

SECTION 8 EMPLOYMENT AT SEA

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8.1 The Changing Work and Social Environment of Seafaring

Seafaring has always been a risky profession, filled with hardships, where skill and teamwork were required in order to survive. These shared experiences created a great bond between the crew, each crewmember had his own skill and these were all needed in order to prosecute the voyage successfully. A good ship and a good master greatly increased ones chances of returning to ones family with the fruits of ones labours. Gradually technology has eroded the need for these skills, why would one require a lamp trimmer on board, when the lights can be operated by the flick of a switch. Economies of scale have also been introduced, larger ships can be crewed by the same amount of crew and yet carry many times the amount of cargo. Containerisation has revolutionised the ship to port interface so that cargoes can flow from one to the other many times quicker than in the past. These technological changes both in the ports and the ships have required vast capital investment and the ever-increasing search for reductions in running costs. One of the areas where the owner has been able to exploit modern technology is in the reduction in crew numbers. Owners often using recruiting agents, seek crews at the minimum level of cost as long as they have the internationally acceptable, levels of competence.

There have been codes in place such as the Rules of Oléron or the maritime code of Barcelona required simple things like the feeding of the crews, that they should be paid wages, given shore leave and they have a right to be returned home. The present day doctrine of maintenance and cure for the seafarer should he be injured or sick comes from these codes. Courts have recognised the justice of these arrangements but owners have always had to be encouraged to implement them. Back in 1775 armed merchant seaman had to hold the city of Liverpool hostage for three days to get their pay. Not long after was the Spithead mutiny in 1797 and half a century after that, in 1856 'The Annual Report of the American Seaman's Friends Society' the shipowners are still the chief obstacle to improvements in conditions onboard the vessel. Most seafarers enjoy accommodation and food much better than they did a hundred years ago and their owners are to be congratulated. However there are still ships where this is not the case and to this day there is still little known about what constitutes

seafarers rights.²⁸ There is a body of international law, The ILO and IMO conventions that are supposed to protect seafarers from this sort of abuse. Can a seafarer really expect the same sort of protection from exploitation and abuse as a domestic worker? The right of a seafarer to claim the protection of the law depends upon a most important concept, that of Jurisdiction. The globalisation of the shipping industry and the use of flags of convenience has allowed the shipowner to avoid the costs of employing a domestic worker. Even the Employment Rights Act 1996 Ch. 18 section 199 is about Mariners and unfair dismissal does not apply to people who work wholly outside the United Kingdom.²⁹ When the vessel is on the high seas the maritime labour law of the country where the ship is registered has jurisdiction over the case.³⁰ This was the customary law when the country of the shipowner the seafarer and the flag were all the same. Nowadays certain port state countries on condition the registering country has no means to maintain standards onboard, may take up the case.

8.2 Maritime Labour Convention 2006

This new international labour convention was adopted by the International Labour Organization (ILO) at Geneva on the 23rd February 2006.

It follows concerns expressed by both seafarers and shipowners on the lack of take up and enforcement of the many (ILO) articles over the years. If flag states did not take up or enforce the articles then owners could ignore them. Seafarers spend most of their lives at sea outside their home country, their employers are often in another country and the flag of the ship in another making them vulnerable should the employer decide to renegade on the responsibilities to them. Many employers are not like that and ensure that their ship comply with the international standards that are in force but find these employers can find themselves at a disadvantage when competing with owners willing to operate substandard ships.

The purpose of this legislation is to consolidate 65 to 68 existing items of legislation, but also it has been designed to resolve the problems that arose above. The code is set out in two sections Part A and Part B. Part A is binding in law and part B is guidance. It sets out the minimum requirements for seafarers working onboard ships of greater than 500 gross tons. It lays down what must be provided in terms of conditions of employment; hours of work; accommodation; food; medical; welfare and social security protection. One of its key aspects is enforcement and the provision of a Maritime Labour Certificate and a Declaration of Labour Compliance. There is the intention if it is ratified that it will become the 'fourth pillar' of the international regulatory regime alongside International Convention for Safety of life at Sea(1974); International

²⁸ Couper, A. D. (1999). *Voyages of Abuse* (Seafarers, Human Rights and Int Shipping). Pluto Press.

²⁹ Wood v Cunard.

³⁰ Brown, E. D. (1994). *The International Law of the Sea*. Dartmouth Publishing.

