as long as the terms in question are well known, certain and reasonable. Works rule books are sometimes agreed by the parties to be included as terms of the contract of employment. In other cases, the rules in the workbook are imposed by the employer. If this is the case, then failure to obey the rules may be a breach of the duty to obey instructions.

4- Variation of the terms of the contract:

We saw that one party cannot unilaterally alter the terms of a contract but that both parties must agree to the alteration. If an employer unilaterally imposes a significant change in an employee's terms and conditions then this will amount to a repudiation of the contract and the employee can either accept the variation or not. An employee who does not accept the variation can regard the contract as terminated and himself as dismissed.

4- Variation of the terms of the contract:

-(In technical terms, the employee accepts that the employer's repudiation has ended the contract.). **However, the employee might accept the variation.** If so, the old contract will have been discharged and the new one substituted. If an employee refuses to accept the new terms but continues working under protest then, for a short time at least, the employee can still leave and claim to have been dismissed. An employee who continues to work without protesting will generally be taken to have accepted the unilateral change.

2- Statutory rights of the employee:

1-Maternity rights:

-Unless the contract terms give a more generous entitlement, all female employees have a statutory right to 52 weeks' ordinary maternity leave. This right, which is set out in the Maternity and Parental Leave Regulations 1999, applies no matter how long the employee has worked for the employer.

A female employee will qualify for statutory maternity pay if she meets three conditions:

- (i) She must have 26 weeks' continuous employment at a point 14 weeks before the expected week of childbirth.
- (ii) She must have stopped work due to the pregnancy.
- (iii) Her weekly earnings must not be so low that no national insurance contributions have to be paid.

2- Statutory rights of the employee:

2-Paternity leave and pay:

-Part II of the Paternity and Adoption Leave Regulations 2002 gives rights to paternity leave and paternity pay. In order to qualify for paternity leave, the employee must satisfy three conditions:

- (i) The employee must have responsibility for the new child's upbringing or expect to have this responsibility.
- (ii) He must either be the biological father of the child or he must be the husband or partner of the child's mother.
- (iii) He must have at least 26 weeks' continuous employment 15 weeks before the baby is due to be born.

2- Statutory rights of the employee:

3-Adoption leave and pay:

-When a couple adopt a child, Part III of the Paternity and Adoption Leave Regulations 2002 entitles one member of the couple to time off work with statutory adoption pay. In addition, the other member of the couple, or a partner of an individual who adopts, may be entitled to paternity leave and pay.

-In order to claim adoption leave, the employee must have worked continuously for the employer for 26 weeks and be newly matched with a child by an adoption agency. Such employees are entitled to 26 weeks' ordinary adoption leave, during which they are entitled to statutory adoption pay, and an additional 26 weeks' adoption leave. The leave can start either on the date of the child's placement or 14 days before the expected date of the placement.

2- Statutory rights of the employee:

4-Parental leave and time off for dependants:

-An employee with at least one year's continuous employment is entitled to take up to 13 weeks' parental leave, in respect of each child, to look after his or her child or to make arrangements for the child's welfare. In the case of disabled children, 18 weeks' leave per child can be taken. In the case of twins, both parents can have 13 weeks' leave for each child. The leave must be taken before the child's fifth birthday and can be taken in either long blocks or short blocks.

5- Flexible working for parents and carers:

Section 80F of the Employment Rights Act 1996 has introduced a right for parents with children under 16 years old to apply for flexible working. In the case of disabled children the age limit is 18. The right is also available if the employee needs to look after a spouse, civil partner, relative or person with whom the employee shares an address.

2- Statutory rights of the employee:

5- Flexible working for parents and carers:

-Employers have a statutory duty to consider these applications seriously but there is no automatic right to work flexibly. However, an employer should refuse an application only if there are good business reasons for doing so.

- Only employees with at least 26 weeks' continuous employment can apply. They must either be the child's mother, father, adopter, guardian or foster parent or be married to such a person. They must be making the application so that they can care for a child for whom they have, or expect to have, responsibility for bringing up. Only one application can be made every 12 months and agency workers cannot apply.

2- Statutory rights of the employee:

6-Transfer of employees:

-The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide that when a business is transferred from one employer to another as a going concern the contracts of employment of all the employees are also transferred. These contracts then take effect as if made between the individual employees and the new employer.

-If an employee refuses to accept the transfer, this ends the employment without a dismissal having taken place. (So the employee will have no remedy.) However, an employee can claim unfair dismissal if his refusal to be transferred was because the transfer would result in significant and detrimental change. Any dismissal made because of the transfer is automatically unfair unless it is made on account of the employee refusing to accept the transfer.

3-ACAS grievance procedure:

-When an employee raises a concern, problem or complaint with his employer, the ACAS Code of Practice should be followed. The Code advises that employers and employees should try to resolve disciplinary and grievance matters informally in the workplace, and should consider using independent third parties to help if necessary. However, where this is not possible the Code sets out procedures which aim to ensure fairness and a standard of reasonable behaviour. **First**, the employee should formally raise the grievance with the employer, via a manager who is not the subject of the grievance. This should be done in writing and without unnecessary delay.

