PART ONE

FUNDAMENTALS

What is employment law?

01

INTRODUCTION

Both employers and employees are protected by legislation, but to most people it is complex and confusing. This chapter seeks to introduce employment law, the court system and tribunals in an easy to understand manner. It also will discuss the reason for employment law and the effect of this law on all parties. In this chapter we will explore:

- the sources of domestic and European law (with reference to Brexit);
- the relevant structure of the Civil Courts and the Employment Tribunal system;
- the role of law in distributing social justice and ensuring fairness;
- the effect of regulation on the economy, employees, employers and society;
- the Employment Tribunal process and out-of-court settlements.

Employment law

Employment law can be separated into three main themes:

- health and safety legislation;
- individual employment legislation;
- collective employment legislation.

The health and safety of workers has been ensured with a framework of legislation for many years, but this is not true of collective employment legislation which has been limited, with the UK preferring a voluntary approach. Employment law has moved from being based on common law to relying on statute. The extent of law covering these three main themes is vast and extends far beyond a book on the fundamentals of employment law. We will be focusing on individual employment law and touching on health and safety legislation.

Domestic law

The UK has a common law system. This means that judges have two main legal sources from which to make decisions; statute and common law.

Statute

A bill will pass through parliament, being discussed and amended at different stages in the process until it gains Royal Assent and becomes a statute. It is now primary law, and will be described as an Act of Parliament. Where necessary, statutes will allow for future regulations to be added and these are known as Statutory Instruments (SI). These Statutory Instruments ensure that additional detail or particular changes can be made to the Act without having to put the whole statute through Parliament. For example, the National Minimum Wage Act 1998 has been amended by the National Minimum Wage (Amendment) Regulations 2017 (SI 2017/465) whereby annual changes for the 2017 national minimum wage have been inserted into the regulations.

Case law

Over the years, judges have made decisions on cases that have become a binding precedent, as they have interpreted the law in a particular new way. It is not the actual decision that becomes binding but the reason for the decision which then can be applied to other similar cases: if the facts of the current case significantly resemble those of the precedent then it will be binding. Judges will interpret the facts of the case in light of any relevant case law and apply this to the case to support them in making their decision.

These precedent cases help by providing practical situations to which statute law has been applied. For example the Employment Rights Act 1996 provides information on the right not to be unfairly dismissed and the remedies for unfair dismissal but it is *British Homes Stores v Burchell* (1980)

ICR 303, EAT which provides clarity on how to determine whether an unfair dismissal case has been managed correctly.

Courts higher in the hierarchy have precedent over the lower level courts. This means that decisions made at Supreme Court level take precedent over those made at Employment Appeal Tribunals or Employment Tribunals. Please look at Figure 1.1, but note this is as of January 2018; it is unclear whether there will be a role for the ECJ for UK employment law.

Codes of Practice

Codes of Practice have been particularly relevant in the education and support of employers to apply statute. The Advisory, Conciliation and Arbitration Service (Acas) has a duty to provide Codes of Practice '*as it thinks fit for the purpose of promoting the improvement of industrial relations*' (Trade Union and Labour Relations (Consolidation) Act 1992, s.199), and the Secretary of State also has the power to produce Codes of Practice, in consultation with Acas. The Commission for Equal and Human Rights (CEHR) and the Health and Safety Executive (HSE) can also produce Codes of Practice.

Employers that fail to abide by these Codes of Practice are not liable and therefore judges cannot base their decisions on the fact that these Codes of Practice have not been applied in the workplace. However judges are able to take the failure to adhere to a Code of Practice into account. This means that this factor may support other facts which lead judges to their decisions.

FIGURE 1.1 The Employment Tribunal system

European law

While the UK is part of the European Union, it is subject to European law, with European law having supremacy and therefore superseding any domestic law. This means that domestic law should be consistent with European law (and so makes it easier as EU law is implemented through domestic law, Pyper, 2016). Article 288 of the Treaty on the Functioning of the European Union 2012/C 326/01 explains that the European Union will produce regulations, directives and decisions which may be dealt with differently by the member states. Regulations are to be taken in their entirety and will apply directly to the member states and are the equivalent of European Union Acts of Parliament. A directive can be interpreted into domestic law as it is less specific and most European Union influence on UK employment law has been through directives. Decisions may be provided for a specific member state, company or individual and is binding on them. Decisions are made by institutions such as the European Court of Justice.