Convention on Standards; Training; Certification and Watchkeeping (78/95) and the International Convention for the Prevention of Pollution from Ships (73/78). It widens the definition of seafarers to mean any person working onboard a ship in any capacity. The structure of the convention is in three different but related parts:

- Articles I General Obligations Every (state must give complete effect).
- Article II Scope and Definitions (Seafarers are anyone employed onboard).
- Article III Fundamental Rights and Principles.
- Article IV Seafarers Employment and Social Rights.
- Article V Implementation and Enforcement Responsibilities (inspect other ships in the states own ports).
- Article VI to X are Regulations and Parts A and B of the Code; Consultation with Shipowners' and Seafarers' Organizations; Entry into Force; Denunciation; Effect of Entry into Force.
- Article XI to XVI Internal workings of the convention.

Regulations and Code provisions organised under 5 Titles:

- Title 1: Minimum requirements for seafarers to work on a ship.
- Title 2: Conditions of employment.
- Title 3: Accommodation, recreational facilities, food and catering.
- Title 4: Health protection, medical care, welfare and social protection.
- Title 5: Compliance and enforcement.
- Each Title has several regulations in each section.
- Each Regulation has the regulation; then the standard and then the guideline.

Regulations:—

1.1 Minimum age; 1.2 Medical certificate; 1.3 Training and qualifications; 1.4 Recruitment and placement.

2.1 Seafarers employment agreements; 2.2 Wages; 2.3 Hours of work and hours of rest; 2.4 Entitlement to leave; 2.5 Repatriation; 2.6 Seafarers compensation for the ships loss or foundering; 2.7 Manning levels; 2.8 Career and skill development and opportunities for seafarers employment.

3.1 Accommodation and recreational facilities; 3.2 Food and catering.

4.1 Medical care on board ship and ashore; 4.2 Shipowner's liability; 4.3 Health and safety protection and accident prevention; 4.4 Access to shore-based welfare facilities; 4.5 Social security.

5.1 General principals; 5.2 Authorization of recognised organizations; 5.3 Maritime labour certificate and declaration of maritime labour compliance; 5.4 Inspection and enforcement; 5.5 Onboard complaint procedures; 5.6 Marine casualties; 5.7 Port state responsibilities; 5.8 Inspections in port.

8.3 Seafarers' Identity Documents Convention 2003 (No. 185), the international Convention that created the first global biometric identification system for issuing secure identity documents to the 1.2 million seafarers on the world seas came into force as of 9 February 2005. The impetus behind the convention is to assist maritime security and puts in place a comprehensive security system that enables the implementation of biometric identification technology on a mandatory basis, and therefore enabling the positive identification of the seafarer that holds the document. The negotiations that concluded with the adoption of Convention No. 185 were held in response to the need for greater global security, while guaranteeing the rights of workers in the shipping fleet, which handles nearly 90 per cent of world trade.

The enhanced security in the document is achieved by converting two fingerprints into a 'biometric template' to be stored in an internationally standardized 2-D barcode which would be printed on the Seafarers' Identity Document (SID). The basic parameter of the identification system is 'global interoperability', meaning that the fingerprint information issued in one country can be read correctly by equipment used in another.

All countries ratifying Convention No. 185 will be required to issue new SIDs that conform to the requirements specified in the standard known as ILO SID-0002.

According to information received by the ILO, more than 50 countries have submitted the Convention for consideration by their national parliaments. Many, including India, Philippines and Indonesia, which have large numbers of seafarers, are making plans for implementation while considering the ratification of the Convention.

Convention No. 185 replaces the Seafarers' Identity Document Convention, 1958 (No. 108) which, had been ratified by 61 ILO member States, representing more than 60 per cent of the world shipping fleet. Please see the ILO website for further details:—

<http://www.ilo.org/global/lang-en/index.htm>.

8.4 A Typical Shipboard Employment Agreement

Wages

The wages are as per the company's wage scale: each officer's remuneration will be paid each calendar month. Full wages are paid up to and including continue to the date of signing off the vessel and one additional day's basic wage will be paid for travelling home on vacation. The tanker allowance shall be paid according to the company tariff. Tanker or other special allowances are paid only for the period of actual service on board tankers; obo carriers; chemical tankers and gas carriers. The special allowance will not be payable when the vessel is under construction in a shipyard, nor during any lay-up period when the vessel is not actually operating, nor during any period when the officer is off the vessel, during transfer or stand-by.

