Labour law

Aileen McColgan
This subject guide was prepared for the University of London External Programme by:

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This is one of a series of subject guides published by the University. We regret that owing to pressure of work the author is unable to enter into any correspondence relating to, or arising from, the guide.

If you have any comments on this subject guide, favourable or unfavourable, please use the form at the end of this guide.
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Chapter 1 Introduction

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1.1 Why study Labour law?
Labour law is concerned with the regulation of employment, that is, the regulation of relationships between:

(i) employers and workers
(ii) employers and trade unions
(iii) trade unions and their members.

The subject is a very important one both practically and, at a more theoretical level, in understanding the politics of the country whose labour law is studied. It is of particular interest to those students also interested in politics or economics.

1.2 Aims and objectives of the course
The course aims to provide students with a solid grounding in labour law. It does not set out to cover the subject comprehensively. Rather, it attempts to give you a strong, critical grasp of some of the important issues which arise in the area, as well as a broad picture of the shape of the subject in general.

The objectives of the course are to enable students:

☐ to understand the legal framework within which UK labour law operates, with emphasis on contextual elements such as industrial relations, employment practice, the impact of economic, social and political policy, and the impact of membership of the European Union

☐ to identify and critique the nature and scope of problems or disputes faced by employing enterprises and employees/workers that may be the subject of legal resolution or otherwise
to understand, evaluate and apply the legal rules and concepts regulating employment relationships at both collective and individual levels

- to appraise the effectiveness of the law in regulating industrial relations and individual employment relationships.

1.3 How to use this subject guide

This guide is a suggested outline of your reading for the main topics falling within the Labour law syllabus. Under no circumstances should you regard it as playing the role of a textbook.¹

You should work through the subject guide from start to finish. Each chapter sets out to outline the main elements in the subject area covered, but you will not have any real grasp of these subjects unless you read all of the Essential reading together with a fair proportion of the additional cases and Further reading (some of these readings are referred to repeatedly). You should attempt to answer the questions provided throughout each chapter and, once you have read all the material required in each chapter, you should attempt to answer the Sample examination questions provided. If you experience undue difficulty, re-read the recommended material using the text in the chapter as a guide. Learning outcomes listed in the chapter give you an easy means of checking how well your knowledge and understanding have developed.

Internal students are expected to spend about ten hours per week on Labour law, over a period of about 24 weeks, plus about 60 hours’ revision – a total of about 300 hours.

1.4 Current examination format and techniques

Examination is by one three-hour paper which combines essay-type with problem-type questions. You will be allowed to take a statute book into the examination: the up-to-date Blackstones Employment Law Statutes or the Butterworths Employment Law Student Statutes or Employment Law Handbook are all acceptable.

As far as examination technique is concerned, you must:

- read each question on the paper **thoroughly** and **at least** once, before you begin to write anything
- once you have decided which questions to attempt, **write a plan** of your answer
- **answer the question as it is asked.** Do not, under any circumstances, simply write down all that you know about the subject to which the question relates. Many students make this mistake when answering essay questions, so be particularly on your guard when you are writing essays. However, the same rule applies to problem answers
- try to be as **clear and concise** as possible in your answers. This applies as much to **how** you write as to **what** you write. Nothing is more infuriating for an examiner than struggling with illegible writing.
- be **strict with yourself about time.** Once you have read the questions and have decided which to answer, divide the remaining time into four equal parts and try not to exceed

¹ You should focus your study around your textbook, Collins, H., K.D. Ewing and A. McColgan, Labour Law: Text and Materials. See section 1.5.
your allowance for each question by more than a few minutes. Otherwise, your final, rushed answer may cost you one or more grades in the examination result.

For further advice on examination technique see the Advice on answering the sample examination questions throughout.

1.5 Course reading

The core textbook for this subject is:


In the remainder of this guide we will refer to this text as ‘Collins, Ewing and McColgan’.

You may also find it useful to read the latest editions of:


These books are regularly updated and it is always useful to check what is the most recent edition.

You should read Chapter 1 of Collins, Ewing and McColgan before you start to work through the subject guide.

1.6 Plan of the guide

Chapter 2 deals with the contract of employment, outlining the nature and role of express and implied contractual terms and the issues surrounding the variation and enforcement of contractual employment terms.