For example, the Parental Leave Directive (96/34/EC) was implemented in the UK in 1999, as an amendment to the Employment Rights Act 1996. The rights are incorporated into the Act and the details placed in a Statutory Instrument, the Maternity and Parental Leave Regulations 1999 (SI 1999/3312). The Parental Leave Directive (96/34/EC) has now been repealed by the European Union and replaced by the Parental Leave Directive (2010/18/EC) with the rights remaining in the Employment Rights Act 1996 and the details found in the Statutory Instrument, the Parental Leave (EU Directive) Regulations 2013 (SI 2013/283). Here the UK has been able to apply its own interpretation of parental leave and the 2013 Regulations are as a result of consultation.

In context – social justice and fairness

We need to appreciate social justice and the approach of international bodies to social justice if we are to understand the reasoning behind legislation, rather than just how to apply the law. Social justice is the distribution of advantages and disadvantages within society and is based on equality and equal opportunity. It concerns aspects of citizenship, covering access to healthcare, education, justice and an acceptable standard of living. Within the workplace, social justice also refers to access to rights and fairness. For example, it refers to the right to influence decisions (employee voice) the right to justice (access to appeals) and protection against exploitation (fair distribution of pay and benefits). Social justice to some degree is supported by law.

The International Labour Organization promotes 'decent work' for all on an international scale and has agreed the principles of fundamental rights with its member states. These include:

- the right to association and collective bargaining;
- the elimination of child labour and all forced labour;
- the elimination of discrimination.

The International Labour Organization (2017a) describes decent work as involving 'opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.' This puts social justice on the employment agenda but these principles are only basic rights with little legal foundation. They are accepted through member country ratification and monitored by the International Labour Organization. The European Union has focused its social policy on the regulation of employment (Majone, 1993), establishing a set of minimum health and safety and employment rights for the member states which are formed through directives and regulations.

Whilst the International Labour Organization and European Union may be viewed as using their position solely to reduce poverty and social exclusion, it is argued by some academics that they may be protecting employment rights against the effects of competitiveness. Multinational companies can choose where best to site their businesses and the legal rights of employees play a part in this decision. They may choose to base their businesses in countries where their responsibilities to employees are less onerous, and it is easy both to hire and fire. This concept, 'the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining competitive advantage' (Bernaciak, 2014), is known as 'social dumping'. Social dumping drives down social standards and employment protection, but the current domestic legislation maintains a minimum protection of rights, including minimum pay.

So the law, whether domestic or European, protects the rights of the weaker party in the employment relationship. It ensures that rights are secured for all employees, not just distributed arbitrarily, dependent on the discretion or whim of an employer. It also ensures that all employees are treated equally.

However whilst law protects the weaker party we cannot assume that it reflects a moral stance. Whilst laws should follow natural justice, moral

choices depend on the perspective of each individual and determining what is natural justice may be difficult. For example, in the UK not all employment rights are protected at the beginning of the employment relationship and the right to be protected from unfair dismissal can only be applied after two years' service (with some exceptions). Ethically it may be argued that this does not meet natural justice, as employers can dismiss employees without following any procedure. But in this case it enables employers to have greater flexibility and so encourages them to recruit new employees, reducing unemployment at a time of economic hardship.

So a country's values and approach to social justice is reflected in its laws. When the UK leaves the EU it may form its own employment legislation (as at January 2018 it is not clear how separate it will be). It will be new territory and any prediction of how UK law will reflect social justice is based on its values. Whilst the UK does not make explicit its values, these values are supported by a history of employment legislation prior to membership of the EU (Vipond, 2016). However, we do have clearly described what the UK seeks its young people to learn in terms of values. 'Schools should promote the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs' (Department of Education, 2014). The UK supports its young people to build 'an understanding of the importance of identifying and combatting discrimination'. This helps us see how the UK might reflect social justice if and when it can form its own legislation without reference to Europe.