Vessel Transfer

If, during the period of this agreement, the officer agrees to be

transferred to any other vessel under the same management or under the management of associated companies, the total period and all other terms and conditions under this agreement remaining the same with the exception of the special allowances.

Leave Pay

Leave pay is calculated based upon the officer's basic wage; it is calculated from the date the officer is on full pay. Leave pay shall be paid on completion of the period of agreement, when the officer is proceeding on leave, except in the following circumstances:—

- (a) in the event that the officer extends his period of service, then leave pay may be paid lump sum, or credited on his account on board at the end of the initial contracted period, if so required by the officer;
- (b) in the event that the officer is transferred to another vessel, his leave pay shall be calculated (pro-rata) to the date of signing-off and shall be paid to him in order to close his accounts on that vessel;
- (c) in the event of the officer being promoted, his leave pay shall be calculated (pro-rata), to the date of his promotion and credited to his account;
- (d) in the event that the officer is discharged and this agreement terminated by reason of illness or injury, or when signing off and mutual agreement or, in the event that this agreement is terminated by the company giving proper notice, extraordinary termination in special circumstances and the vessel is sold, his leave pay shall be calculated (pro-rata), and paid to the date of his discharge.

Travelling Expenses

The company undertakes to pay the travelling expenses of the officer from his home to the vessel and from the vessel back to his home as per the under mentioned terms:—

- (a) in the event of the termination of this agreement by the officer's default, or at his own request, repatriation expenses shall be paid by the officer;
- (b) in the event of the termination of this agreement at the request of the officer within three months of signing it, the officer must pay all expenses of the relief officer, plus the expenses of his own repatriation;
- (c) on completion of this agreement, the company shall pay all travelling expenses of the officer to his home except for excess baggage. Excess baggage means all baggage in excess of thirty (30) kilos. This limit also applies when joining the vessel.

General Duties

The officer shall at all the times obey any and all lawful orders given by the master and/or other person(s) properly authorized by the company and adhere to all current company instructions and regulations.

Compensation

In the event of the death or total incapacity of the officer, as a result of

his duties, including whilst travelling to or from the vessel at the request of the company, the company shall pay an amount of equivalent to thirty-six (36) months of his basic wage, plus an additional US Dollars forty-thousand (\$40,000.00) to the officer or to his nominee. If the officer is disabled in the course of his duties, including accidents, occurring whilst travelling to or from the vessel at the request of the company, the company shall pay the following allowance as a lump sum to the officer according to the degree of his injury compensation (N.B.: this scale of degree of injury compensation is as per the company's scale).

If the officer dies during this employment in the company, but through natural or other causes, but not caused by or in the course of his duties, the company shall pay ten (10) months' basic wage, plus an additional US Dollars thirty-thousand (\$30,000.00) to his nominee. If the officer loses his belongings owing to marine casualty encountered during the period of this agreement, the company shall pay an actual amount equal to the value of his lost belongings or maximum US Dollars five-hundred (\$500.00), in addition to one (1) month's basic wages as compensation for the loss, whichever is the least. The company's liability in the case of the officer's death/injury/illness shall be limited to the appropriate contents of the above clause.

Injury and/or Sickness

Should the officer be injured or become ill during the period of this agreement, all medical expenses shall be for the company's account until his full recovery or for a maximum of three months' duration, whichever is the shorter period, and sickness allowance at the rate of the basic wage will be paid until the officer is certified fit for duty or for a maximum period three (3) months, whichever is the shorter period. In addition to actual medical expenses, dental expenses will be paid only for extractions or emergency treatment. The cost of spectacles will be paid only when these are required as replacement of existing ones, broken or damaged in the course of the officer's duties, and certified as accidentally caused 'while working by the master'.

In the event of illness or injury caused through indiscipline, drunkenness, or illness contracted by the officer prior to employment by the company, or through the fault of the officer, the medical expenses incurred plus the cost of repatriation shall be for his own account and he shall forfeit all rights to his salary from the first day of his incapacitation.

With the exception of any terms affecting the repatriation period and compensation clause, this agreement shall be considered to be terminated when the officer leaves the vessel due to injury and/or sickness.

Medical Examination

Prior to the commencement of his employment on board, the officer shall undergo a medical examination at the company's expense by a doctor designated by the company. The company may, at some time, practice a drug and alcohol test in accordance with 'Guidelines for the Control of Drugs and Alcohol Onboard Ship' issued by 'Oil Companies International Marine Forum' (OCIMF). At the time of such medical

examination, the officer shall supply the doctor with a true and complete statement listing all details pertinent to his past and present state of health.

