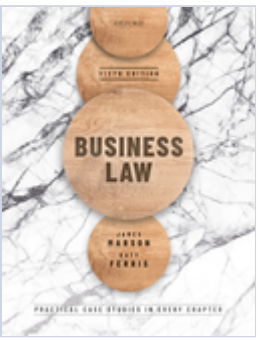

Business Law (6th edn)
James Marson and Katy Ferris

p. 510

20. Ending Employment Contracts at Common Law; and Duties to Redundant and Transferring Staff

James Marson, Reader in Law and Head of Research for Law, Sheffield Hallam University and Katy Ferris, Associate Professor in Business Law, Nottingham University

Published in print: 07 May 2020
Published online: September 2020

Abstract

This chapter identifies the remedy for the termination of contracts of employment through the common law claim of wrongful dismissal. It addresses situations of redundancy, and the rights of individuals and obligations on employers when the business is transferred to a new owner. Each of these measures offer protection to employees, and employers should understand the nature of these rights, the qualifications necessary for each mechanism, and the remedies available, to ensure they select the most appropriate mechanism to bring the employment relationship to an end. Before the 1960s, contracts of employment were largely dealt with by the 'normal' rules of contract law and were often heard by courts that hear contractual disputes. It is important to be aware of the mechanisms that will enable termination of the employment relationship without transgressing the law in order to maintain good working relations.

Keywords: termination of contract of employment, common law claim, wrongful dismissal, redundancy, normal rules of contract law, contractual disputes

At some point, the employment relationship will come to an end. There are various reasons for this—at the employer's will (giving notice); the individual may wish to leave and explore other opportunities (resignation); the task for which employment was established may have been completed; the individual may become redundant; or there may be some 'outside' factor where the employment cannot continue (including frustration). Whilst these are merely a few examples, the mechanisms that will enable a termination of the employment relationship without transgressing the law are clearly of importance. When a business (an undertaking) is sold (its ownership transferred), obligations exist for both the transferor and transferee to

respect and protect the terms and conditions of employment of the affected individuals. By adhering to the legal requirements and adopting the correct approach to dismissal/transfer procedures, not only may court/tribunal action be avoided, but it will assist in maintaining good working relations, which are essential to promote trust, respect, and productivity.

Business Scenario 20

Wilko Co. Ltd has branches throughout the UK. It recently experienced financial difficulties and provided a warning to all employees that redundancies may have to be made.

Xiu has worked as a check-out assistant for Wilko's for five years before being informed that the branch where she worked was to be closed. Following this notice Xiu was offered employment, on the same terms and conditions, at a branch six miles away. She refused the offer due to travel difficulties—Xiu would have had to catch an earlier bus into work.

Robin sold garden furniture at a stand in several stores, and was paid on a commission basis. He worked at other branches in the local area and following Wilko's threat of possible redundancies, he resigned when offered employment at a rival firm.

Sasha, who had worked at Wilko for the previous six years, was employed in a department of the firm which was subject to a reorganization. Consequently, Sasha was regraded, subject to a variation in the terms of her contract, and suffered a loss in pay and status. Sasha refused to accept the variation and has resigned.

Jin was area manager in Sheffield for 10 years. He was told that fewer managers were required in Sheffield but was offered a position as a district manager in Surrey. Jin refused the offer as his children had only recently started school in Sheffield.

p. 511

Learning Outcomes

- Explain the common law mechanism of seeking damages for the wrongful termination of employment (**20.3.2–20.3.6**)
- Compare and contrast the remedies of wrongful dismissal and unfair dismissal (**20.3.6** (**Table 20.2**))
- Identify when an employee may claim protection under redundancy (**20.4–20.4.8**)
- Identify the factors that will make the selection process for redundancies fair and unfair (**20.4.3–20.4.4**)
- Explain the obligations on the employer to consult with the employees (and/or their representatives) over planned redundancies (**20.4.5–20.4.5.2**)
- Explicate the obligations of an employer who wishes to transfer the undertaking, and the requirements on the transferee to protect the transferred workforce's continuity, and terms, of employment (**20.5–20.5.5**).

20.1 Introduction

Before the increasingly broad and complex legislative provisions governing employment relationships began to take effect with great pace from the 1960s, contracts of employment were largely dealt with by the 'normal' rules of contract law. Indeed, a claim for wrongful dismissal is a breach of contract claim (albeit a contract of employment), and is (often) heard by courts that hear contractual disputes. This chapter identifies the remedy for termination of the contract of employment through the **common law** claim of wrongful dismissal. The statutory measures of unfair (and constructive unfair) dismissal are discussed in **Chapter 21**. The chapter also addresses situations of redundancy, and the rights of individuals and obligations on employers when the business is transferred to a new owner. Each of these measures offer protection to employees, and employers should understand the nature of these rights, the qualifications necessary for each mechanism, and the remedies available, to ensure they select the most appropriate mechanism to bring the employment relationship to an end.

20.2 Termination of employment

It is important to recognize from the outset that there are various ways of bringing an employment relationship to an end. Some of these may amount to a dismissal that may enable a claim for wrongful or unfair dismissal. There are also terminations that do not, at common law, constitute a dismissal.

20.2.1 Terminations not Establishing a Dismissal at Common Law

The following is a non-exhaustive list of situations where the employment relationship has ended, but no (common law) claim is available:

- *The mutual agreement of the parties:* There is a situation where the parties may simply no longer wish to continue with the contract of employment and as such release each other from any further obligations. However, the courts are suspicious of such arrangements and will look to see if the worker was provided with any inducement from the employer to end the contract (such as a financial inducement) that could lead to a common sense belief of mutual agreement. Where a termination is instigated by the employer, it will be held as a dismissal not mutual agreement.

p. 512

Francis v Pertemps Recruitment (2013)

Facts:

Mr Francis was employed by the recruitment agency and placed with a client. At the end of that engagement Pertemps offered him one of two options. Francis could either be paid two weeks' notice plus redundancy pay. Or, he could choose to be paid two weeks' notice whilst the agency kept him on its books and looked for engagement with a new client. He chose the latter, then asked to change to

the first offer. On this basis the employer wrote informing Francis of his right to an appeal 'against the decision to terminate your employment'. Francis appealed, unsuccessfully, and then brought an action for unfair dismissal.

Authority for:

The employer's argument that this was not a dismissal claim but one of mutual agreement was rejected by the EAT. Where the employer terminates the contract, as evidenced here by the language used in the communications, it will be accepted as such. This does not, however, reflect the fairness or otherwise of that decision.

If the individual was coerced into resigning due to a threat by the employer (such as a threat of dismissal), then this will not amount to an agreement.

Martin v MBS Fastenings (Glynwed) Distribution Ltd (1983)

Facts:

Martin had been involved in an incident at work where one of the company's vehicles was badly damaged. Following an investigation Martin was invited to attend a meeting to discuss the matter. He was approached before the meeting and told that the company had concluded he was at fault and at the conclusion of the meeting he would be dismissed. Informally, he was advised it would be better for him to resign and therefore would avoid a dismissal on his employment record. Martin's resignation at the meeting was accepted by the employer. However, later he complained of unfair dismissal.

Authority for:

The Court of Appeal held that a resignation had to have been voluntarily issued to be considered as such. Here, there was no voluntary resignation and thus it must be considered a dismissal.

- *Frustration of the contract:* Claims of frustration have been invoked in situations where the individual was conscripted to the armed forces under national service; where the individual becomes ill and cannot continue with the contract (*Condor v The Barron Knights*—see **10.2.3**); or where injury prevents the continuity of the contract.

p. 513

GF Sharp & Co Ltd v McMillan (1998)

Facts:

McMillan was employed by GF Sharp as a joiner and suffered a serious injury to his left hand in October 1994. This left him permanently incapable of working again as a joiner. Following a meeting later in the same year with the company's managing director it was agreed that GF Sharp would keep McMillan 'on the books' despite not working because McMillan could draw more generous pension benefits if he remained in employment until after his 60th birthday (31 March 1996). In August 1996 McMillan made an application for a redundancy payment and GF Sharp refused arguing that, due to his injury McMillan's contract of employment was frustrated and ended with effect from 22 November 1996.