The law and models of justice

In *HR Fundamentals: Employee Relations* (Aylott, 2018) we reviewed the four different types of justice and described them as follows:

- Distributive justice is the perceived fairness of the allocation of rewards.
- Procedural justice relates to the fairness of the procedures used, and employees evaluate the fairness against a number of criteria. These include the way in which the organization selects managers in the process, the method used to collect information, how decisions are made and whether there is access to an appeals process (Leventhal, 1980). An employee may perceive a procedure as unfair if there is no method to appeal a decision.
- Interactional justice relates to the relationship the manager has with the employee and fairness within the supervisory relationship. This could include the manager's dishonesty, invasion of the employee's privacy,

disrespectful treatment and derogatory judgments (Bies, 2001). An employee may accept a low pay rise if given a clear explanation and treated with respect by his or her line manager.

- Informational justice refers to the transparency of information about the process. Some employers make sure all procedures are clearly explained on their intranet sites.

Employment legislation is specifically effective in the provision of distributive justice (for example, ensuring payment in lieu of remaining holiday pay at dismissal) and procedural justice (for example, the disciplinary procedure). The provision of interactional justice can be seen in the role of anti-discriminatory legislation.

The next case study illustrates the different types of justice in terms of an Employment Tribunal case.

CASE STUDY Cooking Up Trouble

In the case of *McAlister v HRM Pubs Ltd* [2302081/2016], Mr N McAlister, the claimant, was a trainee chef for HRM Pubs Ltd from 14 February 2016 until 10 August 2016. His employer paid him in cash *'for a little bit and then they would put him on the books'*, but the Tribunal found that this decision was that of the employer and that he did not choose to be self-employed. The Tribunal also found that Mr McAlister and the employer had mutuality of obligation, and this was sufficient to have worker status. On 1 May 2016 the claimant requested to be taken *'onto the books'* and became an employee.

The Tribunal found that in the period from 14 February 2016, when the claimant started with the respondent, to 30 April 2016, the day before he was acknowledged as an employee, he was at the very least a worker and entitled to holiday pay. He also was entitled to holiday pay of five days for the period he was an employee.

The finding of payment due for holiday describes the need for distributive justice that the claimant was seeking. It was agreed that the claimant was entitled to holiday pay in the gross sum of £307.36 for the period from 1 May to 4 August 2016. With the agreement of both parties and following findings on liability, the net figure for the period from 14 February 2016 to 4 August 2016 was agreed as £530.38.

The payment of a costs order or a preparation time order is allowed when a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted (Rule 74 (1) of the

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). The normal procedures are that the employer pays outstanding holiday pay at the termination of employment, if this has not been paid when they became due. The orders given provide some recompense to support procedural justice, and there was an award of £390 in respect of the claimant's tribunal fees, as a cost order.

There is no interactional justice provided by the Tribunal. The employment has been terminated, and any opportunity to rebuild the employment relationship has long gone. The fact that the respondent did not attend the Tribunal does not allow for any resolution, and for the employer, the employment relationship may be viewed no longer of importance.

In context – the effect of regulation

Regulation of the employment relationship will impact on employers, employees, the unemployed and society, and it can be argued that a non-regulated labour market would enable employees to compete on merit, purely the effect of supply and demand. In the UK, if we exclude health and safety legislation, for which there has been statute and case law for over 200 years, there has been little employment statute or case law and instead a history of voluntarism rather than law in relation to collective employee relations. This has changed, with the rights of employees becoming more than that of determining whether the contract has been breached, but instead has been reinforced as rights in statute, and collective employee relations have been given a solid legal framework.

When regulation is discussed it is the effect of employment protection legislation that is predominately referred to. Since 1946, when Stigler first argued against the minimum wage, the role of employment regulation has been viewed by traditional economists as detrimental. More recently, highly regulated employment protection has been shown to slow down the labour market, with employers retaining employees during a recession but not recruiting new employees for fear of problems when dismissing them later on. This therefore has little impact on unemployment levels but the lack of movement means that those who become unemployed may spend longer waiting to find another job (Blanchard and Landier, 2002). Some governments have provided partial regulation in some cases. For example, employment protection legislation makes it difficult for French employers to make employees redundant but with fixed-term contracts the severance pay is less. At the end of the fixed term, employees may be made redundant or become permanent staff. In the UK the application of unfair dismissal

rights normally only commences after two years' service (with some exceptions). Blanchard and Landier (2002) believe that such partial protection is detrimental to employees and the labour market. They suggest that whilst it persuades employers to recruit, it also encourages them to dispense with staff while the cost is low and re-recruit a new employee.

