**Week 4 and 5 and 6 Employment Law Slides**

1. **Define Employment and Explain the common rules in relation to employment law.**
2. **Define Constructive Dismissal**
3. **Discuss Various ethical perspectives at play with respect to whistleblowing.**

**The tests established by case law to shed light on whether an individual is or is not an employee have also been vague and difficult to apply. But the following criteria is a guide:**

i) **The control test**

ii) **The organisation or integration test**

iii) **The economic reality test**

iv) **The multiple test**

v) **The wishes of the parties**

vi) **Atypical workers and mutuality of obligations**

**The control test:**

***Yewens* v*. Noakes* (1880) 6 QBD 530**

**Facts**

**There was a statutory exemption for premises which were occupied by a “servant” or person occupying the premises “for the protection thereof.” A man and his family occupied a number of rooms within an office building on the alleged basis that he was the caretaker of the building owner. The man was a clerk who was paid a salary of £150 pounds pa.**

**Issue**

**The question arose as to whether the man constituted an employee of the building owner for the purposes of exempting the premises from statutory tax duties.**

**Held**

**The Court of Appeal held that an employee, or a servant to adopt the Court’s definition, is defined as a “person who is subject to the command of his master as to the manner in which he shall do his work.” (pp 3-4). On the facts of the case, the Court held that the man was not a “servant” or an employee of the building owner as the owner had no right to control the man’s work and manner in which it was done. The man earned a salary of £150 per annum in his separate role as a clerk and merely enjoyed residence of the building with his family members. Thus, he did not constitute an employee of the building owner for tax purposes.**

***Troutbeck v White and Todd* [2013] EWCA Civ 1171.**

**Facts:**

**The Claimants were engaged by the Respondent as caretaker/ manager of a house and small farm estate, responsible for undertaking duties which included what might be described as estate management together with maintenance of the house and grounds, including housekeeping. The written agreement was avowedly an agreement to employ them.**

**Issue:**

**The ET held that they were workers, not employees, because the Respondent did not have sufficient control, having divested itself of day to day control.**

**Held:**

**The ET erred in law. The true question for the ET was whether the Respondent retained a sufficient right of control, not whether it exercised day to day control. *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497* discussed and applied. The Respondent retained a sufficient right of control and so the Claimants were employees.**

**The multiple test:**

**In essence the test attempts to answer the question of whether a person is 'performing services as a person in business or on his own account'. In this regard see the following:**

***Market Investigations* v*. Minister of Social Security* (1969) 2 QB 173**

**Ready Mixed Concrete (South East) v. Ministry of Pensions & National Insurance (1968) 2 QB 497**

***Express and Echo Publications* v. *Tanton* [1999] IRLR 367**

***MacFarlane* v. *Glasgow City Council* [2001] IRLR 7**

***Byrne Brothers* v. *Baird* [2002] IRLR 96**

***Staffordshire Central Newspapers* v. *Potter* [2004] UKEAT/0022/04**

***Stringfellows v Quashie* [2012] EWCA Civ 1735**

**The multiple test:**

***Ready Mixed Concrete (South East)* v. *Ministry of Pensions & National Insurance* (1968) 2 QB 497**

**Facts**

**A driver contracted with a mixed concrete company for the delivery of concrete.  The contract declared him an “independent contractor” and set out wages and expenses. The driver was to purchase his own vehicle, yet with a requirement that the vehicle be painted in company colours. He was to drive the vehicle himself but under compliance with certain company’s rules including, for example, the manner of vehicle repairs and payments.**

**Issue**

**The question arose as to whether the driver was an “employed person” under a contract of service with the company for the purposes of the National Insurance Act 1965.**

**Held**

**Firstly, the Court held that whether a contract creates a ‘master and servant’ relationship between an employer and employee is determined on the basis of contractual rights and duties, and that the nomenclature used in the contract is irrelevant – so mindful that some terms are put in so as to evade legal liability of been an employer.**

**Thus, the fact that the contract termed the driver to be an “independent contractor” is not material. Secondly, the Court held that employment under a contract of service exists when: (1) a person agrees to a perform a service for a company in exchange for remuneration; and (2) a person agrees, expressly or impliedly, to subject himself to the control of the company to a sufficient degree to render the company his “master,” including control over the task’s performance, means, time; and (3) the contractual provisions are consistent with ordinary contracts of service.**

**The intention/wishes of the parties:**

**The declared intention of the parties may be important if, for example, a deliberate change in the basis of employment has occurredowever**