Authority for:

The EAT held that a contract of employment is frustrated when, without default of either party, a contractual obligation had become incapable of being performed. As such, following his injury, McMillan could no longer continue with his employment and the contract was frustrated.

The courts will not readily accept an assertion that the contract is frustrated as this would negate the remedies provided under the statutory provisions and common law.

Williams v Watson Luxury Coaches Ltd (1990)

Facts:

Ms Williams was employed as a part-time typist and sustained an injury at work. As a consequence she was absent from work for a period of some 18 months. During this time the employer's business was sold and when Williams declared herself available for work, the employer informed her that there was no work available for her to do. On her claim that she had been unfairly dismissed, the tribunal rejected her argument as the contract had been frustrated due to the length of her absence.

Authority for:

Frustration of contract is a doctrine of last resort and this makes its application to sickness quite difficult to identify. Here the tribunal identified the factors to be considered when drawing conclusions: the nature of the job; the employee's length of service prior to the illness; the nature of the illness, its severity, and how long it may last; the prospect of recovery; the requirement for cover by another person; the length of the employment foreseeable; the employer's conduct; whether

another reasonable employer would have chosen to terminate the contract or would have waited longer to see if the employee could return to work; and whether the employee had been paid wages/sick pay during the absence.

p. 514 ↵ Remember, a finding of frustration means the employee cannot recover any benefits available through protective dismissal laws.

- *The expiry of a fixed-term contract:* When a contract has reached the end of its term, the relationship under that contract is complete and no claim may be made under the common law. However, this does not mean that there is no claim under the statutory provisions and, indeed, non-renewal of a fixed-term contract may enable a claim for unfair dismissal.
- *Non-return following child birth:* Under the common law, there is no breach for an employer refusing to allow a woman to return to her job following a period of absence following the birth of her child. However, the ERA 1996, ss. 96 and 137 establishes that such a refusal will be treated as a dismissal for the purposes of that Act.

20.3 Wrongful dismissal (the common law route)

Under the governance of contract law, the contract of employment may have included a term regarding the period of notice required for each of the parties to terminate the agreement (although see *Autoclenz Ltd v Belcher & Others* for judicial comment on the distinctions between 'general' contracts and contracts of employment). Even in the absence of such a clause, statute establishes the minimum notice period that has to be provided. If this notice period is not adhered to, in the absence of a justifiable reason, then the termination will be in breach of contract and, in this circumstance, may amount to a **wrongful dismissal**. As this is a contractual dispute, the damages will attempt to place the injured party in the position they would have been had the contract not been breached.

20.3.1 The Notice Period

The contract of employment should identify the notice period that is required of each party to end the employment relationship (and these periods may be different between the individual and employer) and how that notice should be communicated.

Newcastle Upon Tyne NHS Foundation Trust v Haywood (2018)

Facts:

Ms Haywood would turn 50 years of age on 20 July 2011 and in April 2011 she was informed that she was at risk of redundancy. Redundancy after her 50th birthday would have lead to a substantially more generous pension payment from the employer. Haywood's contract identified that she was entitled to 12 weeks' notice of dismissal, but nothing was included about how notice should be deemed to have been provided.

On 19 April 2011 Haywood went on holiday and on the 20 April the employer sent the letter of termination with 12 weeks' notice. Haywood returned from holiday on 27 April and read the letter. At this stage, if communication of redundancy was deemed to be effective when read on the 27 April, this would lead to the much higher award. The Supreme Court decided to follow previous authority and
p. 515 therefore the notice was not ↵ deemed effective until the 27 April when the employee had a reasonable opportunity to read or be aware of the notice.

Authority for:

Where an employment contract is silent on when notice of the termination of a contract of employment is deemed to have been given, notice is deemed to have taken effect when it comes to the attention of the employee and they have either read it or had a reasonable opportunity to do so.

In the absence of any notice period ERA 1996, s. 86 states that employees who have worked between one month and two years continuously for the same employer are entitled to one week's notice. This notice period extends by one week for every year that is worked to a maximum of 12 weeks' notice (see **Table 20.1**).

Table 20.1 Notice periods

Period of employment	Notice period applicable
Less than one month	None
More than one month but less than 2 years	1 week
More than 2 years but less than 12 years	Maximum of 12 weeks (one week for every year worked)
More than 12 years	12 weeks

20.3.2 What May Be Claimed

In the event that the employer dismisses the individual contrary to the terms of the contract or the statutory minimum, the claimant is entitled to damages for their losses.

This will be assessed on the standard principles of contract law and will provide the lost income for the notice period that should have been provided, or in the case of a fixed-term contract, the balance of the contract.

Addis v Gramophone Co Ltd (1909)

Facts:

The employee was paid a relatively small salary with the remainder of his pay based on the commission he received from sales. A period of six months' notice on termination was included in the contract. When the employer issued Addis with this notice, he was provided with his salary for the term but he was prevented from working. Therefore he was prevented from an opportunity to earn the commission.

Authority for:

The House of Lords held that a wrongful dismissal had taken place. Addis was entitled to claim a reasonable commission, based, for example, on the earnings of his replacement.

p. 516 ↵ However, claims may not be made for the manner of the dismissal. Being a wrongful dismissal, there may be an element of distress, even humiliation in the nature of such terminations, but these are not recoverable in respect of the '*Johnson* exclusion area'.

Edwards v Chesterfield Royal Hospital NHS Foundation Trust (2011)

Facts:

The claimant was employed as a consultant trauma and orthopedic surgeon whose contract of employment included a three months' notice of termination clause. Further, it identified the disciplinary procedure that was to be followed in the event of alleged misconduct. Subsequent to a dismissal for misconduct, Edwards argued that his dismissal was unfair as the procedures were not followed. Further, that as the contract was breached the normal remedies available in contract that flow from the breach—loss of reputation future earnings etc.—should also be available (above those allowed in the Employment Rights Act 1996 which governs unfair dismissal).

Authority for:

The claim for contractual damages failed. In the case *Johnson v Unisys Ltd* [2001] an employee was not allowed to recover damages for breach of trust and confidence where the circumstances giving rise to the breach related only to the manner in which the employee had been dismissed. This became known as the '*Johnson* exclusion area' and applied in Edwards' case.

The predominant remedy for wrongful dismissal claims is damages, but the courts have been increasingly inclined to make use of injunctions to prevent a dismissal, or to prevent a dismissal that attempts to circumvent a statutory right.

Irani v South West Hampshire Health Authority (1985)

Facts:

Mr Irani was employed by the Health Authority as an ophthalmologist. He and a more senior colleague had a disagreement resulting in the Authority convening an ad hoc panel to discuss the matter. The conclusion was that the differences between the employees were irreconcilable and as Irani was the more junior he should be dismissed. The contract of employment outlined disciplinary and grievance procedures that the Authority was required to follow. When these were breached Irani sought an interim injunction to stop the application of the dismissal, and to compel the Health Authority to fulfil its obligation under the contract.

Authority for:

As the procedures had not been applied properly an injunction was granted to stop the effect of the dismissal pending the correct application of the grievance procedures.

p. 517 ↵ Note that specific performance is not available in contracts of personal service, but in *Irani*, the court followed the ruling in *Hill v CA Parsons* regarding when an injunction should be awarded:

1. there must still exist between the parties mutual trust and confidence so that the employment relationship has not irreconcilably broken down;
2. the claimant was seeking protection of statutory rights;
3. damages would not have been an adequate remedy in the case.