One political argument is to reduce employment protection legislation to improve labour market flexibility and reduce the impact on long-term unemployment. However it is very difficult for a government to propose reduction or elimination of employment protection legislation. Such legislation protects existing employees in their jobs. If it remains difficult for employers to dismiss or make employees redundant then employees have greater bargaining power for better terms and conditions. Employment protection legislation provides employees with a degree of job security and, if employers are to retain their existing employees, enables these employees to develop their abilities and, in particular, access company-specific training. A stable and trained workforce enables the organization to be more competitive. This is because an employee with good job security will 'go the extra mile' and any resulting improved productivity matches any additional costs of legislation to the employer (Altman, 2000). In fact there is evidence that job security along with other high-commitment practices can improve business performance and competitiveness (Pfeffer, 1998).

So despite the traditional economic argument against regulation, and the resultant effect on long-term unemployment, a degree of regulation is necessary to:

- meet political and social demands;
- provide a stable and engaged workforce;
- build competitive companies;
- sustain the economy.

CASE STUDY Purpose of employment law: balancing employer flexibility and employee protection

The approach of the Confederation of British Industry to the legal framework for employment is usually to press for decreased regulation and increased flexibility.

This is illustrated by its response to the Taylor Review (2017) (Confederation of British Industry, 2017). The CBI's annual report (2016) seeks to have regulation and policy that 'unlocks entrepreneurship, growth and job creation' and 'that

encourages innovation and investment will help the UK stand out from the pack as an attractive place to invest, locate and do business'. Whilst there is recognition that austerity has been challenging, it is flexibility and decreased regulation that the CBI looks to support the UK's future.

The TUC also seeks to influence government and the development of future legislation. They also want a strong economy, jobs and growth, but focus on the protection of employee rights.

Despite different perspectives, both the CBI and the TUC have agreement on the need for employee representatives, though so far there have been no moves towards this in the Industrial Strategy White Paper (HM Government, 2017). Both the CBI and the TUC will continue to lobby Parliament with their particular perspective on employment and the need for future legislation.

The role of the court system

The court system provides a structure for cases to be heard and a system of appeal in order for parties to gain justice.

Civil and criminal law

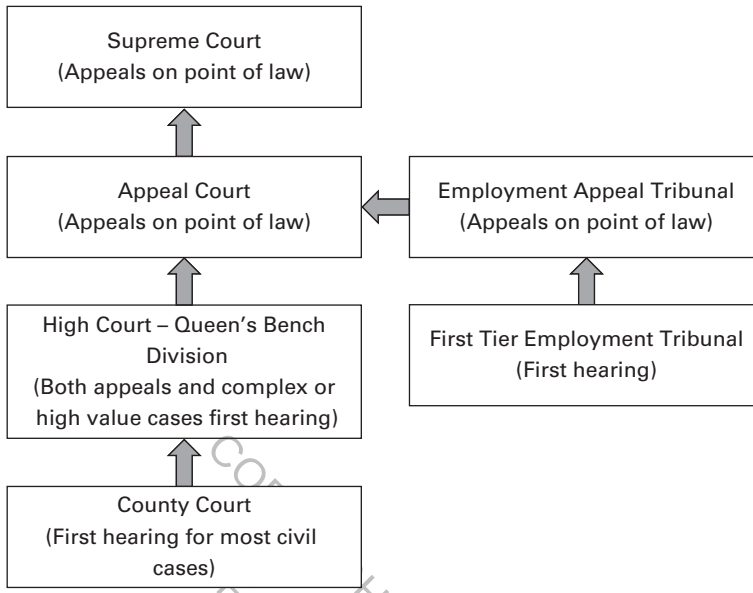
Within the UK law there are two subdivisions, criminal and civil law, each with its own court system. Civil courts provide a way for claims to be made to compensate for loss. In general, employment cases fall under the civil law but some cases may have a criminal element and so may be prosecuted by the Crown Prosecution Service.

