

Practice questions for chapter 28 – The termination of employment

Problem question

In the following cases, discuss whether or not the employee is eligible to bring a claim for unfair dismissal and/or wrongful dismissal:

- Alan is employed in January 2014 on a fixed-term contract that is due to expire at the end of June 2016. At the beginning of July 2015, Alan's employment contract is terminated by his employer.
- Sean has worked for Lock Industries Ltd for three years. The company has been experiencing financial difficulties and Sean has been told that, until the company's financial position improves, he will not be paid his contractual rate of pay, but will instead be paid a lesser amount. Sean resigns.
- Irfan has been employed by Termodyne plc since February 2016. His employment contract provides that should either party wish to terminate the employment contract, two months' notice must be provided. In April 2016, it is discovered that he has been sending malicious and threatening e-mails to other employees. He is immediately sacked without notice, and seeks your advice regarding possible avenues of compensation.
- Celine began work for her employer in February 2014. In December 2015, she is told by her employer that she is likely to be made redundant but that it would look better on her CV if she resigned before being made redundant. Accordingly, she hands in her notice at the beginning of January 2016. Her contract requires that she give two months notice and she works for the full notice period.

Alan is employed in January 2014 on a fixed-term contract that is due to expire at the end of June 2016. At the beginning of July 2015, Alan's employment contract is terminated by his employer.

- Although employment contracts normally last indefinitely, it is perfectly permissible for contracts to last for a fixed duration. Upon the expiration of a fixed-term contract, it will automatically terminate. Technically, the employee is not dismissed as the contract simply reaches its end. However, in our case, the contract does not reach its end. Alan's contract, which was due to last eighteen months, has been terminated after six months. There is no doubt that the termination of a fixed-term contract before the expiry of the specified term can amount to wrongful dismissal.
- An unfair dismissal claim is more complex as several eligibility requirements are imposed. Alan must show that he is an employee and that he was dismissed – he will have no problem establishing these two requirements.
- Alan must also have been continuously employed by his employer for no less than two years. Initially, it would appear that Alan has not met this requirement as he was dismissed eighteen months after he began his employment. However, this is not the case. The period of employment begins on the day the employee begins work and ends on the 'effective date of termination.' The Employment Rights Act 1996, s 97 provides that where the employee is employed under a fixed-term contract, the effective date of termination will be the date on which the fixed-term expires. As the fixed term is not due to expire until two and a half years after Alan commences employment, the two years' service requirement will be met, and Alan will be eligible to bring a claim for unfair dismissal.

Sean has worked for Lock Industries Ltd for three years. The company has been experiencing financial difficulties and Sean has been told that, until the company's financial position improves, he will not be paid his contractual rate of pay, but will instead be paid a lesser amount. Sean resigns.

- In order for a person to bring a claim for wrongful dismissal or unfair dismissal, he will need to show that he was dismissed. Sean has resigned and resignation does not normally amount to dismissal and so a person who resigns normally cannot bring proceedings for wrongful or unfair dismissal.
- However, the Employment Rights Act 1996, s 95(1)(c) provides that an employee will be regarded as dismissed where he terminates the employment contract in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. In such cases, the employee is said to be 'constructively dismissed' and this will constitute dismissal for the purposes of an unfair dismissal claim. It should be noted that a constructive dismissal may still be fair.
- The question is what sort of conduct will entitle the employee to terminate the contract and claim unfair dismissal. In *Western Excavation (ECC) Ltd v Sharp*,¹ the Court of Appeal stated that an employee will only be regarded as constructively dismissed where the employer has breached a term of the contract, and the breach is so substantial that it amounts to a repudiatory breach.
- There is little doubt that a failure to pay the contractual rate of pay will amount to a breach of contract, but in *Cantor Fitzgerald International v Callaghan*,² the Court of Appeal stated that it will not necessarily amount to a repudiatory breach. In that case, the Court distinguished between a failure or delay in paying and a deliberate refusal to do so, with only the latter amounting to a repudiatory breach. Judge LJ (as he then was) stated that:

Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events.... If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory.

- Accordingly, a failure to pay the employee's wages will not always amount to constructive dismissal, and it is open to the court to hold that a temporary failure to pay the employee's wages is not enough to justify constructive dismissal. However, such cases are likely to be rare. The court has repeatedly emphasized the importance of payment as part of the employment contract and a unilateral refusal to pay the contractual rate is likely to amount to a repudiation of the contract, thereby allowing the employee to claim for unfair dismissal.
- Accordingly, it is likely that Sean would be eligible to bring a claim for unfair dismissal, but would not be eligible to bring a claim for wrongful dismissal.