20.3.3 Duty to Mitigate

Having suffered a wrongful dismissal, the injured party must take reasonable steps to avoid further damages accruing and as such they must attempt to mitigate their losses. This does not require the affected individual to accept any job that is offered, or to take up employment at a much lower level than had been enjoyed whilst employed. The courts will expect evidence that alternative work has been sought. As in the case of seeking damages for breach of contract, it would be contrary to public policy to allow the injured party to sit back and allow any damages to mount if they could have minimized these losses through alternative employment.

Brace v Calder (1895)

Facts:

Mr Brace had entered a contract with Calder to serve it (consisting of four partners) for a term of two years. Before the two years had expired, two of the partners retired although the remaining partners were to continue running the business. Consequently Calder offered Brace to continue to serve the new firm for the remainder of the contract on the same terms and at the same rate of pay. He refused and claimed wrongful dismissal.

Authority for:

The Court of Appeal held there was a wrongful dismissal on the dissolution of the partnership, but Brace was only entitled to nominal damages (£50). He had been offered a suitable alternative which was fair and reasonable in the circumstances, and by refusing he had failed to mitigate his losses.

20.3.4 After Discovered Reasons

It may be the case that following an employer's decision to terminate the individual's contract, for example, on suspicion of breach of contract (such as for **gross misconduct** or **gross negligence**), after the dismissal evidence is gained that proves (or disproves) the employer's assertion. This is called 'after discovered reasons' as the evidence is only identified following the action taken by the employer. Whilst in situations of unfair dismissal these will not subsequently make an unfair dismissal fair, they will be allowed to enable the employer to mount a defence against a wrongful dismissal claim. Hence, after discovered reasons can make an
p. 518 otherwise wrongful dismissal a lawful dismissal. As such, it may be ↵ wise for an employer to continue their investigation, even following a dismissal, to gather whatever evidence is available to defeat a possible wrongful dismissal claim.

Boston Deep Sea Fishing and Ice Co. v Ansell (1888)

Facts:

Ansell had been employed as managing director of the firm and was dismissed on suspicion of dishonest practice (in the absence of tangible evidence that supported the employer's allegations). The employer continued to investigate the matter and in the course of this investigation discovered that Ansell had been taking bribes when awarding contracts to suppliers.

Authority for:

In defence to the wrongful dismissal claim, this after discovered evidence was presented and the court accepted that Ansell had breached the fundamental implied term of trust and confidence. Ansell had committed a repudiatory breach of the contract and the employer's actions were justified in bringing the employment to an end.

20.3.5 Time Limit for Claims

As this is a breach of contract case, the claimant can bring a claim for wrongful dismissal up to six years following the notice of the contract being ended.

20.3.6 Who May Claim

As this is an action for breach of contract, any individual who contracts to personally undertake the work can claim the remedy of wrongful dismissal. Therefore, unlike the statutory route of unfair dismissal, the status of employee is not required and this opens up the route for claimants who might otherwise not qualify under unfair dismissal. Further, there is no requirement for a period of continuous employment (**Table 20.2**).

Table 20.2 Comparison: unfair dismissal and wrongful dismissal

	Unfair dismissal	**Wrongful dismissal**
Source of the right	Statutory (ERA 1996)	Common law (contract)
Who may claim	Only available to employees	Anyone with a contract
Minimum period of continuous employment required to access the right	Two years	Immediate from the commencement of the contract
Time limit within which a claim must be lodged	Three months	Six years

	Unfair dismissal	Wrongful dismissal
Where the claim is heard	Employment Tribunal	County Court; High Court. A claim may be heard at an Employment Tribunal where the claim does not exceed £25,000
Basis of the award	Compensation includes a basic award and a compensatory award to reflect ongoing and future losses	Only covers the loss incurred for breach of the relevant notice period, or the balance of a fixed-term contract with no early termination clause
Reasons for dismissal	s. 98 ERA 1996 outlines potentially fair reasons for dismissal. The statute also identifies reasons for dismissal that will be automatically unfair	The employer can choose any reason for dismissal. The stipulation is adherence to the notice period required under the contract
Costs	Legal costs incurred in the action are rarely awarded to the successful party	Costs are more readily awarded in the County Court and High Court
Remedies available	Reinstatement; re-engagement; or compensation	Damages (although injunctions may also be available)
Discipline/dismissal procedures	The procedures identified in the ACAS Code must be complied with or the tribunal may reduce any award by up to 25 per cent. The claimant must have engaged with the ACAS Early Conciliation Scheme prior to lodging a tribunal claim	Any procedures provided by the employer in the contract must be adhered to
After discovered reasons	Cannot make an unfair dismissal fair, but it may reduce any compensation awarded to a successful employee	These may justify a dismissal, and if accepted by the court, will make a wrongful dismissal a fair dismissal
Damages awarded	This is subject to a statutory-imposed cap (updated annually)	As this is a breach of contract claim there is no ceiling to the award of damages. It depends on the breach and the value of the contract

p. 519

20.4 Redundancy

There are many occasions where a business may become unprofitable, or a part of the business may have to be closed. In these events, employees will be affected and the employer may no longer require their services. In these circumstances the employees may be eligible for compensation in the form of a redundancy payment. There are criteria established to determine who is eligible to claim, and the amount of any award to be made.

By possessing this information, the employer will recognize the steps to be taken, particularly in terms of consultation with the employees' representatives, and may avoid unfair selection procedures that will provide the employee with a right to claim unfair dismissal.

Redundancy is a complex issue of which there may have been many factors in the changes to, or decline of, the business that has necessitated the employer taking the decision to dismiss individuals. The law seeks to
p. 520 protect employees who are affected by this ↵ event, but also provide sufficient flexibility to enable an employer to carry on the business, or sell the undertaking to another buyer that may have the resources to 'save' it (e.g.). As such the law provides guidance on how this process may be undertaken to be as fair as possible to all parties.

Redundancy involves two broad scenarios. The employer may be closing the business and hence there is no work for the employee to do; or the employee may be surplus to the employer's requirements following, for example, a **reorganization** or refocus to the business.

> **Note:** the tribunal is not allowed to assess the business need or rationale for the employer ending the business (*Moon v Homeworthy Furniture*).

Redundancy is one of the potentially fair reasons to dismiss, but unlike most of the other categories identified in ERA 1996, s. 98, it does not relate to the capability or the misconduct of the employee and in essence is a 'no fault' termination.

20.4.1 The Definition of Redundancy

The definition of redundancy is contained in ERA 1996, s. 139:

> **For the purposes of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:**
>
> **(a) the fact that his employer has ceased, or intends to cease:**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him; or**
>
> **(ii) to carry on that business in the place where the employee was so employed; or**
>
> **(b) the fact that the requirements of that business:**
>
> **(i) for employees to carry out work of a particular kind; or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer, have ceased or diminished or are expected to cease or diminish.**

When the employer decides to dismiss due to redundancy, the tribunal is not in a position to ascertain the business rationale behind the decision but rather limits the inquiry to determine whether redundancy was the reason for the dismissal, or whether redundancy was merely a 'smokescreen' for some other reason.

Consider

Xiu's redundancy is due to the branch where she has been employed closing. As such it is a redundancy under s. 139(a)(ii). However, for Sasha and Jin, it is a potentially more complex situation if it is the work of the particular kind which is diminishing (and in Sasha's case leading to her regrading). This means that instead of ceasing to carry on the business, there may be a need for fewer
p. 521 employees to do the work that ↵ they perform. For Jin, the work is diminishing. However, for Sasha, if her regrading is due to a change in the nature of her work and a reduction in the requirements on the employer to carry out that work, she will have been made redundant. Alternatively, if the regrading is simply a cost-reducing measure and the particular work undertaken has not diminished, there will be no redundancy. Application of the tests developed in *Safeway Stores v Burrell* is required here (see **20.4.1.1**).

20.4.1.1 Work of a particular kind

In the first definition of redundancy above (s. 139(a)), it is quite easy to identify a redundancy situation as the business is being closed and the entire workforce is being made redundant. However, if another firm is taking over the business (under a transfer of the undertaking) and the business is being sold as a going concern, the employees' contracts will be transferred to the new owner and no redundancies will be established.