If, from the results of the medical examination, the company is of the opinion that the officer is not fit for employment, nor suitable to work on any vessel, the company shall notify the officer to that effect, and where this agreement is signed prior to the medical examination it shall be deemed null and void on receipt of notification.

If it is proved that the officer has given false information regarding his past and present state of health, the company shall terminate the employment of the officer forthwith. As from the termination of the employment of the officer as aforesaid, the company shall be relieved of any responsibility and from payment of any further remuneration to the officer.

Drugs, alcohol, deadly weapons and dangerous goods.

Drugs

No drugs (other than those which have been medically prescribed and which the master has been notified of) will be permitted on the vessel at any time. Any officer found to be using illegal drugs will face instant dismissal and repatriation at his own expense. As an abuse deterrent, all officers will be tested at least once a year through a combined program of random/unannounced testing and routine medical examination.

Alcohol

Any officer who fails to perform his assigned duties due to alcohol impairment will face instant dismissal and repatriation at his own expense. Alcohol impairment shall be defined a blood alcohol content 40 mg/100 ml or greater.

The same method as above shall be applied to this subject as an abuse deterrent. Company policy on drug and alcohol abuse as per attached is incorporated in this contract.

Deadly weapons and dangerous goods—no officer shall be allowed to carry on board or have in his possession any deadly weapons or other dangerous goods.

Termination of Agreement

With the exception of any terms affecting repatriation, this agreement shall be considered terminated when the officer signs-off the vessel's articles of agreement.

Prior to completion of the period of this agreement on board the vessel, the officer is required to give a minimum fourteen (14) days notice to the company for termination.

However, should this period expire at a time when the vessel on which the officer is then serving is at an inconvenient port for the schedule of replacement, the company shall be entitled to extend the period of such employment until the vessel reaches a convenient port, however, such extension at the company's option shall not be more than 30 days.

This agreement is considered cancelled:—

- (a) by mutual agreement of both parties concerned;
- (b) on receipt of thirty (30) days notice of termination from either party;
- (c) if dismissed by the master for justifiable reasons;
- (d) if the officer is continuously incapacitated by the reason of illness, sickness or injury, so as to be unable to perform the duties for which he has been employed.

Dismissal

The master and/or the company shall be entitled to dismiss the officer and thus terminate this agreement, with immediate effect and without previous notice for following reasons:

- (a) criminal offence or embezzlement of the ship's property and wilful damage to such property or to vessel's cargo;
- (b) serious misconduct and neglect of duties such as but not limited to, insubordination, refusal to work, leave the vessel without master's permission, taking onboard and/or excessive use of alcoholic drinks and possession of drugs;
- (c) action jeopardizing the safety of the vessel, its crew and/or cargo as well as the life of any person;
- (d) desertion and/or delay of return to vessel for its sailing time;
- (e) misrepresentation or concealment of any material fact for the purpose of securing this agreement, such as, but not limited to, giving false information regarding past or present state of health, past experience as a seaman and/or falsely representing himself to be officially qualified.

Extraordinary Termination by the Company

Should the vessel through unforeseen circumstances, especially 'force majeure' cases, not requiring the services of the officer, the company may terminate this agreement with twenty-four (24) hours notice. However, the full monthly wages shall be paid pro-rata until the date of arrival at home.

Should the vessel be sold, her management changed, laid up and, in case of extensive dry-docking for repair or surveys, the company shall be entitled to terminate this agreement prior to its termination with twenty-four (24) hours' notice. However, the officer shall be entitled in such cases to one single discharge indemnity equal to fifteen (15) days of his basic wages or the basic wage until the expiration of this agreement, whichever shall be the shorter period. Such discharge indemnity to be paid only if the officer can not be re-employed during such period and has not refused substantially equivalent sea-going employment.

Payments made to the officer in accordance with above shall be settled directly by the company after expiry of period concerned.

War and Warlike Operations Allowance

If a war or zone of warlike operations arises during the currency of this agreement in any country, but within the vessel's trading area, the officer

shall sail the vessel to, within and out of the zone, if required by the company.

The officer shall be entitled to an allowance of one-hundred (100%) percent of his basic wage and tanker allowance in pro-rata in accordance with the company scale. Also, the compensation for the officer's injury incurred by the warlike action shall be double.