Chapter 3 considers various statutory employment protections, including the national minimum wage and the regulation of working time, together with various time off rights.

Chapter 4 deals with the area of discrimination law, an increasingly complex subject over recent years, and tries to give a principled outline of this difficult area.

Chapters 5 and 6 deal with dismissal: Chapter 5 with contractual issues relating thereto, and Chapter 6 with statutory protection.

Chapter 7 considers the role of collective bargaining: the extent to which employers can be required to engage in such bargaining and in the exchange of information, etc., with their employees.

Chapter 8 concludes by looking at industrial action: the liabilities faced by trade unions and individuals who participate in such action and the extent to which statute provides protection from such liabilities.
### 1.7 Glossary of abbreviations

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<td>All ER</td>
<td>All England Law Reports</td>
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<td>CA</td>
<td>Court of Appeal</td>
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<td>Central Arbitration Committee</td>
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<td>Disability Discrimination Act 1995</td>
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<td>EC</td>
<td>European Community</td>
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<td>European Convention on Human Rights</td>
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<td>European Court of Justice</td>
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<td>ERA</td>
<td>Employment Rights Act 1996</td>
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<td>EqPA</td>
<td>The Equal Pay Act 1970</td>
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<td>ET</td>
<td>Employment tribunal</td>
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<td>EU</td>
<td>European Union</td>
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<td>GOQ</td>
<td>Genuine Occupational Qualification</td>
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<td>Genuine Occupational Requirement</td>
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<td>HL</td>
<td>House of Lords</td>
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<td>Industrial Case Reports</td>
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<td>Institute of Employment Rights</td>
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Your next step:

**Read Chapter 1 of Collins, Ewing and McColgan.**
Chapter 2 The contract of employment

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Introduction

The contract of employment is the cornerstone of the employment relationship. It outlines many of the rights and obligations of the employment relationship. Further, it provides the basis on which the structure of statutory protection is built. Statutory protections provide a floor of employment rights. But in many cases they are conditional on the existence of a contract of employment (rather than, for example, on a contract for services). Further, their operation depends on contractual notions such as contractual termination (dismissal) and can be blocked by contractual concepts such as frustration.

This chapter considers the definition of the contract of employment, the content of the contract (that is, the source of express terms and the source and content of typical implied terms). It also provides an introduction to questions of enforcement, though these are for the most part dealt with in Chapter 3, which covers contractual questions arising from dismissal.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- explain the main tests which distinguish between a contract of employment (also known as a contract of service) and a contract for services or other non-employment form of relationship
- explain in outline why this distinction matters
- outline the main sources of express contractual terms
- distinguish between a statement of written particulars and a contract of employment
- list the different types of implied terms which apply in the employment context and the main implied terms binding employers and employees
- explain the relationship between express and implied terms in the context of employment
describe how an employer may lawfully alter the terms and conditions under which an employee works
explain how an employee who wishes to resist such changes might do so.

2.1 Definition of the contract of employment

Essential reading

- Collins, Ewing and McColgan, Chapter 2: 'The employment relation', sections 2.1, 2.7.

The employment relationship is founded upon the ‘contract of employment’, so no-one is properly regarded as an ‘employee’ unless he or she is employed under a contract of employment (otherwise known as a contract of service and distinguished from a contract for services). Many employment rights (the right to claim unfair dismissal and redundancy, for example) are dependent upon the worker qualifying as an employee. In addition, the question whether or not an employee has been dismissed will turn in part on the contract of employment.

Yet the definition of a ‘contract of employment’ is far from clear and, worse still, the tests applied often vary between the courts which apply labour law and the bodies charged with determining whether or not someone is an employee for tax or social security purposes. Happily, you only have to grapple with the tests which have developed from the ‘mixed test’ applied by the Court of Appeal in Ready Mixed Concrete through the decisions of the Employment Appeal Tribunal in Nethermere (St Neots) Ltd v Gardiner and O’Kelly v Trusthouse Forte and, most recently, of the House of Lords in Carmichael v National Power.

Recent interesting developments include the decision of the Court of Appeal in Dacas, while the decision of the ECJ in the Allonby case casts doubt on the lawfulness as a matter of European law of the restriction of employment rights to ‘employees’ alone. This may have important implications for future developments.