3-ACAS grievance procedure:

-Second, the employer should hold a formal meeting with the employee, without unreasonable delay, to discuss the nature of the grievance. The employer and the employee should make every effort to attend the meeting. The employee should be given a chance to explain the grievance and how he thinks it should be resolved. The employer should consider adjourning the meeting to conduct any necessary investigation. The employer should allow the employee to be accompanied at the meeting by a companion, such as a fellow worker or a trade union representative.

Third, the employer should decide on appropriate action and communicate this to the employee in writing. The employee should also be told of the right to appeal against the decision.

3-ACAS grievance procedure:

-Finally, the employer should allow the employee to appeal against the decision if he does not think that the grievance has been satisfactorily resolved. Appeals must be submitted in writing and without unreasonable delay. An appeal should be heard without unreasonable delay, preferably by a manager who has not previously been involved. The employee has the right to be accompanied at the appeal. The outcome of the appeal should be communicated in writing without unreasonable delay.

4- Unfair and wrongful dismissal:

-A dismissed employee may be able to sue the employer for either unfair or wrongful dismissal. These are quite separate matters.

-Unfair dismissal is a statutory remedy which gives the dismissed employee a right to a fixed payment.

-An employee who sues for wrongful dismissal is simply suing for breach of contract. All contracts of employment give the employee an entitlement to a certain amount of notice after one month in the job. If an employee is wrongfully dismissed, without having been given this notice, the contract will have been breached and the employee will therefore be entitled to damages. In theory, an employer could sue an employee who left the employment without giving the required amount of notice but in practice this hardly ever happens.

4- Unfair and wrongful dismissal:

1-Unfair dismissal:

Who can claim?

Section 94(1) of the Employment Rights Act 1996 gives an employee who has at least one year's continuous employment the right not to be unfairly dismissed. Section 212(1) ERA 1996 defines the weeks which count towards continuous employment.

What is a dismissal?

There can be a claim for unfair dismissal only if the employee is dismissed. Section 95 ERA 1996 provides that an employee is dismissed if:

- (i) the employer terminates the contract, with or without notice;
- (ii) a fixed term contract ends and is not renewed; or

4- Unfair and wrongful dismissal:

iii) the employee terminates the contract on the grounds of the employer's unreasonable conduct (this is known as constructive dismissal).

When is a dismissal unfair?

‘Unfair’ has a technical meaning here. Section 98 ERA 1996 provides that all dismissals are unfair unless the employer can justify the dismissal on one of following six grounds:

(i) The employee's capability or qualifications to do the job. (Dismissal for lack of qualifications is very unusual. Dismissal for lack of capability often arises because the employee is ill.)

(ii) The employee's conduct, inside or outside the employment. (If the conduct is outside the employment then it must be serious enough to have a detrimental effect on the employer's business).

4- Unfair and wrongful dismissal:

(iii) That the employee was made redundant. (iv) That it would be illegal to keep the employee on in the job.

(v) Retirement in accordance with the Equality Act 2010 .

(vi) Some other substantial reason which would justify the employee's dismissal.

The last category is necessary to prevent the list of reasons from becoming too rigid. Usually the reason is a commercial one.

***Automatically unfair dismissals:**

A dismissal is automatically unfair if it was:

- (i) on the grounds of the employee trying to enforce a relevant statutory right;
- (ii) on the grounds of pregnancy;

4- Unfair and wrongful dismissal:

- (iii) for being a member of a trade union;
- (iv) for being on strike, if the dismissal occurred in the first eight weeks of the strike;
- v) for being a union representative;
- (vi) for carrying out health and safety duties;
- (vii) for refusing to work on Sundays (some workers do not have this protection);
- (viii) in connection with a transfer of undertakings from one employer to another.

4- Unfair and wrongful dismissal:

2-Wrongful dismissal:

An employee is summarily dismissed when he is dismissed without notice. The employee's behaviour might justify such a dismissal, in which case he will have no remedy. If an employee is summarily dismissed without a justifiable reason, however, then his contract of employment, which will entitle him to a period of notice, will have been broken. The employee can then sue the employer for breach of contract, and such an action is known as an action for wrongful dismissal. Of course, it is possible that the employer may lawfully dismiss the employee without notice. This would be the case if the employee had behaved so badly that he had committed a repudiation of the contract. The employer could accept the repudiation and dismiss the employee without committing a breach of contract.

4- Unfair and wrongful dismissal:

2-Wrongful dismissal:

-It is difficult to generalise from the cases, but employees have been held to repudiate the contract by refusing to obey lawful orders, gross misconduct, neglect or serious breach of duty. However, it must be stressed that each of these matters will not necessarily amount to a repudiation which justifies dismissal. In each case the employment tribunal must consider the facts and come to a decision.

-In general, an employer can escape liability for wrongful dismissal, but not for unfair dismissal, by giving the employee wages in lieu of notice.



Thank You