The role of courts in employment law

The majority of cases that affect employers and employees will be heard at an Employment Tribunal. If the Employment Tribunal has erred in its judgment on a question of law then the case can be referred to the Employment Appeal Tribunal. Appeal can then be taken up to the Court of Appeal and the Supreme Court. This is the end of the process for domestic law, but if there is an issue of law that relates to the application of European law, then the case may be referred to the European Court of Justice, subject to its future jurisdiction for the UK (see Figure 1.1 earlier).

Cases of negligence are usually related to health and safety legislation. The Employment Tribunal does not have jurisdiction over negligence cases where there has been a breach of a duty of care with a resultant injury or loss. These tend to be heard at the High Court (Queen's Bench Division),

FIGURE 1.2 Civil Court System



with the right of appeal to the Court of Appeal and the Supreme Court. Cases of breach of contract can be heard at the County Court with appeal at the Queen's Bench Division, Court of Appeal and the Supreme Court. Breach of contract can also be heard by the Employment Tribunal, if the claimant no longer works for the employer (repondent). A simplified version of the civil court system is given in Figure 1.2.

The role of tribunals in employment law

Prior to making a claim, the claimant must contact Acas to seek early conciliation (EC). This will last for up to a calendar month (this can be extended on agreement by two weeks) and EC pauses the time limit for making a claim to tribunal.

Employees that wish to make a claim do so by completing an ET1 Form for single claimants and ET1A Form for multiple claimants. To be accepted, the Employment Tribunal must receive the prescribed form with the claimant's name and address, the name and address of the respondent or respondents, and the early conciliation certificate number or numbers provided by Acas, or a declaration that the claimant is exempt from the requirement to go through the early conciliation process.

The ET1 should be received by the Employment Tribunal normally within three months of the date of termination of the contract with the employer, or the last day that the employee worked for the employer prior to resigning. There are special rules for time limits for redundancy and equal pay claims. Once the ET1 has been accepted by the Employment Tribunal, it will send the employer a copy of the ET1 and an ET3 form for them to complete. The ET3 must be received by the Employment Tribunal within 28 days. If the Employment Tribunal does not receive the ET3 it will make a default judgment. Once the ET3 is accepted by the Employment Tribunal, a copy is sent to the claimant and to Acas.

The role of the Employment Tribunal, including making and responding to claims, is set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Structure of an Employment Tribunal

The Employment Tribunal consists of a judge and two lay members, one with experience of employee issues and the other employer issues. In practice this may mean that one tends to have Trade Union experience and the other HR experience, but this is not necessarily the case. The judge must have some legal qualification and at least five years' experience but may not necessarily be a solicitor or barrister, though the majority are.

Jurisdiction of Employment Tribunals

The Employment Tribunal has limited jurisdiction, which means that there are only certain issues that the Tribunal can hear. There is a wide range including:

- suffering a detriment, discrimination, including indirect discrimination, harassment or victimization or discrimination based on association or perception on grounds of age or other protected characteristics (Equality Act 2010, s.13, s.14, s.19, s.26, s.27, s.120);
- failure to pay equal pay for equal value work (Equality Act 2010, s.64, s.120, s.127, s.128);
- failure to consult for redundancy (Trade Union and Labour Relations (Consolidation) Act 1992, s.189);
- failure to receive a redundancy payment (Employment Rights Act 1996, ss. 163 and 177);
- failure of the employer to consult with an employee representative or Trade Union about a proposed transfer (Transfer of Undertakings (Protection of Employment) Regulations (SI 2006/246), r.12);

- the right to be accompanied – and there is detriment (Employment Relations Act 1999, ss. 11 and 12);
- failure of the employer to pay or an employer makes unauthorized deductions (Employment Rights Act 1996, s.23);
- failure to receive a written pay statement (Employment Rights Act 1996, s.11(2)).

CASE STUDY Early conciliation

Early conciliation 'stops the clock' on the time period for submission of a claim to the Employment Tribunal. An application cannot be made if there is no certificate from Acas S18A (8) Employment Tribunals Act 1996, unless the case is one subscribed by S18A (7). Case law provides some direction on early conciliation. Some of the cases have centred around minor errors surrounding the name of respondents, such as *Mist v Derby Community Health Services NHS Trust* [2016] ICR 543, but here we look at the completion of certificates and time limits.