**. On this point see**

***Ferguson* v. *John Dawson Ltd* [1976] 1 WLR 1213**

***Massey* v. *Crown Life Insurance Co* [1978] 1 WLR 676**

**Atypical workers and mutuality of obligations**

**The question here with respect to atypical workers is frequently whether there is sufficient mutuality of obligations for there to be an overall employment relationship. On this see:**

***O’Kelly* v. *Trusthouse Forte* [1983] IRLR 369**

***Nethermere (St Neots)* v. *Gardener* [1984] IRLR 240**

***Carmichael and others* v. *National Power* [2000] IRLR 43**

***Clark* v. *Oxfordshire Health Authority* [1998] IRLR 125**

***Stevedoring and Haulage Services* v. *Fuller* [2001] IRLR 627**

***Bridges* v. *Industrial Rubber plc* [2004] All ER (D) 261 (Nov), EAT**

***Autoclenz v. Belchert and others* (2011) UKSC 41**

**Atypical workers and mutuality of obligations**

***Stevedoring and Haulage Services* v. *Fuller* [2001] IRLR 627**

**Facts: The claimants were stevedores whose contracts were intermittent. The employer denied that they were employees.**

**Held: There was no contract while the claimants were not at work. There was no overarching or global contract, and it was not possible to transform a relationship which was not contractual into a contract of service by implying terms into the relationship. It was not possible to imply a contract of employment where the parties had entered into an agreement, the express terms of which were wholly inconsistent with there being such an implied contract.**

**Students are encouraged to look at the Supreme Court judgement in the Uber drivers case re employment contracts and atypical workers/self employed**

**Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748**

[**https://www.bbc.co.uk/news/business-56123668**](https://www.bbc.co.uk/news/business-56123668)

[**https://www.supremecourt.uk/press-summary/uksc-2019-0029.html**](https://www.supremecourt.uk/press-summary/uksc-2019-0029.html)

**WHAT ARE THE COMMON LAW SOURCES OF THE CONTRACT OF EMPLOYMENT?**

**i) The initial contact between the employer and prospective employee**

**ii) Express terms. Express terms are found within the written contract, or in the written statement giving particulars of the main terms of employment as required by section 1, Employment Rights Act 1996**

**iii) Collective agreements. Collective agreements between employer and trade union on terms and conditions of employment may be incorporated into the contract.**

**iv) Common law implied terms. The courts have implied into the contract rights and obligations for both employer and employee**

**v) Custom and practice**

**vi) Work rules**

**vii) Statutory minimum rights. Statute has intervened in the employment contract to allow certain employees a ‘floor’ or minimum of employment rights**

**The initial contact between the employer and prospective employee**

On this point see the case of ***Sarker* v *South Tees Acute Hospital NHS Trust* [1997] IRLR 328**

**EXPRESS TERMS**

**However, under s.1 Employment Rights Act 1996 (ERA) if there is no written contract the employer must provide a written statement of the main terms of the employment as upheld in *Kampelmann* v*. Landschaftsverband Westfalen-Lippe* [1998] IRLR 333.**

**S 1 Written Statement under the Employment Rights Act 1996**

**For a discussion of the tribunal’s powers relating to the s.1 written statement, see Court of Appeal decision in *Eagland* v. *British Telecom* [1992] IRLR 323.**

**The s.1 statement is “very strong prima facie evidence of what were the terms of the contract between the parties”, but it is not in itself a contract, despite the decision in: *Gascol Conversions* v. *Mercer* [1974] IRLR 155 where Lord Denning found that s 1 statement which described itself as a “new contract of employment” and was signed by the employee had the effect of a contract. See also**

**F. W. Farnsworth Ltd v Lacy [2013] IRLR 198**

**The Employer’s Implied Obligations Include:**

1. **To pay wages**
2. **To provide work**
3. **To exercise care**
4. **To maintain a relationship of “trust, confidence and mutual respect” between the employer and the employee**
5. **contractual right to damages**

**The Employer’s Implied Obligations Explained:**

**1. To pay wages:**

The employer’s obligation to pay wages is a fundamental condition of the employment contract as held in ***Cantor, Fitzgerald International* v. *Callaghan* [1999] ICR 639**

**2. To provide work**

**There seems to be no general obligation for the employer to provide work (for so long as wages are paid) except in certain special cases, e.g.:**