Irfan has been employed by Termodyne plc since February 2016. His employment contract provides that should either party wish to terminate the employment contract, two months' notice must be provided. In April 2016, it is discovered that he has been sending malicious and threatening e-mails to other employees. He is immediately sacked without notice, and seeks your advice regarding possible avenues of compensation.

- It is worth stating immediately that Irfan will not be able to bring a claim for unfair dismissal. In order to bring a claim for unfair dismissal, several eligibility requirements must be met, one of which is that the employee has served at least two years' continuous service. As Irfan has only worked for Termodyne for around two months at the date of his sacking, he will be barred from bringing a claim for unfair dismissal.
- His only option is to bring a claim for wrongful dismissal. Any employee can bring a claim for wrongful dismissal and there are no eligibility requirements to satisfy. All the employee need

¹ [1978] QB 761 (CA).

² [1999] ICR 639 (CA).

demonstrate is that the dismissal amounted to a breach of contract. Irfan will likely to try to argue that employees have a right to notice and this right has been denied to Irfan, and therefore his dismissal was wrongful.

- However, Termodyne will argue that Irfan was summarily dismissed and so no breach of contract has occurred. Summary dismissal occurs where the employer dismisses the employee without notice and has valid grounds for doing so. Summary dismissal will be valid (that is, it will not amount to unfair or wrongful dismissal) where the employee commits an act that amounts to a repudiatory breach of his employment contract.
- There is no doubt that Internet and e-mail abuse can justify summary dismissal. For example, in *Thomas v Hillingdon London Borough Council*,³ a summary dismissal was found valid where the employee was found to be downloading pornography whilst at work. Accordingly, it would appear likely that Irfan's summary dismissal is valid and, whilst he may be eligible to bring a claim for wrongful dismissal, it will most likely fail. However, the courts have indicated that summary dismissal will only usually be justified in exceptional circumstances, and it is not clear exactly what the courts will regard as exceptional.

Celine began work for her employer in February 2014. In December 2015, her employer tells her that she is likely to be made redundant but that it would look better on her CV if she resigned before being made redundant. Accordingly, she resigns at the beginning of January 2016. Her contract requires that she give two months notice and she works for the full notice period.

- In order for a person to bring a claim for wrongful dismissal or unfair dismissal, he will need to show that he was dismissed. Celine has resigned and resignation does not normally amount to dismissal and so a person who resigns normally cannot bring proceedings for wrongful or unfair dismissal.
- However, a resignation is a voluntary termination of employment by the employee. It follows that if the resignation is not voluntary, the termination will not amount to resignation and will likely amount to a dismissal. The case of *Essex County Council v Walker*⁴ is a good example of this and has facts similar to those of our case. In that case, Brightman J stated that if the employee is expressly invited to resign, then the court will likely hold that the employee was dismissed. Accordingly, it is likely that Celine was indeed dismissed.
- Any employee is entitled to bring a claim for wrongful dismissal – there are no eligibility requirements – all that need be established is that the dismissal was in breach of the employment contract. On the face of it, it would not appear that Celine's employer has breached the employment contract, but we are not provided with any details regarding the content of Celine's employment contract.
- An unfair dismissal claim is more complex as several eligibility requirements are imposed. Celine must show that she is an employee and that she was dismissed – she will have no problem establishing these two requirements.
- Celine must also have been continuously employed by her employer for no less than one year. Initially, it would appear that Celine has not met this requirement as she was employed in February 2014 and was dismissed in January 2016. However, this is not the case. The period of employment begins on the day the employee begins work and ends on the 'effective date of termination.' The Employment Rights Act 1996, s 97 provides that where the contract is terminated by notice (by either party), then the effective date of termination is the date on which the notice expires. As Celine is required to give two months' notice and as she gave notice in January 2016, the effective date of termination will be at some point in March 2016. As she was employed in February 2014, she will

³ *The Times*, 4th October 2002 (EAT).

⁴ (1972) 7 ITR 280 (NIRC).

therefore have met the requirement for two years' service and will be eligible to bring a claim for unfair dismissal.

Problem question

In the following cases, calculate the basic award of compensation for unfair dismissal:

- Hywel is unfairly dismissed in May 2016, after working for his employer for eight years. At the time of his dismissal, he was 26 years old and was paid £325 per week.
- Gareth is unfairly dismissed in June 2016 – the reason for the dismissal being that he was an employee representative of a trade union. At the time of his dismissal, he was 27 years of age, had worked for his employer for three years and was paid £400 per week.
- Leslie is unfairly dismissed in July 2016, after working for her employer for twenty-five years. She has received redundancy pay calculated based on the statutory formula. At the time of her dismissal, she was 63 years old and was paid £550 per week.
- Hannah is unfairly dismissed in August 2016, after working for her employer for thirty years. At the time of her dismissal, she was 58 years of age and was paid £300 per week.