Where the situation becomes more complicated is in the assessment under s. 139(b) as the statute requires a diminution in the number of employees required to perform 'work of a particular kind', rather than a diminution in the work itself. If the employer is reducing the workforce but the work required remains the same or is increasing then a redundancy situation will occur (*Johnson v Peabody Trust*), whereas if the employer, in the same circumstances, has reorganized the business and still requires the same number of employees, then no redundancy has taken place. The courts will look to the reason for the dismissal instead. Such an example may be seen in *Vaux & Associated Breweries Ltd v Ward* where an older woman was replaced in the public house by a much younger woman (to do the same job) on the basis of establishing a younger image for the premises. Ms Ward was not made redundant in this circumstance.

In s. 139(a)(ii) where the business that the employees had previously been employed is ceasing, the question to be asked is 'Where is the "particular" place of work?' *Rank Xerox Ltd v Churchill* placed the interpretation of 'place of work' on the contract between the parties. Hence if a mobility clause was included in the contract, this interpretation was to be where the employer could require the employee to work, rather than looking at where the work was actually taking place. In *Bass Leisure Ltd v Thomas* the EAT addressed previous authorities such as *Rank Xerox* and held that where a woman had been informed that her position with the employer, based in Coventry, was moving to another plant some 20 miles away, despite the fact that her contract

contained a mobility clause, the focus for redundancy was a geographical test. The woman worked in Coventry and when this employment ceased she was in effect made redundant, even though alternative work was offered 20 miles away.

The questions to be asked when determining if a redundancy situation has occurred were outlined by the EAT in *Safeway Stores v Burrell*:

1. Was the employee dismissed?
2. If answered in the affirmative, had the requirements of the business for the employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

p. 522

3. If so, was the dismissal caused wholly or mainly by that cessation or diminution of work?

Consider

The staff who are subject to redundancy (Xiu, Robin, Sasha, and Jin) must qualify for the right to seek a remedy under this aspect of the law. Being governed by statute, these criteria are strictly applied and where any one is missing, the individual would have to seek a remedy in another legal area (if available).

20.4.2 Qualifications to the Right

As with unfair dismissal, qualification criteria exist that restrict the remedy only to an individual who:

- has ‘employee’ status;
- was continuously employed by the same employer for two years before the relevant date of the redundancy;
- is not in one of the excluded categories;
- was dismissed;
- was dismissed on the basis of redundancy.

20.4.2.1 Employee status and continuous employment

The test for employee status is assessed in the same way as it is for unfair dismissal and the particulars of employment will give evidence of the two years’ continuous service.

20.4.2.2 Excluded categories

Certain categories of individual do not have the ability to bring a redundancy claim. These include share fishermen; employees of the Crown; and those individuals who were employed as a domestic servant of a relative. Access to the right is also restricted to those individuals who were dismissed for misconduct or for involvement in industrial action, and if the individual had been offered suitable alternative employment having been informed of the redundancy and unreasonably declined this, they will be ineligible to claim.

Consider

Robin has left the firm due to the threat of redundancy. However, significantly, his contract had not been terminated by reason of redundancy—he left the firm and took up employment with a rival firm. This will mean he does not qualify for a redundancy payment. Sasha has resigned due to the employer's unilateral variation of the contract. Could this amount to a constructive dismissal (see ERA 1996, s. 136(1)) which would satisfy the requirement that the employee has been subject to a dismissal? Xiu and Jin have been offered alternative employment with the firm—whether this is suitable will determine whether they have been dismissed for the purposes of redundancy law.

p. 523

20.4.2.3 Dismissal

The employee's claim can only be made if the tribunal finds they have been dismissed for the reason of redundancy.

The employee is dismissed by reason of redundancy if:

- the contract under which they were employed has been terminated by the employer;
- the contract was for a limited term and the contract terminates by virtue of the limiting event without being renewed under the same contract; or
- the employee terminates the contract in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (ERA 1996, s. 136).

For a dismissal to be effective in a redundancy claim the employee must have been given a specific date on which their employment will cease (termed 'being put under notice of dismissal'). The dismissal for the purposes of redundancy must be the actual notice of dismissal and not some future intention of the employer.

Morton Sundour Fabrics v Shaw (1966)

Facts:

Mr Shaw had worked for the company for a number of years as foreman and was entitled to 28 days' notice of termination of his employment. In March 1966 Shaw was informed that the department where he worked would have to be closed down at a date in the near future (although that date was not specified). Within days of being so informed, Shaw secured alternative employment and tendered his resignation. Later he claimed a redundancy payment.

Authority for:

Shaw had not been made redundant. In order to terminate a contract of employment for redundancy the notice must specify the date on which the employment was to come to an end. Alternatively, it must contain facts from which that date was ascertainable. The mere issuing of a warning is insufficient.

There is an exception to the above rule whereby an employee may leave the employment before the redundancy becomes effective (ERA 1996, s. 142). If the employee serves the employer with a 'counter-claim' within the statutory notice period of their intention to leave the employment early, and this is accepted by the employer, then the employee's right to claim a redundancy payment is protected. In the event of the employer refusing this request, they may provide a 'counter-notice' to the employee's claim. If the employee decides to leave the employment without serving the notice period and brings a redundancy claim, the tribunal will decide whether to enable the claim to proceed and the level of compensation (if any) to be awarded.

The dismissal is effective when notice of it has been received, not when it is delivered.

ERA 1996, s. 163(2) assists the employee by presuming redundancy is the reason for the dismissal and placing the burden on the employer to disprove this. The employee will not be held to have been dismissed if they are offered a renewal of the contract or re-engagement with the employer; if they are offered 'suitable' employment with an associated company of the employer; or where the business has been transferred under
p. 524 the TUPE 2006 Regulations. ↵

Consider

Sasha has had her pay and status reduced following a reorganization of the department where she was employed. Whether this amounts to selection for redundancy is a matter of debate. However, if the employer's requirements for that particular role have not diminished, a tribunal will not hold Sasha to have been made redundant. In this circumstance, consider her remedies for an unfair dismissal due to

the unilateral and fundamental change (breach?) of her contract.

Situations exist where an employee whose role is being made redundant is given another job with the employer (redeployed) and the person who currently occupies that (second) role is dismissed instead. This is known as 'bumping'. This is a legitimate tactic in redundancy cases and, according to the EAT in *Mirab v Mentor Graphics (UK) Ltd*, the test to be applied is whether what the employer did in the particular circumstances of the case fell within the band of reasonable responses test.

20.4.3 The Employer's Selection of Employees for Redundancy

When the business is going to continue trading, but the reorganization involves making redundancies from certain departments, or it applies to groups of employees, the law provides guidance on how to establish fair selection procedures. There are many instances where an employer's decision, albeit innocently made, will in fact amount to a discriminatory or unfair selection. This enables a claim for unfair dismissal if the tribunal holds that there was discrimination in the selection procedure, therefore communication and consultation with the employees, trades unions, and employees' representatives, in accordance with policies allowed under the legislation, will lessen the chances of claims being brought against the employer. As much warning of the possibility of redundancies as possible should be provided to the employees and their representatives to enable alternative courses of action to be taken. The employer should also identify any suitable alternative work that may be available in the organization for those selected for redundancy. Such transparency will also assist in maintaining good industrial relations during a very tense period in the business. See *Williams v Compair Maxam Ltd* for an example of how not to carry out the selection process for redundancy.