Dispute between Parties

The parties to this agreement agree to attempt to settle amicably any and all problems which may arise out of this agreement. In the event of failure of settlement, any problem arising from this agreement that cannot be solved between the company and the officer shall be referred to a court in London.

SECTION 9 EMPLOYMENT LAW

Contents:

1. *The Nature of Employment*
2. *Unfair Dismissal*
3. *Meaning of Dismissal*
4. *Remedies and Compensation*
5. *Dismissal Flow Diagram*

9.1 The Nature of Employment

The definition of employment has changed from the time of masters and servants as we now recognise new concepts such as core and peripheral workforces. The core workforce still retain the relationship where one person (the employee, worker or servant) supplies his or her skills and labour to another (the employer or master) in return for payment. The peripheral workforce or part timers have grown to be 11% of the workforce in the United Kingdom. This allows the employer a degree of flexibility and they no longer have to consider the other dimensions of part-time work such as access to skills development, training and promotion, equality of earnings and job security. The employees' relationship with the employer must be close and continuing, to distinguish from situations where an independent contractor contracts to do a particular job, whereupon he leaves and sells his services to the next bidder. Employment can be for a fixed or indefinite period, long or short, or merely until a particular piece of work is completed or for a life time.

Many EEC directives also have a bearing on employment in the United Kingdom such as the Equal Pay and Equal Treatment Directives.

A person can be both employed by and still have a legal relationship with the employer. For example, since a company has separate legal personality, it can employ its own directors, so that the latter are both employees and directors of the company. Employees can also be agents of the employer and act on his behalf and deal with third parties on behalf of the employer. (Ship's Master may be both an employee and an agent of the employer).

The basis of the relationship between the employer and the employee is often expressed in a contract. The express and implied terms of this contract are still the basis under which the court would still look to solve any dispute between employer and employee. The purpose of determining whether or not a contract of employment exists is usually to provide some benefit to the employee, but not only does the contract need to be taken into account, but also jurisdiction will need to be considered.

Newby v P&O Cruises Ltd 1998 EAT 1998, LTL 15.10.98. (The approach of the employment tribunal, to the Master's decision, under the Merchant Shipping Act 1995.)

http://alpha.bailii.org/uk/cases/UKEAT/1998/55_98_1510.html

Wood v Cunard Lines Ltd 1990 IRLR 281 EAT. (The extent of unfair dismissal rights for merchant seamen.)

Royle v Globetick Management Ltd 1977. (A few days in the United Kingdom.)

Two acts define what a worker is:—

Section 296 of the Trade Union and labour Relations (Consolidation) Act 1992 and Section 230 of the Employment Protection Act 1996, both provide that the worker has a contract of employment or provides any work or services for another party not being a client or a customer. Both do not deal with Crown Employment. Some workers may clearly have rights similar to that of an employee even though for instance they are self employed.

However should a valid employment contract be in place then a person working inside the United Kingdom should have these rights:—

1. An employer is normally 'vicariously liable' for torts committed by his employees in the course of their employment. In limited circumstances an employee's acts may involve the employer in criminal liability, as for example under Health & Safety Legislation and Merchant Shipping Acts.
2. An employee has statutory protection, for example minimum periods of notice, compensation for redundancy and remedies for unfair dismissal.
3. Social Security provision for statutory sick and maternity pay, unemployment benefit, etc.
4. An employer must deduct income tax from wages and salaries under schedule E (PAYE).
5. If the employer's business fails and he is insolvent, an employee has certain preferential rights over other creditors in respect of unpaid wages and redundancy payments.
6. The terms of a contract of employment include implied rights and duties of both employers and employees.

Also such Acts as the Equal Pay Act, Sex Discrimination Act, Race Relations Act and the Disability Discrimination Act also apply to an employment contract.

The general principals of contract law apply to the formation of employment contracts. There must be genuine agreement on the essential terms. Consideration is principally the undertaking of work in return for the undertaking to pay the agreed wage or salary. As in all contracts mistake, misrepresentation, duress or undue influence can vitiate a contract of employment. On the other hand, a worker seeking employment need not disclose past misdeeds, unless asked, even some criminal convictions, because the relationship is not one *uberrimae fidei*. Sometimes, he need not disclose the truth even if asked, but this is exceptional. (*Property Guards Ltd v Taylor* 1982), failure to disclose may

be relevant if this is a contributory cause of an accident (*Cork v Kirby MacLean Ltd 1952*). If an employer subsequently discovers a continuing problem such as an illness, this might affect the employee's suitability, not because of failure to disclose it initially, but because the problem is still there.