Introduction

- Before looking at each case, it is worth setting out how the basic award of compensation for unfair dismissal is calculated. Basically, the basic award is calculated by multiplying the employee's weekly pay at the time of dismissal by the number of years' continuous service.
- However, the following should be noted:
 1. The weekly pay is subject to a maximum limit, which is set out in s 186(1) of the Employment Rights Act 1996 and is currently £475 (note that this tends to increase every year).
 2. The number of years' continuous service is also subject to a maximum, namely twenty years.⁵
 3. Older employees receive more compensation than younger employees:
 - i. For each year served where the employee was under 22, he shall receive half a week's pay
 - ii. For each year served where the employee was over 22, but under the age of 41, he shall receive one week's pay
 - iii. For each year served where the employee was aged 41 or over, he shall receive one-and-a-half week's pay.
- Accordingly, the basic formula for calculating the basic award is:

Weekly wage × number of years service × age multiplier

Hywel is unfairly dismissed in May 2016, after working for his employer for eight years. At the time of his dismissal, he was 26 years old and was paid £325 per week.

- As Hywel is only earning £325 per week, the maximum weekly pay limit does not apply. Hywel worked for his employer for eight years, but for four of those years, he was under the age of 22. Accordingly, he will only receive half a week's pay for those years. Accordingly, using the formula stated above, Hywel will receive £650 for those four years, calculated as follows:

$£325 \text{ (weekly wage)} \times 4 \text{ (number of years' service)} \times 0.5 \text{ (age multiplier)} = £650.$

⁵ Employment Rights Act 1996, s 119(3).

- Hywel also served for four years when he was over the age of 22. He will receive a full week's pay for these years. Accordingly, for those years, he will receive

$£325$ (weekly wage) \times 4 (number of years' service) \times 1 (age multiplier) = $£1,300$.

- Combining the two will give us the total basic award that Hywel will receive, namely $£1,950$.

Gareth is unfairly dismissed in June 2016 – the reason for the dismissal being that he was an employee representative of a trade union. At the time of his dismissal, he was 27 years of age, had worked for his employer for three years and was paid $£400$ per week.

- As noted above, the weekly pay is subject to a maximum amount and, as Gareth was dismissed in June 2016, this amount is $£475$. As all of Gareth's time spent with his employer took place while he was over the age of 22, but under the age of 41, the basic award will be calculated as follows:

$£400$ (weekly wage) \times 3 (number of years' service) \times 1 (age multiplier) = $£1,200$.

- However, there is an added complication here. In certain cases, a minimum basic award will apply which, at the time of writing, is $£5,807$.⁶ One of these cases is where an employee is dismissed for being an employee representative under the Trade Union and Labour Relations (Consolidation) Act 1992.⁷ Accordingly, Gareth's basic award of compensation will amount to $£5,807$.

Leslie is unfairly dismissed in July 2016, after working for her employer for twenty-five years. She has received redundancy pay calculated based on the statutory formula. At the time of her dismissal, she was 63 years old and was paid $£550$ per week.

- This is a trick question. The Employment Rights Act 1996, s 122 grants the tribunal the power to reduce the basic award in certain cases. Section 122(4) provides that, where the employee has already received redundancy pay, this shall be deducted from the basic award.
- As redundancy pay calculated in virtually the same way as the basic award of compensation for unfair dismissal, the usual outcome is that, where s 122(4) applies, the employee receives no basic award.
- Accordingly, as Leslie has already received redundancy pay, she is unlikely to receive the basic award of compensation for unfair dismissal.

Hannah is unfairly dismissed in August 2016, after working for her employer for thirty years. At the time of her dismissal, she was 58 years of age and was paid $£300$ per week.

- As Hannah is paid only $£300$, the weekly wage maximum will not apply. Hannah has worked for her employer for thirty years, but the number of years' service is also subject to a maximum, namely twenty years.
- Three of the years she worked for her employer took place while she was under the age of 41. Accordingly, for those years, she will receive $£900$:

$£300$ (weekly wage) \times 3 (number of years' service) \times 1 (age multiplier) = $£900$

⁶ *Ibid*, s 122.

⁷ *Ibid*, ss 122 and 103.

- The remaining seventeen years were served while she was aged 41 or over. Accordingly, for those seventeen years, she will receive £7,650:

$£300$ (weekly wage) \times 17 (number of years' service) \times 1.5 (age multiplier) = £7,650

- Accordingly, her total basic award of compensation will be £8,550.