20.4.4 Automatically Unfair Selection for Redundancy

Just as with unfair dismissal, there are categories of employees who, when selected for redundancy because of their membership of that category, will be held to have been unfairly selected. Selections from the following categories will be held automatically unfair:

- membership or non-membership of a trade union, or activities connected with the membership (Trade Union and Labour Relations (Consolidation) Act 1992, s. 153);
- pregnancy or childbirth, or if the employee has asserted statutory rights or made complaints under health and safety legislation (ERA 1996, s. 105);
- selection due to the discriminatory policy or its non-application (*Williams v Compair Maxam*).

p. 525

20.4.5 Obligation to Consult

When the employer is planning redundancies involving 20 or more employees at one establishment, there is an obligation, following the EU Directive on Collective Dismissals (75/129/EEC) (as amended by Council Directive 98/59/EC), and brought into effect in the UK through the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992, ss. 188–198, to consult with the recognized trade union or other employee

representatives. The appropriate representatives are identified in TULRCA 1992, s. 188(1B), although where an employer does not recognize a union, or has fewer than 10 employees, information and consultation may take place with the whole workforce. There is no requirement to hold elections and establish an employee representative group. The requirement is to begin the consultation process when the employer is 'contemplating' redundancies, which implies that the consultation is to begin as soon as is reasonably practicable. In *R v British Coal Corporation, ex parte Vardy* this was held to be when the employer first believes they may need to make redundancies. This was furthered by the Court of Justice in *Junk v Kuhnel*, where it was held that the consultation should take place when the employer intends to make redundancies rather than wait until the notices of dismissal are sent to the employees. However, TULRCA 1992, s. 188(1A) provides that consultation must take place:

- where between 20–99 employees are to be made redundant—the minimum consultation period is a period of 30 days before the first dismissal;
- where over 100 employees are to be made redundant—the minimum period is 45 days before the first dismissal (Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (S.I. 763/2013)).

20.4.5.1 Purpose of the consultation

Evidently, the rationale for requiring a period of consultation with the affected employees' representatives is to enable possible alternatives to redundancies (such as reductions in hours, overtime bans, and so on) to be explored. These may be agreed which will affect all employees but may reduce the necessity of dismissals. Even if these negotiations do not produce a situation that prevents dismissals, agreements can be reached on the selection procedures to be used. The EAT has also held that the consultation places a duty on employers to identify the reason for the redundancies (*UK Coal Mining Ltd v National Union of Mineworkers*).

When an employee has been informed they are to be made redundant, they are entitled to time off work to attend training courses to increase their skills for new work and attend interviews for new employment (ERA 1996, s. 52).

20.4.5.2 Failure to follow the consultation requirements

A failure to consult with the employees' representatives before redundancies are announced may lead to a claim for compensation. The employer is required to explain why the consultations did not take place, and if no answer is provided, or the tribunal does not accept the employer's response, then the tribunal may make a declaration to that effect. The tribunal may also make a 'protective award' to compensate the employees who have been, or are about to be made redundant, which may be made for a period of up to 45 days (the protected period). The pay, following *Susie Radin Ltd v GMB* (see **20.5.5**), should be to deter future employers from failing
p. 526 to follow the consultation requirements (as confirmed ↵ in *Sweetin v Coral Racing*). The tribunal will make the award based on the seriousness of the employer's default and on the basis of what is 'just and equitable' in the circumstances. The award is calculated on the basis of one week's pay for each week in the protective period, and the maximum (if this figure is exceeded) is established on the same basis as is for unfair dismissal/redundancy claims (as of 6 April 2019—£525).

There may exist circumstances where the consultation period cannot practicably be held in the time limits identified above. TULRCA 1992, s. 189(6) provides for 'special circumstances' to exist where the employer should not be subjected to the protective award on the basis of this failure (*USDAW v Leancut Bacon Ltd (in liquidation)*). Events occurring after the proposed redundancies of 20+ individuals, however, will not provide a defence to an employer failing to inform and to consult. In *Keeping Kids Company (in compulsory liquidation) v Smith and Others*, the company applied for emergency funding from the Government to avoid the business facing financial ruin. A grant was offered in late July and then revoked in early August following details of a police investigation into failures by the company. The company closed and affected staff brought claims for a protective award for the company's failure to inform and consult as required under s. 188(1A) TULRCA 1992. The employer had failed in its consultation duty, but given the award of the grant (which would have saved the company) which was expected, before its withdrawal, the affected staff were entitled to the protective award but the amount was reduced due to the circumstances of the grant.

20.4.5.3 Requirement to inform

Employers that are proposing to dismiss more than 100 employees are required, under TULRCA 1992, s. 193, to inform the Department for Business, Energy & Industrial Strategy at least 90 days before the first redundancy takes place. If there are more than 20 (but less than 100) employees being made redundant, the information requirement is at least 30 days before notice is provided of the termination of employment. Failure to follow the requirements results in a criminal offence being committed that may be punished with a fine (TULRCA 1992, s. 194).

20.4.6 Calculation of the Payment

The remedy that is provided in the case of redundancy is compensation. The ERA 1996, s. 135(1) states that an employer shall pay their employee a redundancy payment if the employee is:

- dismissed by the employer due to redundancy; or
- is eligible for a redundancy payment due to being 'laid off' or the employment constituting short-time.

The payment is subject to a maximum figure identified in the statute (in the same way as unfair dismissal payments are subject to a maximum) (see **21.4.3**)—note, years in employment whilst under the age of 18 are not included in the calculation. However, this statutorily imposed figure will not prevent an employer from establishing its own payments in excess of this amount (which is usually through an enhanced redundancy scheme that reflects the employees' length of service with the firm).

Note that if the employee claims both redundancy and unfair dismissal, and is successful in each, then any
p. 527 awards will be offset so as not to compensate the claimant twice. ↵

Consider

Both Xiu and Jin have been offered alternative work following the notice of redundancy. In each case, the key issue is whether the alternative work is suitable and whether any employee's refusal is reasonable. In Xiu's case, it would appear she has been unreasonable in the refusal—taking an earlier bus into work would not seem (on face value at least) unreasonable. Sasha has been offered alternative employment, yet it is following a regrading which has adversely affected her terms and conditions of employment. Is this suitable and reasonable? If the tribunal holds the offer is suitable and her refusal unreasonable, Sasha will not be considered to have been made redundant. Jin's case is different. Moving hundreds of miles, particularly when the employee has a family settled in the existing area, may be unreasonable unless the employer could offer a substantial inducement to accept (which is, of course, unlikely in cases of redundancy).

20.4.7 Offer of Alternative Employment

As noted earlier, during the employer's procedure for handling the redundancy they should consider if the employee may be suitable for alternative work. This will assist both the employer in not having to make a redundancy payment, and the employee will move to alternative work without having to find employment (which may be difficult). The offer must begin within four weeks of the previous employment ceasing to avoid having to make a redundancy payment (ERA 1996, s. 141(1)). Whilst the employee is not obliged to accept this offer of employment, if they unreasonably refuse an offer of alternative employment they will lose the right to claim a redundancy payment. In *Bainbridge v Westinghouse Brake & Signal Co. Ltd*, an employee who had been based for the previous five years of his employment in Newcastle, and was offered posts in Glasgow and then in Leeds, was not unreasonable in a refusal to accept these offers. His children were situated in local schools, were to undertake examinations, and these issues were taken into consideration when determining reasonableness.

The tribunal will enquire:

1. whether a 'suitable' offer of alternative employment was made (e.g. *Taylor v Kent CC* where a headmaster was offered alternative work in a pool of substitute/mobile teachers (with his pay frozen at his existing level). This was held not to be suitable alternative work);
2. if this question is answered in the affirmative, was the employee unreasonable in their refusal? (Compare *Rawe v Power Gas Corporation* and *Fuller v Stephanie Bowman (Sales) Co. Ltd*.)

