A for either wrongful or unfair dismissal against

Business, Industries

A contract of employment is onethat is of personal service. As with any contract or agreement, there will be apoint at which it will come to an end. This could be a mutual decision betweenthe parties in the contract/agreement or a mutually exclusive one in which asignificant disagreement may arise between the parties due to which one of themdecides to conclude the relationship or simply decide not to be in it. Wheneveran employment relationship or contract ends, it is important to evaluate theterms of the dismissal.

A mutual agreement to be released from each other fromfurther contractual obligations must be reached. At this stage, an individualmay qualify to bring a claim for either wrongful or unfair dismissal againstthe employer or persons with whom the contract has been signed with. The firststage is to identify which of the two dismissals the individual qualifies tohave a right to and then proceed to seek out remedies for one to pursue.” Wrongful dismissal is one inwhich a dismissal occurs due to the breach of the contract of employment” 1. Thisis most commonly seen when the worker is unjustifiably dismissed contrary tothe required notice period (ERA 1996 s. 1 (4)(e)). It includes incorrect noticeperiods for dismissal and fundamental breaches in contracts by employers.

Thebreach of contract must be significant enough to deny the person in thecontract what they had contracted for, or, displays the other party no longerwished to be bound by the terms of the contract. The basic principle of wrongful dismissal is that there has been a wrongful act in the dismissingof a worker/employee; It focuses largely on the procedures adopted by theemployer during the dismissal of the employee. It does not focus on the

reasonfor dismissal as unfair dismissal does. An example, I present the case ofBrace v Calder (1895) 2 QB 253. Mr brace was employed by Calder, A scotchwhiskey company comprising of four partners. After the retirement of two of thepartners, Brace was made an offer to continue to work for the remaining two.

His contract to serve as managing director was for two years whereas two of thepartners retired after five months. Brace refused to continue, resigned andthen claimed wrongful dismissal. The courts found that the contract had in factbeen breached by the early retirement of the two partners before the contract withBrace has expired. Brace was entitled to damages; however, it was also foundthat Brace had in fact acted unreasonablyin not accepting the offer of staying on and remaining to work for the tworemaining partners. The case concluded by awarding Brace nominal damages of £501. In my opinion, this was a fair trialwith success in legislation and procedures. Although Brace had a very valid claim forwrongful dismissal, it was clear from any point of view that he could have heldhis same position in the company without any significant changes to hisactivities.

The fact that the courts took that into account and found that heacted unreasonably ensures that employees and workers are deterred from makingwrongful dismissal claims so opportunistically. In the case where the terms ofthe contract are proved to have beenbreached and a wrongful dismissal has occurred, the innocent party i. e.

theemployee/worker, will have the option to pursue legal remedies through civilcourts. The legislative principle if the employee has been employed

between aweek and two years, is one week. For more than two years, it is a week forevery year worked. For e. g.

if one has worked for 7 years the notice periodwill be 7 weeks (ERA s. 86). However, it should be noted that under the ERAthere is an exclusion which states that the notice does not have to be upheldif the employer has a reasonable justification for the lack of dismissal (Knownas summary dismissal). Such reasonable justification canbe seen in the case of Pepper v Webb (1969) 2 AIII ER 216. Pepper was employedas a gardener for three months for Mr and Mrs Webb. After a personality clashbetween Mrs Webb and Pepper, he refused to finish his work on the greenhouseand remarked: “ I couldn’t care less aboutyour bloody greenhouse and your sodding garden”. He was subsequently “ summary dismissed” for gross misconduct.

Inthis case, the actions of the employeegranted and justified a summary dismissal. One could argue that this occurredbecause of the personality clash between himself and Mrs pepper however thatwould still be no reason to act in such an indecent manner. Hearings for wrongful dismissalsin the UK are heard in an employment tribunal where damages sought are lessthan £25, 000 or in the county and highcourt where legal aid is possible. The claim then moves on to the high court, the courtof appeal and the supreme court whereapplicable. As a result, employment tribunals have parallel jurisdiction withordinary courts over wrongful dismissal cases.