**- where the employee is on piecework**

**- where skilled employees need to maintain their skills by working on a regular basis**

***William Hill Organisation Ltd* v. *Tucker* [1999] ICR 291**

***SG&R Valuation Service v. Boudrais* [2008] EWHC 1340(QB), 12 May 2008**

***Christie v Johnston Carmichael* [2010] IRLR 1016 EAT**

**3. To exercise care**

**Implied into the employment contract is a term that the employer will take reasonable care of the employee, although breach of the common law duties to provide a safe system of work and proper equipment and breach of statutory duty under the Factories Act do not automatically lead to a fundamental breach of the employment contract. In relation to this see:**

***Hone v Six Continents Retail Ltd* [2006] IRLR 49 (CA)**

**The Employer’s Implied Obligations Include (Continued):**

**4. To maintain a relationship of “trust, confidence and mutual respect”**

**This is the reciprocal of the employee’s obligation to co-operate with the employer, and now developed into a duty of “mutual respect”. On this see *Milne v Link Asset & Security Co Ltd [2005] All ER (D) 143*.**

**5. Contractual right to damages:**

***Neary* v. *Dean of Westminster* [1999] IRLR 288**

***Eastwood* v. *Magnox Electric plc* [2002] IRLR 447**

***Johnson* v. *Unisys Ltd* [2001] IRLR 279 (HL)**

**The Employer’s Implied Obligations Include (Continued):**

**5. Contractual right to damages**

***Johnson* v. *Unisys Ltd* [2001] IRLR 279 (HL)**

**Facts:**

**Johnson had worked for Unisys for over 20 years. He suffered from work related stress and Unisys was aware of this. In 1994 Johnson was summarily dismissed for gross misconduct and paid a month’s salary in lieu of notice. His internal appeal was unsuccessful but the tribunal upheld Johnson’s unfair dismissal claim because he had been given no real opportunity to respond to the allegations against him and Unisys had not followed its own disciplinary procedure. The tribunal awarded Johnson the statutory maximum compensatory award, then £11,000. Following his dismissal Johnson suffered a major psychiatric illness. He was ill for around two years and unable to work.**

**Held:**

**Johnson’s claim was struck out and he appealed unsuccessfully to the Court of Appeal and House of Lords. The courts referred to *Addis v Gramophone Company Limited* [1909] which held that damages for wrongful dismissal cannot include compensation for injury to feelings arising out of the manner of dismissal. The unfair dismissal legislation provided a statutory remedy for Johnson’s claims, albeit limited to a maximum amount of compensation. Further, the courts should not extend the application of the implied term of trust and confidence to the termination of employment because this would override the express contractual right to dismiss with notice.**

**The Employee’s Implied Obligations**

**i) To obey reasonable instructions/orders**

**An employee’s refusal to obey a legitimate instruction/order may constitute a repudiatory breach of contract. This would permit the employer to dismiss the employee summarily (without notice), although the necessary disciplinary procedures would have to be followed first. But employers must not be unreasonable in the way they exercise their contractual authority, and they themselves are subject to the obligation to maintain a relationship of trust, confidence and mutual respect.**

**An important issue is how far the employer may retain managerial prerogative in the introduction of new systems of work and new techniques and in Human Resource matters, and still remain within the terms of the contract. In the case of new systems of work and new techniques this was the object of litigation in:**

***Robinson v. Tescom Corporation* [2008] IRLR 408**

**ii) To exercise reasonable skill and care**

**See *Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust* [2006] IRLR 100 in re to this issue.**

**The Employee’s Implied Obligations (Continued)**

**iii) To act in good faith**

**a. This implied term imposes upon the employee a duty:**

**not to disclose confidential information - *Re a Company’s Application* [1989] ICR 449**

1. **not to compete with the employer’s business.**

**This is a second element in the employee’s implied duty of fidelity/confidentiality, and requires the employee not to solicit or respond to the approaches of customers during working hours, or outside working hours if serious harm could be done to the employer’s business.**

**c) not to impede the employer’s business**

**The courts have implied into the contract of employment a term that the employee should co-operate with the employer - see** *Secretary of State for Employment* v*. ASLEF* (No 2) [1972] ICR 19.