20.4.8 Trial Period of Employment

An employee who accepts the offer of alternative employment is entitled to a trial period to ascertain if the work will be suitable. This trial period may last up to four weeks (ERA 1996, s. 138) and if the employee is dismissed from this position within this trial period, the dismissal will be held as being due to redundancy.

p. 528

20.5 Transfer of undertakings

When an employer decides to sell part or all of a business, the business (or 'undertaking') and its workforce transfer to the purchaser. The relevant legislation was enacted due to the UK's membership of the European Union, and was first brought into effect in 1981, with an update to the Regulations in 2001, and the most recent legislation (the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)) taking effect from 6 April 2006. These Regulations were transposed from the Acquired Rights Directive (Council Directive 77/187/EEC) (ARD) that sought to preserve employees' rights and continuity of employment when a business was transferred to a new owner.

As TUPE 2006 is the UK's transposition of the EU Directive (ARD) it covers transfers in the UK. However, the EAT has held that TUPE 2006 may also affect transfers outside of the UK. In *Hollis Metal Industries v GMB and Newell Ltd* involving the transfer of part of a curtain-making business to a new employer in Israel, it was held that the transfer could fall under the TUPE 2006 Regulations, although the EAT did note the potential difficulties in the enforcement of any awards under the law. It has essentially been held that TUPE 2006 would apply in this respect as the transferor was based in the UK and hence this gave the domestic tribunals jurisdiction over the matter.

When the business is transferred to a new owner, and TUPE 2006 is applicable, those employees who were employed 'immediately prior to the transfer' automatically become the employees of the new owner, and they are employed on the same terms and conditions as they held before the transfer (*Litster v Forth Dry Dock and Engineering*). The new employer takes on the obligations and rights of these individuals and any of the collective agreements that had been agreed with the previous employer. Not only are the rights and conditions of the contracts of employment preserved, but any dismissal of an employee (regardless of whether this occurs before or following the transfer) where the sole or principal reason is due to the transfer, is automatically unfair (inserted through The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, reg. 8(1)(1)). The exception to the finding of an automatically unfair reason for dismissal is where an '**economic, technical or organizational**' (ETO) reason exists—consequently, a dismissal in these circumstances may be fair, insofar as the decision is reasonable. The ETO must be the actual reason for the dismissal. If the dismissal is simply connected to the transfer, TUPE will be invoked making the dismissal automatically unfair. See *Manchester College v Hazel*.

20.5.1 A Relevant Transfer

TUPE 2006 preserves the rights of individuals, and continuity of employment, where a relevant transfer has taken place. A relevant transfer consists of two broad categories, the first being of *a transfer of an economic entity that retains its identity* (an 'economic entity' is defined as an 'organized grouping of resources' that has the objective of pursuing an economic activity—reg. 3). This is what may be considered a 'standard' business transfer involving the transfer of the business between the current owner (the transferor) and the new owner (the transferee). An organized grouping must facilitate the exercise of an economic activity which pursues a specific objective—see *Lom Management Ltd v Sweeney*. Further, the grouping must be a conscious/deliberate effort of the employer to put the employees to work on a specific contract for a client, not simply a matter of 'happenstance'—*Seawell Ltd v Cava*.

p. 529 ↵ Hence, from this Regulation, there must be a transfer of a business activity from one owner to the next, and it must consist of the business, or an identifiable part of the business. It is also necessary, for TUPE 2006 to be effective, that the transfer includes a stable economic entity. In assessing these criteria, the business transferred must be likely to continue in the same or some similar aspect of economic activity that was in existence under the previous ownership (*Securicor Guarding Ltd v Fraser Security Services Ltd*). In *Rygaard v Dansk Arbejdsgiverforening* the Court of Justice of the European Union (Court of Justice) identified that this involved some aspect of permanence to the business. TUPE 2006 also includes the transfer of a lease or franchise and in *Daddy's Dance Hall* (see **20.5.3**) the transfer of a lease for a bar and restaurant was still subject to the Regulations. Whilst TUPE 2006 does not apply to transfers of shares (*Brookes and Others v Borough Care Services and CLS Care Services Ltd*), in *Millam v The Print Factory (London) 1991 Ltd* the Court of Appeal held that the two entities must be maintained as separate legal entities to avoid invoking TUPE.

The second form of transfer was added through TUPE 2006, reg. 3, and provides for *changes of service provider* (including organizations such as firms of accountants, lawyers, and so on).

For a transfer of a service to come under the remit of TUPE 2006, the following requirements must be met:

1. there must be an organized grouping of employees;
2. the service must not be a short-term or one-off contract;
3. the client must remain the same;
4. the activities must remain (be fundamentally) the same—they must not become fragmented.

The Regulations consolidate the case law of the Court of Justice to widen the concept of relevant transfer and which take the form of:

1. contracting-out/outsourcing (such as where a service previously undertaken by the client is awarded to a new contractor);
2. re-tendering (such as where a contract for a service is awarded to a new contractor);
3. contracting-in/in-sourcing (such as where a contract with the previous contractor is performed 'in-house').

This is a very interesting aspect of the law as it provides a new dimension to transfers of an undertaking.

Hunt v Storm Communications, Wild Card Public Relations and Brown Brothers Wines (2007)

Facts:

Storm (a public relations consultancy firm) was employed to manage the public relations of the firm Brown Brothers Wines (Europe). Ms Hunt was employed by Storm as the account manager and spent approximately 70 per cent of her working hours devoted to the Brown Brothers account. Brown Brothers wished to transfer the account to another firm (Wild Card Public Relations) and informed

p. 530 Storm of this decision in June 2006. ↵ On the transfer of the account Storm informed Ms Hunt that she had been transferred to Wild Card under TUPE 2006. Wild Card Public Relations did not agree or wish for Ms Hunt to transfer to its business and claimed she had not been 'dedicated' to the business of Brown Brothers. However, the tribunal held that Ms Hunt was designated an 'organized grouping of resources' under TUPE 2006 and her principal purpose was acting on behalf of the client company. As such the effect of the transfer of the service was that Ms Hunt would transfer to the new firm taking over the Brown Brothers account under the TUPE 2006 Regulations.

Authority for:

The case was heard in a tribunal and therefore does not establish a precedent, but it does indicate the implications of the extension of TUPE to service provisions—outsourcing.

20.5.2 The Effect of the Transfer on Contracts of Employment

Upon a relevant transfer, the employees take their contractual rights and continuity of service with them when the transfer is completed. Whilst the transferee has to provide the same rights and continuity to the workers, they are also responsible for any liabilities or claims against the previous employer. Hence employment claims under, for example, equality laws will transfer to the new owner (*DJM International v Nicholas*), as will claims under torts (e.g. personal injury—*Bernadine v Pall Mall Services Group Ltd*). As such, reg. 11 of TUPE 2006 places an obligation on the transferor to provide the prospective owner (the transferee) with 'employee liability information' (which following The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, must be provided at least 28 days before the transfer (reg. 10)) which includes details such as the ages of the employees, the contracts of employment and written particulars, and the firm's grievance procedure and disciplinary details. The transfer of the business also includes the transfer of collective bargaining agreements that had existed before the transfer (reg. 5), and any trade union that had been recognized by the employer before the transfer must also be recognized by the incoming employer (reg. 6). However, in *Mears Homecare Limited v Bradburn and others*, the EAT held that the requirement in s. 9 of the National Minimum Wage Act 1998 for employers to maintain pay records does not continue with the transferor in a TUPE transfer. In cases of a transfer, the transferee should require the transferor to deliver pay records for the transferring employees so wage information may be provided in compliance with the law.

20.5.2.1 When an employee does not want to transfer

TUPE 2006 protects an employee's terms and conditions of employment. However, there may be situations where the employee does not wish to have their contract transferred to the new employer, and they do not wish to work for the incoming owner. In *Katsikas v Konstantinidis* the Court of Justice held that employees could not be compelled to transfer to a new employer against their will. Regulation 4(7) of TUPE 2006 enables an employee, upon the knowledge of the transfer and the new owner, to inform the transferor or transferee, before the transfer, (and this has been extended to after the transfer—*New ISG Ltd v Vernon*) that they do not wish to transfer. Upon making this statement of their intention not to transfer, the employee's contract of

p. 531 employment ends (although without dismissal), ↵ and they cannot claim any remedy connected with a dismissal. There is an exception to this rule regarding refusals not amounting to dismissals. Where the employee refuses to transfer to the new employer under the belief that their conditions of employment will be changed with a resulting detriment being suffered, they may refuse to transfer (resign) and then claim constructive dismissal (*University of Oxford v Humphreys*).