Appeals are generally availableand claims are to be lodged within six years (Limitation Act 1980). Unlikeunfair dismissals, with wrongful dismissals, no employee status is required tomake a claim and no qualifying period is

imposed upon the claimer. Generally, the remedy for a wrongful dismissal is a “ damages” claim although injunctionshave also been approved depending on the specifics of the case. The amount of damages recoverable is the “ moneys needed to compensate the plaintiff fortheir net loss of salary or wages during the period for which the defendant wasbound by their contract to employ the plaintiff” 2. In the case of a fixedterm contract, the assessment will extend over that fixed term. However, wheredamages are not adequate to compensate the injured party, equitable remediessuch as injunctions are used at the court’sdiscretion.

This is an equitable remedy in the form of a court order whichcompels a party to do or to refrain fromdoing specific acts. A party that then fails to comply with this injunction, proceeds to face criminal or civil penalties as a result 3. An example of such case would beIrani v Southampton and South West Hampshire Health Authority (1985) IRLR 203.

A doctor was dismissed against agreed procedures when he and his superior had irreconcilable differences at work. Beingthe junior member and since there were no alternative vacancies available, Irani was dismissed. In this case, damages would not have been an adequate enough remedy as had Irani beendismissed, it would have meant an end of his career in the health service. Instead, Irani sought an injunction to preserve his future in the healthcareindustry. In this case, this was the onlysolution to the case as the employer had no complaint about the professionalcompetence of Mr Irani, and therefore, s.

33 was carried out and Mr Irani wasnot banned from NHS work. Unfair dismissal is slightlydifferent from wrongful dismissal. It involves the termination of one with anemployee status for a reason that is not permitted under the statute. It is a dismissalwhere the employer fails to comply with statutory requirements concerningdismissal set out in the Employment Rights Act (ERA 1996) 2. Bothconstructive and express dismissals come under unfair dismissals; whereconstructive dismissals are ones in which the employee terminates because ofthe employers' conduct.

One of the main reasons for the introduction of unfairdismissal was that the wrongful dismissals were failing to remedy situations inwhich dismissals were carried out in a procedurally unfair manner. Furthermore, in most cases, it is required that the employee must be in the employ of theemployer for more than one year continuously before a claim can be sought. Thisis usually justified with the reason that the employer requires this period oftime to establish whether the employee is suitable for the position 3. In myopinion, the law of unfair dismissal would not stop the employer fromdismissing an unsuitable employee, therefore, the law could just apply from thebeginning of employment as opposed to starting from one year, however it couldalso be argued that this could leave the employer open to multiple false claimswhich, although will be won eventually, will waste valuable time and resourcesof the courts and of the employer itself. An example of this would be thecase of British Home Stores v Burchell (1978) IRLR 379.

An employee wasdismissed on suspicion of theft however, there was a lack of clear evidencethat the employee was complicit in the alleged theft. BHS dismissed theemployee regardless and was then taken to court where they lost the case andthe tribunal ruled that the dismissal was unfair. This was a significant caseas it established the ‘ Burchell principles’ where employers were then requiredto hold proof of guilt. Where proof was unavailable, they would have to atleast have reasonable grounds upon which to hold their beliefs. The routes for seeking remediesfor unfair dismissals are as follows.

Firstly, a claim for an unfair dismissalmust be lodged at an employment tribunal within three months of the date ofdismissal/Last day worked. 12 weeks has been set as the maximum statutory timeperiod applicable. Unlike wrongfuldismissal, unfair dismissal is unbound by the rules of contract and instead isgoverned by its own legislative provisions. For unfair dismissal claims, there are criteria that need to be followed by both parties. The employee must show thatthey are qualified and prove that they were dismissed. Upon satisfaction ofboth conditions, the employer must show that they exercised a fair reason for dismissing the employee. The six possiblereasons that are fair grounds for dismissal are as follows; retirement, redundancy, capability, conduct, statutory illegality or breach of a statutoryrestriction, and some other significant reason.

If the employer’s reason does not fall into these categories, A tribunalmoves to provide remedies for the employee. If, however, it does fall into oneof those categories, the reason for dismissal is to be judged as fair or unfairdepending on the circumstances upon which the employer acted, and

whether theiractions were reasonable or unreasonable. Any appeals are heard at theEmployment Appeals Tribunal (EAT) whichmoves on further to the court of appeal and then the supreme court 1.

