

## Employment Law

### Part 1 Revision Notes

Employee status

Tribunal jurisdiction- only up to £25,000. Beyond that, must use civil courts.

| Rights available to employees only:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Rights available to all workers:                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <ul style="list-style-type: none"><li>• Written pay statement</li><li>• Written statement of contract</li><li>• Statutory minimum notice</li><li>• Protection from unfair dismissal</li><li>• Statutory maternity pay and leave</li><li>• Statutory paternity pay and leave</li><li>• Statutory adoption pay and leave</li><li>• Parental and dependency leave</li><li>• Right to request flexible working</li><li>• Protection on business transfer</li><li>• Redundancy pay</li><li>• Guarantee pay on lay offs</li><li>• Medical suspension pay</li></ul> | <ul style="list-style-type: none"><li>• National minimum wage</li><li>• Protection against unlawful deductions</li><li>• Equal pay</li><li>• Working hours and breaks</li><li>• Holidays</li><li>• Union recognition where majority in favour</li><li>• Not to be refused work on grounds of union membership</li><li>• Time off for union duties and training</li><li>• Time off for recognised union activities</li><li>• Protection against discrimination.</li></ul> |

Worker-defined by s 230 (3) ERA 1996-

An individual who has entered into or works under

- (a) a contract of employment; or
- (b) any other contract, whether express or implied, and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

#### **Test for determining status: employee or independent contractor**

Definition of **employee**: 'an individual who has entered into or works under ... (or, where the employment has ceased, worked under) a contract of employment.' (s 230 (1) ERA 1996)

Definition of **contract of employment**: "' a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

Contract **OF** service= Employee

Contract **FOR** service= independent contractor/ self-employed

Three tests:

1. **Control test**- can the employer control not only *what* is done but *how* it is done? (Unsuitable for skilled workers)
2. **Integration test**- is the person's job an integral part of the business, or more of an accessory? 'part and parcel test'- is the worker involved in administrative duties/ managerial decisions?
3. **Multiple test**- a mix of the two tests alongside the following factors (as per *Ready Mixed Concrete* case):
  - Mutuality of obligations- agrees to do work in consideration of remuneration
  - Sufficient degree of control- how to do work, what to do, when to come in
  - Must not be a 'sham contract'- not enough to see how the contract describes them: do they pay their own tax, insurance, uniforms, materials?
  - Can send substitutes? If from a specific approved list- employee ( *Macfarlane v Glasgow City Council*); If can freely delegate-unlikely ( *Premier Groundworks v Jozsa* )

### Murray v Foyle Meats Ltd:

Essentially said that it boils down to a business decision. The employer simply needs to show that there is a need for fewer employees.

#### Step 5: Procedure for achieving a fair redundancy

If the dismissal satisfied the redundancy definition it must still pass the reasonableness test in S.98(4) ERA 1996.

**Williams v Compare Maxam Ltd** laid down steps an employer should follow:

- give warning of redundancies to the union or employee representatives
- consult with the individual employees likely to be affected
- consult with union/employee representative to try to agree selection criteria
- establish objective selection criteria
- ensure that selection is in accordance with criteria established
- individual consultation
- look for alternative employment for those employees affected by redundancy.

#### Step 5 Continued: The ACAS Code does not apply but should still be followed:

In an individual redundancy scenario, for example, the process should include providing written notification to the employee, in advance of a meeting, informing them they are at risk of redundancy, having ideally at least 2 individual consultation meetings and considering suitable alternative employment.

One way of doing this formally is through **Consultation**:

- i) The reasons for his proposals.
- ii) The numbers and descriptions of employees whom it is proposed to dismiss as redundant.
- iii) The total number of employees of any such description employed by the employer at the establishment in question.
- iv) The proposed method of selecting the employees who may be dismissed.
- v) The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
- vi) The proposed method of calculating the amount of any redundancy payments to be made.

#### Step 6: Fair Selection Criteria

In defining the pool the tribunal will have regard to:

1. whether groups of employees were doing similar work
2. whether the employees' jobs were interchangeable
3. whether having established the pool, it was agreed with the union (if appropriate)

The selection criteria should be objective as far as possible and may include, e.g. absence, time keeping, dexterity, aptitude, flexibility. Even if the selection criteria is fair in itself the employer must ensure that it is applied in a reasonable manner.

### 3. Identify the type of discrimination:

#### a. **Direct Discrimination:**

**S 13-** (1) A person (A) discriminates against another (B) if, **because of a protected characteristic, A treats B less favourably** than A treats or would treat others

You need to apply a hypothetical comparator as per **s 23-** (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case. (meaning other than the protected characteristic, there are no other significant differences.

An example: Jack and Rebecca have the same qualifications. They both get invited to a job interview. Jack gets asked job-related questions, while Rebecca is asked about her personal life, her plans of starting a family. Jack gets the job.

Something to note is that there does not need to be a real comparator, just how would they treat another.

There is **NO DEFENCE** available when it comes to direct discrimination however of course this won't apply for occupational requirements (Schedule 9 para 1) e.g. it won't be discrimination to only consider boys for the role of Harry Potter

#### b. **Indirect discrimination:**

**S19-** (1) A person (A) discriminates against another (B) if A **applies to B a provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a **proportionate means of achieving a legitimate aim**.

Essentially- this is a provision, criterion or practice that technically applies to everyone equally, but disadvantages those with a protected characteristic e.g. compulsory staff meetings during school runs disadvantaging parents. But this you can defend if it is a **proportionate means of achieving a legitimate aim**- e.g. only time when most staff are available. In the exam, you can argue why or why not this is proportionate.

#### c. **Victimisation-**

**S 27-** (1) A person (A) **victimises** another person (B) if A subjects B to a detriment because—

- (a) B does a **protected act**, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) **Each of the following is a protected act—**
- (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule

Example: you used the Act to complain about your employer, now they refuse to promote you for that reason

#### d. **Harassment:**