Consider

With regards to Sasha, would your answer change if the reorganization she was affected by was a consequence of a sale of the business to a new owner? Consider changes to the terms of a contract in a redundancy situation compared with similar changes following a TUPE transfer.

20.5.3 Dismissal or Variation to the Contractual Terms and Conditions

The transferee has to recognize the rights of the contract that the employee was subject to prior to the transfer (reg. 5(1)). This has also been held by the Court of Appeal in *Computershare Investor Services v Jackson* to restrict the employees' terms and conditions to those at the time of the transfer, so they did not have access to beneficial terms of the new employer. Employees are entitled to benefits conferred at the date of a transfer and not from the start of their continuous employment. In *Daddy's Dance Hall* it was held that employees cannot be bound by agreements to vary the terms and conditions of employment if the transfer was the reason of the change. This included unilateral changes and those that were agreed by the transferee and the employees (although this is questionable following the Court of Appeal's decision in *Regent Security Services v Power* where it was held that an employee was entitled to rely on changes to their terms and conditions of employment following a transfer). The EAT has also identified that whilst the principle established in *Daddy's Dance Hall* remains, changes to employees' detriment are void, but those to their benefit are allowed (*Power v Regent Security Services Ltd*). This has been included in reg. 4(4) of TUPE 2006, unless there is an 'economic, technical or organizational' reason for the variation—which renders such changes or variations 'not void'. Changes/variations in contracts are not void where they are unrelated to the transfer; where the contract permits a variation; where there is an economic, technical, or organizational reason for the change; and where at least a year has passed since the transfer, the terms which have been varied are contained in a collective agreement, and overall, the changes are no less favourable to the employees.

Regulation 7 of TUPE 2006 also deems dismissals unfair if the sole or principal reason is the transfer itself. There is, again, an exception to this rule if the dismissal was due to an economic, technical, or organizational reason.

Important changes have been made since the enactment of The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations (CRATUPEAR) 2014 which took effect to transfers following 1 January 2014. In relation to collective agreements, whereby the terms and conditions of work affecting individuals could be regulated and agreed between the employer and, for example, a
p. 532 recognized body such as a trade union, the following provisions were applicable. The collective agreement

↵ could be established to operate for a given period—such as a five-year term, or it may cease to operate on any given event—such as upon derecognition of the trade union. Importantly in relation to TUPE, the transferee was not allowed to change these terms or the agreement. CRATUPEAR 2014 has amended this situation, first, by making the agreement static after the TUPE transfer, and secondly by enabling the transferee to renegotiate collective agreements which were in operation before (and effective with) the transfer, one year after this transfer (CRATUPEAR 2014, reg. 6), insofar as overall the changes are no less favourable to the affected employees. This simply means that the transferee is bound by the agreement as it stood on the date by which the transfer was concluded—if at a later date (but before ownership passes from the transferor to the transferee) the old employer (the transferor) changes the collective agreement, the new employer (the transferee) is not bound by such changes (CRATUPEAR 2014, reg. 6(2)).

20.5.4 An Economic, Technical, or Organizational Reason

Under reg. 7(3), an otherwise unfair dismissal connected to the transfer may be justified by the new employer if it is due to an economic, technical, or organizational (ETO) reason. Many transfers occur because the business that is the subject of the transfer is not performing as well as it could, or is in financial difficulties. Even if this is not the case, a new employer may have ideas regarding streamlining the business and improving its profitability. As such, there is some scope for them making changes to the organizational structure. Note, however, that this provides the employer with a 'potentially' fair reason to dismiss and they will have to convince the tribunal that the reason was fair. The Regulations do not offer much guidance on how to interpret the ETO, but there is latitude for the new employer to dismiss employees if the business is not profitable with the existing numbers of staff (this would constitute an economic reason) and a most frequent ETO is redundancies (*Gorictree Ltd v Jenkinson*). The new employer may choose to reorganize the management structure of the firm to increase its profitability/viability (an organizational reason), or they may decide that aspects in the production/manufacturing process require alteration (a technical reason) and so on. Following from CRATUPEAR 2014, a redundancy situation (a dismissal) involving the change of location of a business, which used to be held as an unfair dismissal, will now be included as an ETO (although it must still be explained and consulted upon by the employer). What this means for employees is that where the employee refuses to move to a new 'base'/location, this no longer constitutes an automatically unfair dismissal.

20.5.5 The Obligation to Consult Regarding the Transfer

TUPE 2006 does not stipulate any minimum consultation periods, albeit for requiring that consultation occurs (reg. 13). It requires that the employer consults with the affected employees' representatives as to the transfer, its date, and the reason for it; any legal, economic, and social implications for the affected employees; any measures that are to be taken by the employer; and any measures (if there are any) that the new employer will take that may impact on the affected employees (reg. 13(2)). If the employer fails in the duty to consult, both transferor and transferee will be held jointly and severally liable (reg. 15(9)), and if no justification for this failure is presented, the employees or the employee representatives (such as a trade union) may complain to a tribunal and be awarded compensation of up to 13 weeks' pay (TULRCA 1992, s. 189 and TUPE 2006, reg. 16(3)). This award of compensation should be sufficient to deter future employers from disregarding the law (as upheld in *Sweetin v Coral Racing*). ↵

Susie Radin Ltd v GMB (2004)

Facts:

In March 2000 the Union was informed by the employer that the factory may close. In April 2000 letters of redundancy were issued to the employees. Conversations between the employer and the Union were held in June, but the factory closed in July 2000. A claim was made against the employer for protective awards for the affected employees as no meaningful consultation took place.

Authority for:

The Court of Appeal agreed with both the tribunal and EAT that the employer had breached the requirement to consult with the Union prior to any redundancy notices. The level of the award will be based on the seriousness of the employer's breach and it is no defence that consultation would have made no difference to the final result.

There exists a defence for the employer who does not consult due to 'special circumstances' that makes consultation not reasonably practicable (TULRCA 1992, s. 188(7) and TUPE 2006, reg. 15(2)). It should be noted that special circumstances may involve, for example, a sudden or unforeseen reason for the employer's insolvency, but would not be accepted as a reason simply because the employer attempted (unsuccessfully) to trade out of the financial difficulties before going into insolvency.

Clarks of Hove Ltd v Bakers' Union (1978)

Facts:

The employer summarily dismissed 368 of its employees (the majority of its workforce) for the reason of redundancy. On the same day the company ceased trading and appointed a receiver. As no consultations had been conducted with the recognized trade union, the union complained to the tribunal.

Authority for:

The insolvency of an organization will not, of itself, amount to 'special circumstances' for the purpose of excluding the requirement of consultation established in the TULRCA 1992, s. 188.

Employees have the right to request information from their employer regarding changes to terms and conditions of employment, information regarding the business's economic situation, and, of relevance to this section, when the business is involved in a transfer of the undertaking or there is the prospect of

redundancies. The Information and Consultation of Employees Regulations 2004 provide that for organizations with 50 or more employees (from 6 April 2008), and where at least 10 per cent of these employees make a valid request, the employer has to set out an agreement as to how and when consultation
p. 534 over the matter will take place (which requires at least 15 employees and a ↵ maximum of 2,500 employees). If the employer fails in this request the Central Arbitration Committee can make a declaration that the Regulations have been breached, and they also provide for a penalty payment of up to £75,000 (enforceable in the EAT). In *Amicus v Macmillan Publishers* the EAT made its first judgment imposing a penalty under the Regulations (in this case £55,000) for the employer's 'significant' failure at 'almost every stage of the proceedings'.