Activity 2.1

Alice is a worker who is supplied by an agency which directly pays her wages to a contracting company, which is responsible for determining her conditions of employment and hours of work and disciplinary issues relating to her, and at which she has worked for 12 years continuously before it decides to 'let her go'.

(a) Decide who is likely to be Alice’s employer.
(b) Suggest alternative footings upon which the employment relationship might be based and list the possible advantages and disadvantages each might have over the existing situation.

1 ‘Let someone go’: a euphemism for dismissal or ‘sacking’.
Prepare a list of factors likely to point towards employment status, and a list of factors likely to be regarded as inconsistent with that status.

Feedback: see page 21.

Summary

It is frequently important to be able to determine whether a worker is properly classified as an ‘employee’ or not. The answer to this is far from straightforward in many cases, and can only finally be determined by the court. Guidance is, however, available from the case law discussed above and in more detail in the reading.

Self-assessment questions

1 Why is it important to determine whether or not a worker is employed under a contract of employment? (You should consider the types of statutory rights which are, and those which are not, dependent on employee status.)

2 What are the main tests applied in determining this issue? (See O’Kelly and Nethermere as applied by the House of Lords in Carmichael.)

3 What is the significance of the decision of the ECJ in Allonby? (See in particular the discussion of ‘employee’ versus ‘worker’ as the basis of protection for European law purposes, in Chapters 3 and 4.)

4 How does the classification of the employment relationship help the employer to achieve flexibility? What are the costs to workers? (This calls for consideration of what employers might gain by avoiding, for example, liability for unfair dismissal.)

5 What is the purpose of section 23 Employment Relations Act 1999?

Useful further reading


2.2 Express terms

Contracts of employment, like all other contracts, consist of express and implied terms. The express terms are those terms to which the parties have actually agreed (although, of course,
agreement can be shown by signing a contractual document without reading its terms, or by acting in a particular way without actually intending to signify agreement). Implied terms, which you will also have come across in your Elements of the Law of Contract course, are inserted by the courts for a variety of reasons. They are dealt with below.

The questions which arise with express terms relate primarily to what those terms are. In contrast with many other types of contract, the express terms of contracts of employment are rarely to be found in one place: because contracts of employment subsist over long periods of time, their terms are frequently to be found in a variety of different documents and verbal agreements as well as in the formal ‘contract’, if indeed there is any such document.

Few employees actually have a formal written ‘contract’, although employers are required to issue all employees with a written statement of their important contractual terms (ss.1–7 Employment Rights Act 1996). You need to be familiar with the contractual terms that must be included in this statement. But it is also important to bear in mind that, unless the parties to the contract of employment demonstrate otherwise, the statement of written particulars is not itself the contract of employment – it is just the employer’s statement of what he or she believes the various terms of the contract to be. The written statement is only evidence of the various contractual terms and, unless the employee has agreed that it accurately represents those terms (usually by signing the statement as a contract of employment – see Gascol Conversions Ltd v Mercer, discussed in Collins, Ewing and McColgan section 2.6.2), it is not binding on the employee.

If there is no written contract of employment, or if any such contract is incomplete, where are the express terms of the employment contract to be found?

The most important source of contractual terms for most public sector employees is the collective agreement between their employers and a trade union, whether or not the employee is a member of that trade union. Collective agreements cover markedly fewer private sector employees. Collectively agreed terms cannot bind third parties (i.e. employees, whether or not they are union members) in the absence of their agreement, but collectively agreed terms may be incorporated into individuals’ contracts of employment either expressly or impliedly. An example of express incorporation can be seen in Anderson v Pringle. Implied incorporation is more difficult – see Singh v BSC for a case in which the court refused to find that such incorporation had occurred. Nor are all contractual terms suitable for incorporation – see NCB v NUM for the distinction between those terms which are and are not appropriate for incorporation.

Collective agreements are not the only source of contractual terms. As with any other contract, the express terms consist of those agreed to by the parties whether verbally or in writing (though it will be difficult to prove the existence of verbally agreed terms in case of dispute). Among the places where contractual terms might be found are letters of appointment (see Robertson v British Gas) and oral or written agreements either prior to or during the course of employment. More recently, the House of Lords has accepted that terms may be incorporated from equal opportunities policies –
see Taylor v Secretary of State for Scotland. Another possible source of contractual terms is the company rule book, though this is for the most part the employer’s statement of how it will exercise its managerial prerogative and (see Secretary of State v ASLEF) is certainly not to be regarded as contractual in its entirety.