Mariners unfortunately fall within a category excluded for some but not all legal rights for reasons of policy. Finally, certain terms in contracts of employment may be illegal or void if contrary to public policy. Terms by which an employee purports to surrender statutory rights such as redundancy payment or compensation for unfair dismissal are void by statute except in certain fixed term contracts.

The difference between employed and self employed is a matter of service. The employee has a contract of service where as the self employed has a contract for a service.

Section 1 of The Employment Rights Act 1996, provides that, not later than two months after the beginning of the employment, the employer shall give the employee a written statement. The statement must, first, outline the scope of the contract. It must:—

1. identify the parties;
2. specify the date when the employment began;
3. state, whether with any previous employer counts towards the employee; period of continuous employment, and if so, when the continuous employment began;
4. if the contract is for a fixed term, specify the date when the contract expires;
5. the scale or rate of remuneration, or the method of calculating it;
6. the intervals at which remuneration is paid;
7. any terms and conditions relating to hours of work;
8. any terms or conditions relating to holidays and holiday pay, incapacity for work and sick pay, and (normally) pensions;
9. the length of notice which the employee must give, and is entitled to receive, to end the employment;
10. the title of the job.

The statement should also include a note:—

1. specifying any disciplinary rules applicable, or referring to a reasonably accessible document setting out such rules;
2. specifying a person to whom the employee can apply if he is dissatisfied with a disciplinary issue affecting him, also a person to whom they can apply to seek redress for any grievance relating to the employment.

9.2 The Basic Principles of 'Unfair' Dismissal

Employment Protection Act 1996 Ch. 18 Part X UNFAIR DISMISSAL
Sec 94.

It specifically states:—

Employment protection legislation provides that certain 'employees' have a right not to be dismissed in an unfair manner or for an unfair

reason and if they feel that they have been so dismissed they may complain to an Industrial Tribunal for a ruling. Such a complaint must be made by the individual who was dismissed (usually with the support of a trade union), but if the employee dies then a personal representative of the deceased can make an application to the Tribunal or continue one that is already started.

An 'employee' is an individual who has entered into, works or has worked under a contract of employment. A contract of employment is a contract of service or apprenticeship. Its terms may be expressed in writing or orally, or may be implied.

The following cannot complain of unfair dismissal:—

1. Those who are not employees, e.g. independent contractors or freelance agents.
2. Employees who have not completed one year continuous employment with their employer at the effective date of termination. The qualification period of one year is reduced to four weeks where an employee is dismissed on medical grounds in consequence of certain health and safety requirements or recommendations. There is no qualification time at all for employees who are dismissed for their own trade union membership or trade union activities.
3. Part-time employees who normally work less than 16 hours a week, unless they have been continuously employed by their employer for five years or more for at least 8 hours a week.

Whatever the hours of work of part-time employees, they may complain to an Industrial Tribunal of dismissal on account of their trade union membership or activities.

4. Employees who, before their effective date of termination had reached the normal retiring age for their employment or, if there is no normal retiring age, had reached age 65 for men and for women. Whatever the age of employees they may complain to an Industrial Tribunal of dismissal on account of trade union membership or activities.
5. Employees with fixed term contracts for one year or more where the dismissal consists only of the expiry of the contract without renewal and the employee has previously agreed in writing to forego the right of complaint in such circumstances.
6. An employee who is the husband or wife of the employer.
7. Employees who ordinarily work outside the United Kingdom under the terms of their contract of employment (but most merchant seamen on UK registered ships and most employees working on offshore oil and gas installations in British sectors of the Continental Shelf can complain of unfair dismissal).
8. Masters and crew engaged in share fishing who are paid solely by a share in the profits or gross earnings of a fishing vessel.
9. Employees covered by a dismissal procedures agreement entered into after 1-10-1980 which has been exempted from the unfair dismissals provisions by an Order made by the Secretary of State for Employment.

9.3 The Meaning of Dismissal (Section 95) EPA 1996

Dismissal is defined as the termination of employment by:—

1. The employer, with or without notice.
2. The employee's resignation, with or without notice, where the employee has resigned because the employer by conduct in breach of the contract of employment has shown an intention not to be bound by the contract. (Constructive Dismissal)
3. The expiry of a fixed term contract of employment without its renewal.
4. The employer's refusal to allow an employee to return to work after the birth of her baby where she has a legal right to do so.

