

# 4

# Employment Law

*Josh McLeod and Yvonne McLaren*

Employment laws are put in place to protect employees from any mistreatment from their employers, and are a vital part of a country's efforts to protect its citizens. Some countries are regarded as having very restrictive employment laws whilst others are regarded as more relaxed. According to the Organization for Economic Co-operation and Development (OECD), who analyse and compare employment protections in various countries, the UK, Canada and the USA have the most lenient laws whereas France, Spain and Turkey have the strictest. This chapter will focus on UK employment law, where workers' rights can be traced back to the 1300s and significant changes are still occurring today. By examining the UK's history of employment law, the contract of employment, corresponding rights and duties of both the employer and employee and the circumstances in which the contract of employment might come to an end, students will gain a valuable insight into a unique area of UK business law.

## The history of employment law

Until the 1950s, the relationship between employer and employee involved little regulation from UK government. This meant that the terms of any employment contracts were either determined by the customs and practices of the particular trade in which the employee engaged, or by the employer. Employers have historically enjoyed a stronger bargaining position than the employee, with the relationship often characterized as 'master and servant'.

The 1970s to 1990s saw increased legislative interventions by UK government which moved further towards a system of employment protections emanating from a desire to afford the employee a better bargaining position within organizations. Examples of this increased protection include the **Equal Pay Act 1970**; the **Health and Safety at Work Act 1974**; the **Sex Discrimination Act 1975**; the **Race Relations Act 1976**; the **Employment Protection (Consolidation) Act 1978** (now contained in the **Employment Rights Act 1996**).

### **The Employment Rights Act 1996**

This is a statutory law. A statutory law is a written law, where right and wrong is expressly stated. The ERA 1996 is one of the most pertinent statutes underpinning employment law. You can access all of the statutes for this Act at: [www.legislation.gov.uk](http://www.legislation.gov.uk)

In thinking about employment law it is helpful to have a basic understanding of the legal principles of **contract law**. Here, we will review the **Scots law of delict** (in England this is known as **tort law**) and of course, other countries will have their own equivalents.

### **Contract law**

Contracts are agreements voluntarily entered into by two or more parties, each of whom intend to create a legal obligation between them. Contract law refers to the body of law that governs these agreements and is concerned with aspects such as the nature of contracts, contractual obligations and termination.

### **Delict**

A delict is a legal wrong. Where a person has suffered wrongful loss at the hands of another, they are entitled to reparation for this loss.

It is important to note that reference to these areas of law is reflected in **Common Law** decisions and principles (case law). However, more recent developments will have significant reference to statutory law such as the ERA 1996.

### **The Common Law**

The part of the law that is derived from judicial precedent rather than statute. This means that instead of having the law set out in writing like the ERA 1996, decisions are made in consideration of similar cases that have happened in the past.

## **The institutions involved in employment law**

Various institutions of employment law exist that seek to resolve employment disputes before they take escalate. In the UK these include the Advisory Conciliation and Arbitration Service (ACAS), the Central Arbitration Committee (CAC), and the Equality and Human Rights Commission. After a dispute takes place, it must be resolved via the domestic courts. In Scotland this includes the Sheriff Court and the Court of Session. In England, the County Court and the High Court will perform a similar function. Most disputes, however, will begin their journey via the employment tribunal with appeals then being referred to the Employment Appeal Tribunal where appropriate. These tribunals were

created specifically to enforce employment rights which have been created via statute.

## ■ Employment tribunals

These independent judicial bodies were established via the **Industrial Training Act 1964**. The modern day employment tribunals started their lifespan as industrial tribunals with a name change from the 1<sup>st</sup> August 1998 via the **Employment Rights (Dispute Resolution) Act 1998**.

Employment tribunals are specialist tribunals generally comprised of one legally qualified chairperson (the employment judge), an individual nominated by an employer association and another person appointed by the Trades-Union Congress (TUC). The tribunals are constituted under the **Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2013**, while the jurisdictions and powers of employment tribunals are set out in the **Employment Tribunals Act 1996**.

A significant advantage of these specialist tribunals relates to the relative speed and informality of the process; there are no complicated procedural rules and an unrepresented party may be given assistance from the employment judge or lay members where matters are complicated. Further advantages might reflect the physical environment which will be less formal than a court. For example, no-one is likely to wear a wig or gown. This certainly supports the modern day alternative dispute resolution techniques which consider time, cost and control essential for parties in any dispute.

Within the Employment Tribunals, almost all hearings are open to the public, and evidence will be given under oath or affirmation. Decisions are based on the majority and a claim must generally be brought within three months of the effective date of termination of the contract of employment. Note that a person must have been employed for a minimum of two years in order to pursue a case via the Employment Tribunals.

## ■ The Employment Appeals Tribunal (EAT)

The EAT is a wholly appellate tribunal, which means that no cases will begin their journey here. Primarily, its role was established to hear appeals from employment tribunals on questions of law only. Appeals on questions of fact are only allowed in exceptional circumstances, on the grounds that a tribunal decision was so substantially defective that no reasonable tribunal could have arrived at that decision in ordinary circumstances. It may also hear appeals from decisions of the Certification Officer and The Central Arbitration Committee.

An individual may represent themselves at an EAT hearing or may be represented by any other person of their choosing (who may or may not be a lawyer). The main hearing of an appeal is held in public before the judge, who sits alone, unless the judge has directed that the appeal will also be heard by lay members. The hearing itself usually consists of legal arguments from each side, with the appellant making submissions first. Judgment may be given orally at the end of the hearing or may be reserved to be handed down at a later date. The Court of Session will hear appeals from the EAT, but permission must be given by the EAT.

## The employment contract

Only individuals employed under a 'contract of employment', otherwise known as a 'contract of service', have the legal status of being an employee.

Other workers who are employed to provide services for an employer, but do not have a contract of employment, are defined as independent contractors. This is known as a 'contract for services'. It is not uncommon for companies to have a mixture of employees and independent contractors working within their organization. However, there are a number of implications for workers who do not work under a contract of employment. Perhaps the most significant distinction is that statutes, such as the ERA 1996, confer employment protection rights only upon employees, which includes protection against unfair dismissal, entitlement to compensation in case of redundancy and a right to a minimum notice period of termination. In addition, employers may be liable for delicts committed by employees during the course of employment, but this is not the case for independent contractors. There are also a variety of terms that are implied into a contract of employment such as the duty of faithful and loyal service. In some instances, this duty means that an employee cannot carry out the same work for an employer's competitor. An independent contractor, however, has no duty of faithful and loyal service.

### **Contract of employment**

A contract of employment is an agreement between employer and employee that acts as the basis for the employment relationship. It will set out the employment rights, responsibilities and duties. Although most employment contracts do not need to be in writing to be legally valid, this is desirable in case of a dispute.