For example, in *De Mota v ADR Network & anor* UKEAT/0305/16, both respondents were named on a single Acas Early Conciliation form. The Employment Tribunals (Early Conciliation) (Exemptions and Rules of Procedure) Regulations (2014) Sch.1 para. 4. state that a separate form was required for both respondents. This was struck out by the Employment Tribunal, but at Employment Appeal Tribunal it was held that Parliament had not intended that processes leading up to the certificate were to be reviewed. It was a mandatory requirement to have a form, providing for good order and administration: but it was one thing to require good order but another to restrict access to justice as a result. The certificate was valid even though it named both respondents.

In *Fergusson v Combat Stress* 4105592/2016, there was an issue surrounding the interpretation of the application to Acas stopping the clock. Section 111(2) of the Employment Rights Act (1996) provides that a Tribunal may not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. The appellant had her employment terminated on 11 August 2016. Acas received her Early Conciliation Form on 14 July 2016 (day A) and she received the certificate on 14 August 2016 (day B). The Employment Rights Act (1996) S.207B (3) states that the time between days A and B will not be taken into account. The claim was submitted on 18 November 2016 (three calendar

months and four days from the receipt of the certificate) with the rationale that the time spent in early conciliation was added to the primary time limit.

The claim should have been submitted within three months (with the date of the act or omission as the date of the claim). This made the claim four days late. However, if run from day B, the claim was in time. This remains, at the date of the case, an ambiguity in law. In this case the claim was allowed to proceed, but it is clear that this remains a problematic area of law.

Prior to the Employment Tribunal

It is usual that a case management meeting is held with the judge, and any orders made by the judge will need to be complied with. To prepare for the case both parties may wish to gain more information from each other, and the Employment Tribunal may give orders for this. The date for the tribunal hearing will be received by both parties at least 14 days prior to the hearing. Each party may wish witnesses to attend and will need to send the bundle of documents to be used at the tribunal hearing to the other party, within seven days of the hearing. Table 1.1 shows the average awards for the different jurisdictions.

At the hearing

It is not always necessary to have a legal representative – they will have an understanding of the process and law but there is a cost which may not be covered despite the fact that the respondent may win the case. Each side will be able to call witnesses, cross-examine witnesses and provide evidence themselves. Which party goes first will depend on the case, and the burden of proof required. For example, in unfair dismissals the employer will usually lead the

TABLE 1.1 Employment Tribunal Awards April–June 2016 (Ministry of Justice, 2016)

Jurisdiction	Average award (£)
Age discrimination	£9,025
Disability discrimination	£21,729
Race discrimination	£14,185
Religious belief discrimination	£19,647
Sex discrimination	£85,622
Sexual orientation discrimination	£20,192
Unfair dismissal	£13,851

proceedings, as they need to prove the dismissal was fair, whilst in discrimination cases the employee will usually start the proceedings, as it is necessary for them to prove that there may be discrimination. The employer would then need to provide an adequate explanation for their actions.

The case is heard, with both parties summing up their argument before the panel, or before the judge if the judge is sitting alone. Then the panel or the judge, withdraws to make the decision. If the judgment accepts the claimant's case then both parties will need to produce evidence and submissions that relate to the claimant's remedy. At times there are separate remedy hearings, but often evidence on remedy may be covered as part of the hearing or covered later in the hearing itself, if there is time. The respondent should therefore have prepared evidence. For most claims the claimant will be seeking compensation for loss of earnings and the respondent may be able to provide some evidence about how easy it would be for the claimant to find similar employment. However for unfair dismissal there is a possibility that the claimant may seek reinstatement or re-engagement. Very occasionally the Employment Tribunal may wish the respondent to provide the claimant with the same or similar job but the employer can prepare evidence in order to respond to this.

Out-of-court settlements

If an employer is in a dispute with an employee it is possible for the employer to instigate a 'without prejudice' conversation. This means that these discussions to agree a settlement cannot be used at Employment Tribunal. (It is now possible for employers to offer and discuss settlement even when a prior dispute between the employer and employee does not exist.)