**iv) Customs and Pratices**

**Many elements of the employment relationship are governed by long-standing practice as much as by other contractual sources.** **See *Sagar* v. *Ridehalgh* [1931] Ch 310**

**The Employee’s Implied Obligations (Continued)**

**v). Work Rules**

**Work rules are instructions on such matters as discipline provisions, sickness, safety procedures and holidays. They may be incorporated into the contract of employment expressly or impliedly.**

**According to Lord Denning “these rules are in no way terms of the contract of employment. They are only instructions to a man as to how he is to do his work.”**

**TERMINATION OF CONTRACT AT COMMON LAW**

**Contract of employment can be terminated by:**

**1 Termination by mutual consent – see *Birch* v. *University of Liverpool* [1985] IRLR 165**

**2 Frustration - see *Williams* v. *Watson* [1990] IRLR 164**

**3 Statutory Notice - Termination of Employment - Part IX Employment Rights Act 1996. Termination is based on length of service:**

**i) one week for up to two years**

**ii) one week for each year between two and twelve years, or**

**iii) 12 weeks for over 12 years.**

**See *Delaney* v. *Staples* [1992] IRLR 191**

**4 Termination by Breach - a contract can be ended by the repudiatory breach of one party. See *Geys v Société Générale* [2012] UKSC 63**

**5 Constructive Dismissal – see *Western Excavating* v. *Sharp* [1978] IRLR 27 and *LB Waltham Forest* v*. Omilaju* [2004] EWCA (Civ) 1493**

**Constructive Dismissal**

***Western Excavating* v. *Sharp* [1978] IRLR 27**

**Facts:**

**Mr Sharp was very short of money. His financial plight was brought to a crisis when he was suspended without pay on disciplinary grounds. He asked his employer either for an advance on his holiday pay, or alternatively for a loan to tide him over. The employer refused.**

**In order to get his accrued holiday pay Mr Sharp resigned. He then claimed constructive dismissal on the ground of his employer’s unreasonable conduct in refusing him financial help.**

**Held:**

**The Court of Appeal held that both the EAT and the employment tribunal had been wrong to find Mr Sharp constructively dismissed. The test for constructive dismissal was not “had the employer behaved unreasonably?” but “had the employer been in serious breach of contract against the employee?”.**

**The words in s.96 of the ERA 1996, “entitled to terminate it without notice”, were the language of the law of contract, showing that the Act envisaged a breach of contract test. There was no term in Mr Sharp’s contract giving him the right to an advance on his holiday pay or to obtain a loan. Consequently the employer’s refusal was not a breach of contract. Accordingly there was no constructive dismissal.**

**In its judgment, the Court of Appeal set out four points which are now regarded as the classic formulation of the constructive dismissal test.**

1. **There must be a breach of contract by the employer; this can be an actual or an anticipatory breach.**
2. **The breach must be sufficiently serious, namely a repudiatory or a fundamental breach, or the last of a series of breaches, which taken together form sufficiently serious conduct by the employer (known as the “last straw” concept — see *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, CA).**
3. **The employee must leave as a result of the breach.**
4. **There must be no waiver of the breach, for example through the employee’s delay in leaving.**

**TERMINATION OF CONTRACT AT COMMON LAW (Continued)**

**6 Summary Dismissal – see *Wilson* v. *Racher* [1974] IRLR 114**

**7 Wrongful Dismissal**

**Whistleblowing**

**Only certain kinds of disclosure qualify for protection under the Public Interest Disclosure Act (PIDA) 1998. These are known as "qualifying disclosures" and must relate to one of the following "relevant failures" on the part of the company/organisation:**

* **A criminal offence.**
* **A breach of a legal obligation.**
* **A miscarriage of justice.**
* **A danger to any individual's health or safety.**
* **Damage to the environment.**
* **Deliberate covering up of information relating to any of the above.**

**Disclosures are only protected if they are made to an appropriate party. The *Public Interest Disclosure Act* 1998 protects whistleblowers who make disclosures in good faith to:**

* **Their employer, either directly or through an internal company procedure.**
* **Another person whom they reasonably believe to be solely or mainly responsible for the relevant failure.**

**The Employment Tribunal assesses whether it was reasonable to make a disclosure by considering:**

* **The identity of the party to whom the disclosure was made.**
* **The seriousness of the relevant failure.**
* **Whether the relevant failure is continuing or is likely to occur again.**
* **Whether the disclosure breaches a duty of confidentiality that the employer owes to any other party.**
* **If the disclosure was first made to the employer or to any other appropriate person, what action the employer took or might reasonably have taken.**
* **If the disclosure was first made to the employer, whether the individual complied with the employer's internal procedures for disclosure.**