If, after being given notice of dismissal by the employer, an employee gives due notice, in writing or otherwise, to terminate the contract of employment at an earlier date than required by the employer, the employee will still be regarded as being dismissed by the employer but the 'effective date of termination' will be the date that the employee's own notice, rather than the employer's notice, takes effect.

Fair Dismissal (Section 98 General (*Fairness*) (2))

Dismissal can only be fair if the employer can show that the reason for the dismissal was one of those listed below and the Tribunal is satisfied that the employer acted reasonably in the circumstances in regarding that reason as sufficient to justify dismissing the employee. The acceptable reasons are:—

1. One related to the employee's capability or qualification for the job.
(Lack of ability i.e. professional lack of ability it must be gross)
(Physical lack of must be long term and on merit)
2. One related to employee's conduct.
(Misconduct can be corrected by discipline, so must be gross misconduct)
3. Redundancy: (Section 105)
(Acceptable method of selection equally applied must be genuine)
4. A statutory duty or restriction on either the employer or the employee which prevents the employment being continued.
(Becomes illegal or certificate suspended)
5. Some other substantial reason which could justify dismissal.
(A temporary worker replacing someone on maternity leave or someone, who is ill, can be dismissed when the original employee returns to work and it is considered some other substantial reason.)

What the employer claims he or she has to prove, where the reasons for dismissal the real ones, where these reasons acceptable under the act. Through out the relationship with the employee where they treated fairly the procedure must be in place both in words and in spirit. In all his dealings with the employee did the employer behave in a reasonable manner? Was there some other course of action open to the employer?

Inadmissible Reasons for Dismissal

A dismissal will be held to be unfair if it is for an inadmissible reason, i.e. if the main reason for dismissal was:—

1. If the employee was, or proposed to become, a member of an independent trade union, or took part, or proposed to take part in the activities of an independent trade union—unless the activities were within working hours and there was no arrangement with the employer permitting the employee to take part in such activities during working hours.
2. If the employee refused to belong to a non-independent trade union.
3. If the employee is dismissed for not belonging to a trade union.

There is no qualifying period of service or age limit for employees who wish to complain of unfair dismissal for an inadmissible reason.

Complaints to an Industrial Tribunal (Section 111)

A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.

9.4 Remedies

There are three possible remedies for unfair dismissal:

1. Reinstatement, the employee is treated in all respects as if the dismissal had not occurred.
2. Re-engagement, the employee is to be re-employed but not necessarily in the same job or on the same terms and conditions of employment.
3. Compensation for unfair dismissal.

When a Tribunal rules that an employee has been unfairly dismissed it will explain what orders it can make for the employee to be re-instated or re-engaged and will ask the employee whether or not such an order is wanted. In deciding whether to make either order the Tribunal will take into account:

1. The employee's wishes.
2. The practicability of the employee returning to work for the employer.
3. Whether or not it would be just to make the order if the employee was partly to blame for the dismissal.

Where a Tribunal orders re-engagement it will be on terms which are, wherever possible, as favourable as if the employee had been reinstated, unless the employee was partly to blame for the dismissal.

Compensation

Where no order for re-instatement or re-engagement is made the Tribunal will provide the alternative remedy of compensation for unfair dismissal. Such an award will usually consist of a basic award and a

compensatory award. The basic award is based on the employee's age, length of service and weekly pay and is calculated in the same way as redundancy payment. The compensatory element is an amount which the Tribunal considers just and equitable for the loss which the employee suffered because of the dismissal, from May, 1999 the compensation can be up to £50,000.

The Basic Award

This is calculated by adding up the following amounts, but only continuous employment within the last twenty years can count:—

1. One and a half weeks pay for each completed year of employment in which the employee was not below the age of 41 and not over 65 for men and for women. (41 to 65).
2. 1 week's pay for each completed year of employment not covered above, in which the employee was not below the age of 22. (22 to 41).
3. A half week's pay for each completed year of employment in which the employee was below 22 years of age. (up to 22).

The maximum number of weeks pay which may be counted as a result of the above formula is 30 and the maximum amount of weekly pay which can be taken into account is currently £200, payment above this rate is at the employer's discretion! The Secretary of State for Employment is required to review the maximum every year.