An out-of-court settlement is when the claimant and respondent (employee and employer) come to an agreement about the dispute without resorting to redress through the Tribunal. This may be achieved through Acas or at any time prior to the Employment Tribunal. Previously known as a compromise agreement, it is a legally binding contract between an employer and employee, usually made during or after termination of the employment contract (for example, redundancy or dismissal). The legal framework for settlement agreements can be found in s.111A Employment Rights Act (1996) and is supported by a Code of Practice (Acas, 2013b) and additional guidance (Acas, 2013a).

Any discussion in order to make an out-of-court settlement is made 'without prejudice' which means that the discussion and any relevant papers are inadmissible as evidence at an Employment Tribunal. The rights discussed,

and sometimes conceded, in a private discussion are only accepted as part of this discussion and not for any future litigation. Confidentiality must be maintained, but the right to this is lost if there is improper conduct, as described in the Code of Practice. So, for example, if during the seven days an employee considers the offer, the employer reduces the offer or the employee threatens to undermine the employer's reputation, then the status of 'without prejudice' is lost. Any document relating to the arrangement of a settlement should be recorded as 'without prejudice' (but only those documents truly part of an attempt towards a settlement will be included as 'without prejudice' despite the term). 'Without prejudice' allows these documents to take a privileged status.

Settlement agreements are generally used when there is an employment dispute but this is not necessarily the case. Settlement agreements can be used to protect the employer, at a cost, and are consensual and mutual agreements, with the employee able to reject a settlement agreement. Some employers choose to make all redundancies through settlement agreements, others do not, and sometimes they are used to manage an employee whose performance is unsatisfactory out of the organization. For whatever reason, settlement agreements are usually proposed by the employer and the employee should take legal advice so they can negotiate effectively. Often the consideration made by employers includes payment but also a job reference, helping the employee to find a new role.

There are some areas in which settlement agreements cannot be made. For example in cases of whistle-blowing or automatically unfair dismissal, the employer will not be able to make a payment to the employee. This is to protect the rights of employees.

Any payments made by means of a settlement agreement are tax exempt (up to £30,000) as are any legal costs (new provisions are being made to s.413A, Income Tax (Earnings and Pensions) Act (2003) to overcome these existing provisions).

Conclusion

In general, employers and employees alike do not want to resort to the law to resolve their differences. At times employers, particularly small employers, can feel that the extent of the law puts them at a disadvantage. Yet employment law is there to protect the weaker party, be that a junior member of the team being unfairly dismissed or a senior manager who is being made redundant. Not all employers have the interests of their employees in their sights when

they are seeking to be profitable or struggling to survive. Not all employees act professionally and honestly and the law should protect both parties.

For several reasons the number of Tribunal cases has reduced, and the promotion of settlement agreements may support this reduction further. Hopefully some of this reduction is because of better HR practice, with employers following the law and employees less likely to resort to litigation but preferring to talk. The trend over the next few years will be telling.

In the next chapter we justify the need for employment law, for both employers and employees. We review the need of employees to a work–life balance, anti-discrimination practices and protection against unfair dismissal and the role of the law in supporting business reputation and good practice. However, we finish this chapter by touching on the right to justice and what this means.

CASE STUDY Refunding justice

In 2013 fees were set in place for claimants at Employment Tribunal. These were set to reduce the number of malicious and weak cases, but the number of cases dropped by 79% (BBC, 2017). In 2017 Unison, supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain, made an appeal to the Supreme Court.

Courts and tribunals ensure that the laws passed by Parliament, and the common law produced by the courts themselves, are applied and enforced. If courts and tribunals are to function effectively, they need to apply and enforce the laws. The argument to the Supreme Court was that individual members of the UK need access to the courts to enable these courts to complete their function and that the right to access justice is enshrined in chapter 40 of the Magna Carta of 1215, which remains on the statute book.

It was also argued that the right to access justice through the courts is not a purely private matter. The decision in an individual case may have wider implications; for example, the case of *Dumfries and Galloway Council v North* [2013] UKSC 45; [2013] ICR 993 resolved an issue of law over equal pay.

And finally it was argued that individuals need to know that there is a method for protecting their rights and a remedy against those who fail to meet their obligations.

The Supreme Court reflected on the argument that 'the sharp, substantial and sustained' drop in claims indicated that a significant number of people had been affected adversely by the Fee Order. It held that there was no justification for the fees and that they were unlawful. They held that all fees should be refunded, and this is now in the process of being carried out.