If a claim for unfair dismissalis won, the remedies are slightly different thanthose for wrongful dismissal. Three remedies are available, the first being reinstatement. This is the primary remedyalthough relatively few are requested and complied with. The tribunal ordersthe employer to reinstate the unfairlydismissed employee essentially giving them their job back. If an employer doesnot wish to comply, the decision cannot be forced upon them however the damagesawarded to the unfairly dismissed employee will increase. The second remedyinvolves re-engagement.

Where the employee has unfairly been dismissed, theirposition with the employer may have already been filled by a new employee bythe time the tribunal hears the case. The tribunal can, therefore, not order the employee to be reinstated into the same position as it no longer exists, however, the employer is ordered to make anoffer of alternative employment as close to the level of pay, promotionopportunity and seniority as was with the previous position. The third and final remedy is the remedy ofcompensation or damages as is with the cases of wrongful dismissal. Thisdamages payment is intended to compensate the employee for all direct losses thatwere incurred as a result of the dismissal. There are two elements to thissettlement; a basic award and a compensatory award.

The basic reward iscalculated using a formula which reflects the claimant’sage, length of service and usual weekly wage (Limited to £330 per

week); (ERAss. 119-122, ss. 227). The compensatory award is a sum that the tribunalconsiders as just and equitable, normal up to a maximum limit of £63, 000 (ERAss. 123-124). The purpose is tocompensate for the employees' losses and not punish the employer. These awards, however, have been quite low; in 2015-2016 the average compensation for anunfair dismissal was £13, 851 4.

As mentioned before, further awards may applyupon the disagreement by the employer to reinstateor re-engage. I would criticise this compensationas although it keeps employers' costs down, it fails to provide reasonablejustice for employees' rights and fails to encourage employers to maintain apolicy of job security. The remedy that is offered to the wrongfully dismissedworker or employee is a very important indicator of how much importance isplaced by the law on employees' rights. If a considerable amount ofcompensation is awarded to one whosedignity and respect have been violated bytheir employer, it can be concluded that the law and society are in clear condemnation of such behaviour. Substantial remedies are important also to show employers how providing jobsecurity will be beneficial to themselvesand deter them from dismissing opportunistically and unfairly. An example of unfair dismissal canbe seen the case of Reed & Bull Information Systems v Stedman (1999). Ms Stedmanwas a secretary for about one year during which she was sexually harassed by themarketing manager who made provocative remarks towards her.

The tribunal settledin favour of Ms Stedman and found that her dignity work had been undermined andan offensive and hostile work environment was

created; subsequently Ms Stedman wasoffered a settlement. By forcing the employer to go through disciplinaryprocedures the employee will get a chance not only to show to get their damages but also to show that they have donenothing to deserve the dismissal and in fact should not have been dismissed. This will protect the employees' self-respect and dignity by making theemployer carefully consider the dismissal. However, although it is advantageousto have re-employment and re-engagement as remedies, it is very rarely the casethat this is imposed. I feel like this is a failure of the legislation as inmost cases it is deemed non-practical for the employer to re-employ theemployee which has filed a claim against them. Even when the rule is imposed, employers only have to pay a very little sum on top of the pre-existingcompensation if they breach the order. I feel that this is insufficient as adeterrent against unfair dismissals and as a result nullifies the reinstatement and re-engagement remedies.

To conclude, that the legislationcurrently in place protects employees well from being wrongfully or unfairly dismissed. There are many laws in place which protect both the employer and the employee frommaking opportunistic and baseless claims. It is also, however, my opinion that the law of dismissal largely protects employees rather thanworkers. Much of the legislation dates back from the 1960s and 1970s, longbefore the needs of the wider category of workers had been recognised. Anemployee is protected by the (ERA s. 86) where it sets out the minimum noticeperiod that the employee must be given depending on how long they have worked forthe employer. No such minimum applies to workers' contracts, and if thecontract did not contain a clause of notice, it would be up to the courts

todecide how much notice the worker was entitled to. It would seem unlikely thatthe courts will entitle casual workers with the same long notice periods asemployees due to the inherent instability of their jobs.