The basic award can be reduced if the employee:

1. Contributed to some extent to the dismissal or conduct before dismissal justified a reduction.
2. Has already been awarded or has received a redundancy payment.
3. Was within a year of 65 for men and women at the effective date of termination.

http://www.opsi.gov.uk/ACTS/acts1996/ukpga_19960018_en_11.

Please see the Office of Public Sector Information for a copy of the Act.

9.5 Dismissal Flow Diagram

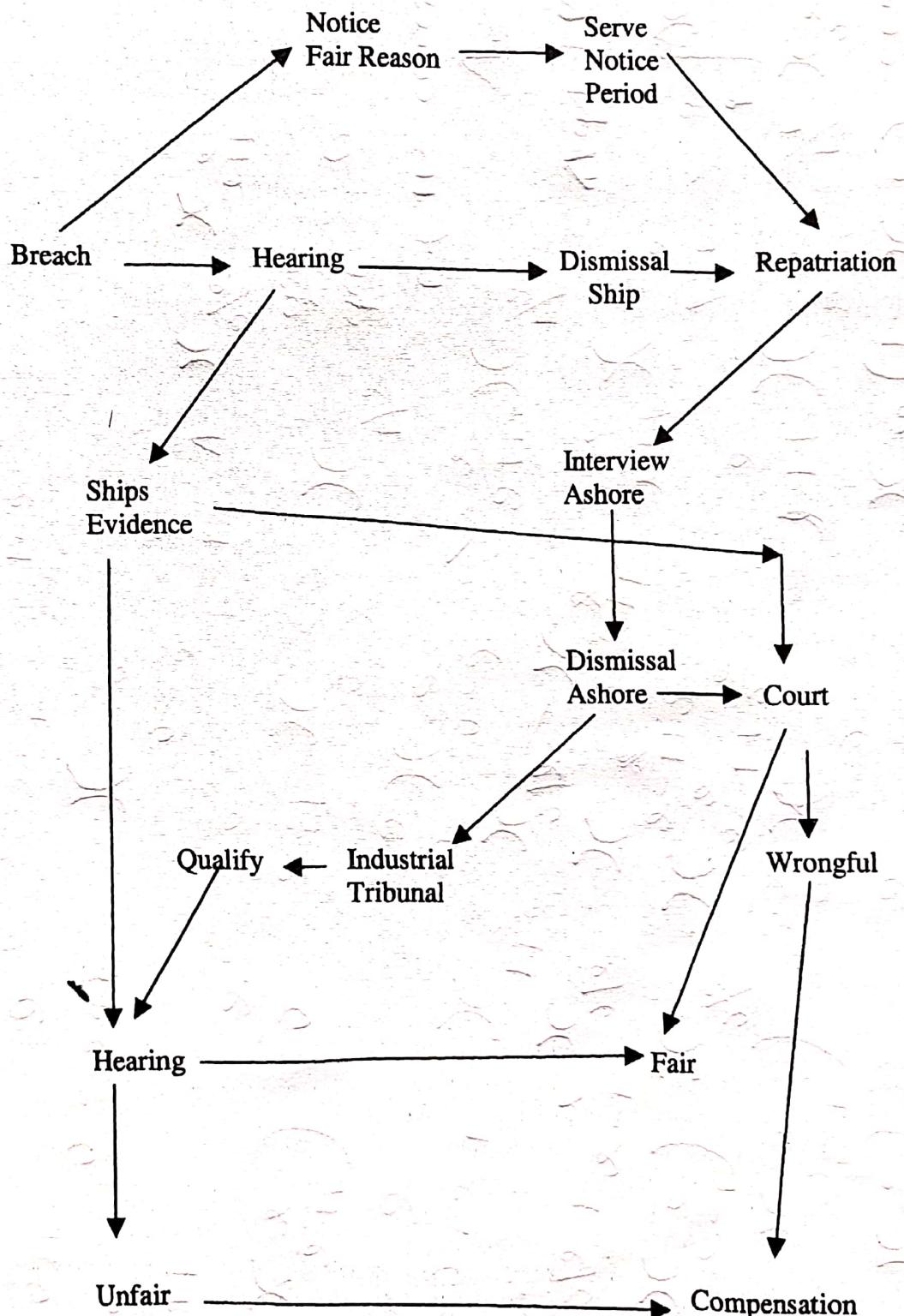


Figure 24