Conclusion

This chapter has considered issues surrounding ending the employment relationship. When read in conjunction with **Chapter 21**, the individual and employer will be in a position to identify where terminations of employment are lawful, and those situations in which a termination may lead to a claim for breach of contract and/or of statute. **Chapters 20** and **21** should be read together to gain an overview of how the common law and statutory dismissal regulations interact, and to understand employers' responsibilities when the business is being sold. These laws are not simplistic, but neither are they particularly onerous, and awareness enables effective strategies for dismissal to be implemented enabling claims to be avoided; time and money lost (or wasted) in defending a dismissal can be reduced; and poor strategies for dismissals can lead, potentially, to a damaged reputation with the consequential negative impact on industrial relations.

Summary of main points

Termination

- There are many instances of the employment relationship ending but they will not always amount to a dismissal that would enable a claim for wrongful dismissal. Note, however, that these may give rise to a dismissal and claim under statute.

Wrongful dismissal

- Dismissals with the correct notice period provided, or in response to an individual's breach of the contract, are fair at common law.
- Wrongful dismissal occurs where (e.g.) the employer terminates the contract in breach of the required notice period and without a valid reason.

- To enable a lawful dismissal, the employer must adhere to the contractual notice period. In the absence of any contractual term, the bare statutory minimum applies.
- An employer is only permitted to substitute the notice period with a payment in lieu of notice where the contract allows this through an express term.
- An employer is entitled to dismiss without notice (a summary dismissal) where the individual has committed some fundamental breach of the contract.
- The claimant may wish to claim through wrongful dismissal rather than unfair dismissal due to there being fewer qualification criteria (a contract to perform the employment personally is required) and there is no maximum limit to the damages that may be awarded.
- The remedy for wrongful dismissal does not include reinstatement or re-engagement (as with unfair dismissal) but injunctions are available to prevent the employer from breaching the contract of employment.
- An individual dismissed in breach of the contract will be expected to mitigate their losses.
- Contrary to unfair dismissal, after discovered reasons may be used in wrongful dismissal to justify a dismissal.

p. 535

Redundancy

- Redundancy may involve the employer ceasing to trade or the employee may be surplus to the requirements of the business.
- To qualify, the claimant must have ‘employee’ status; have been continuously employed with the same employer for at least two years; have been dismissed (and the reason being redundancy); and must not be in one of the excluded categories.
- The employer’s redundancy selection policy must be fair and this can be assisted through negotiation with the employees’ representatives/the recognized trade union. The policy should follow the ACAS Code of Practice wherever possible.
- There are automatically unfair reasons to dismiss for redundancy that include (e.g.) pregnancy; trade union membership and activities, and so on.
- The employer is obliged to consult with the employees or their representatives over any planned redundancies and the reasons for these.
- To be deemed fair, the employer should consider the employee for any suitable alternative work. If this is offered within four weeks of the redundancy this will prevent any payment having to be made (if the reasonable offer of employment is accepted).
- Employees who take up the offer of alternative work are entitled to a four-week trial period to assess whether the work is actually ‘suitable’.

TUPE Regulations

- When businesses are transferred, individuals may have their employment preserved and their contractual rights maintained following the TUPE 2006 Regulations and CRATUPEAR 2014.
- Individuals must have been employed 'immediately prior to the transfer' and there must have been a 'relevant transfer'.
- A relevant transfer requires the transfer of a stable economic entity that retains its identity, with an 'organized grouping of resources'. TUPE 2006 also includes changes of service provider to protect those involved in outsourcing; re-tendering; and in-sourcing.
- The new employer (transferee) becomes liable for any claims/liabilities against the former employer by employees.
- The employee is entitled to refuse to transfer to the new employer and by doing so brings to an end their contract (and hence any application of a restraint of trade clause), but does not amount to a dismissal.
- The employee who has transferred may not be subject to worse terms imposed by the new employer but can benefit from more favourable terms introduced by it.
- A dismissal due to a relevant transfer will be unfair unless the transfer is due to an economic, technical, or organizational reason. This enables the new employer to justify the dismissal as being 'potentially' fair.
- Employers are obliged to consult with employees and their representatives regarding planned redundancies and transfers, unless there exist 'special circumstances' for not consulting.

Summary questions

Essay questions

1. 'The statutory action for unfair dismissal is far superior to a common law action for wrongful dismissal. As such, wrongful dismissal can safely be ignored for all practical purposes.' Critically assess the above statement.

p. 536

2. In the case of *Allen v Flood* (1898) Lord Davey pronounced 'an employer may refuse to employ from the most mistaken, capricious, malicious or morally reprehensible motives imaginable, yet a worker has no right of action … no right to be employed by any particular employer.'

To what extent does this statement continue to represent the law?

Problem questions

1. Redmount Borough Council (RBC) has an Adult Education Department which has had rising costs over the past few years. Given the budgetary restraints imposed by central government RBC has decided to take measures to reduce its overheads. Part of these measures has resulted in the catering and cleaning functions being transferred to an outside company—'Cleaneasiest Ltd'. There were 10 existing members of the catering and cleaning division of the Adult Education Department and these were transferred to the employment of Cleaneasiest Ltd, although the employees were transferred on a lower hourly rate of pay than enjoyed with RBC.

Two months into the transfer, RBC were very unhappy with the quality of the service provided by Cleaneasiest Ltd and as such invoked an early termination clause in the contract (which they were entitled to do) and cancelled the contract. The Adult Education Department now wishes to replace Cleaneasiest Ltd with another company Clean-You-Out Ltd However, Clean-You-Out Ltd is unwilling to take on any of the 10 original employees.

Advise the employees and their trade union of any rights they may have in relation to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. Joshua has been working at (the fictitious) Greenfingers Garden Centres Ltd for eight months. Without any warning he is called into the manager's office and told he is being dismissed immediately for misconduct due to his poor timekeeping. Joshua had been late to work for the two previous mornings but had made the time up during his lunch break and he had not been informed by anyone that his employer was unhappy with his work or his conduct.

Unknown to the employer, Joshua had been stealing shrubs from Greenfingers and selling these to his friends.

Advise the parties as to their legal position.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-20-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Hall, M. (2005) 'Assessing the Information and Consultation of Employees Regulations' *Industrial Law Journal*, Vol. 34, No. 2, p. 103.

McMullen, J. (2006) 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' *Industrial Law Journal*, Vol. 35, No. 2, p. 113.

Prassl, J. (2013) 'Employee Shareholder "Status": Dismantling the Contract of Employment' *Industrial Law Journal*, Vol. 42, No. 4, p. 307.

Taylor, S. and Emir, E. (2019) Employment Law: An Introduction (5th Edition) Oxford University Press: Oxford and New York.

Williams, E. (2006) 'TUPE 2006—Mission Accomplished or Mission Impossible?' *Business Law Review*, Vol. 27, No. 7, p. 178.

p. 537

Websites

https://www.gov.uk/browse/employing-people <http://www.gov.uk/browse/employing-people>

The Government's website detailing updates and policy discussions relating to employment matters.

http://www.legislation.gov.uk/ukpga/1992/52/contents <http://www.legislation.gov.uk/ukpga/1992/52/contents>

The Trade Union and Labour Relations (Consolidation) Act 1992.

http://www.legislation.gov.uk/uksi/2006/246/contents/made <http://www.legislation.gov.uk/uksi/2006/246/contents/made>

The Transfer of Undertakings (Protection of Employment) Regulations 2006.

Online resources

Visit the online resources <https://oup-arc.com/access/marson6e-student-resources#tag_chapter-20> for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

Related Links

Visit the online resources for this title <https://arc2.oup-arc.com/access/marson6e>

Test yourself: Multiple choice questions with instant feedback <https://learninglink.oup.com/access/content/marson-and-ferris-concentrate4e-resources/marson-and-ferris-concentrate4e-diagnostic-test>

Find This Title

In the OUP print catalogue <https://global.oup.com/academic/product/9780198849957>