### Activities 2.2–2.4

2.2 Draw up a model statement of written particulars for Bob, a supermarket cashier, including all the information required by s.1 ERA.

2.3 List the sources of any additional express contractual terms of employment that might be applicable to Bob.

2.4 Describe the relationship between the contract of employment and the written particulars of employment.

*Feedback: see page 21.*

### Summary

Express contractual terms are those which have been explicitly agreed – whether in writing or otherwise – between the parties to a contract. These should be evidenced in the written statement of particulars which an employer is obliged to provide to employees but they may also be found in sources as diverse as the letter of appointment and any collective agreement applicable to the employee (whether or not she is a member of the trade union).

### Self-assessment questions

1. Under what circumstances are terms of collective agreements legally enforceable?

2. What is the relationship between the statement of written particulars and the ‘contract of employment’? When are the two one and the same?
### 2.3 Implied terms

#### Essential reading

- Collins, Ewing and McColgan, Chapter 2: ‘The employment relation’, sections 2.2, 2.3, 2.5, 2.6.1, 2.6.3, 2.6.6.

Implied terms are those terms which are inserted by the courts to fill the gaps left by the express terms to which the parties actually agreed. Contracts of employment are peculiarly reliant upon implied terms because they subsist over such long periods of time (during which events are likely to occur which have neither been foreseen nor provided for in advance by the parties). Terms may be implied:

- on the basis that they are necessary and the parties would either have agreed to them had they thought of them at the time of contracting – or, more controversially, would have done so had they been behaving reasonably
- from **custom and practice**, although the test for this is not easy to satisfy.

In addition, the courts have become increasingly ready to insert terms into the contract of employment not, as was traditionally the rationale behind implied terms, on the assumption that the parties would have included these terms had they thought about it at the time, but, rather, because these are the type of terms which a contract of employment **should** contain.

Among the commonly implied terms are:

- the employee’s duties of:
  - co-operation (*Cresswell v Inland Revenue*)
  - confidentiality (*Faccenda Chickens v Fowler*)
  - fidelity (*Secretary of State v ASLEF*, *Ticehurst v BT*)
- the employer’s duties:
  - to safeguard employees’ health and safety (*Johnstone v Bloomsbury Health Authority*)
  - to provide employees with necessary information about their contractual rights (*Scally v Southern Health & Social Services Board*)
  - to exercise due care in drawing up any references supplied (*Spring v Guardian Assurance*)
• (increasingly) to provide employees with work (*William Hill v Tucker*)

• and, most important of all, not to act in such a manner as to destroy the trust and confidence which should exist between employer and employee (*United Bank Ltd v Akhtar, Bliss v South East Thames*).

This last term has become of overarching importance in recent years but for the limits of its onward march, see the decision of the House of Lords in *Johnson v UNISYS*.

The general view is that, because implied terms can do no more than to fill the gaps left by the express agreement of the parties, implied terms can never contradict expressly agreed terms. To see how close the courts have come to overriding this in the context of employment see *Johnstone v Bloomsbury Health Authority* and *United Bank v Akhtar*.

**Activity 2.5**

(a) List the most significant implied terms binding (i) employers and (ii) employees.

(b) Write a memo describing the extent to which implied terms can modify or restrict the application of express terms.

(c) List at least four different applications in the case law of the implied terms of mutual trust and confidence (hint: *Akhtar* illustrates one, *Bliss* another).

(d) What role is played by implied terms in regulating the employment relationship?

(e) How does the decision of the house of Lords in *Johnson v UNISYS* limit the application of the implied term of mutual trust and confidence?

*Feedback: see page 21.*

**Summary**

Implied terms have a very important role to play in the contract of employment, filling in many of the gaps inevitably left by expressly agreed terms and, contrary to the orthodox view of the role of implied terms, in some cases modifying the operation of express contractual terms.

**Useful further reading**

- Lindsay, Mr Justice 'The implied term of trust and confidence' *Industrial Law Journal*, 30(1) 2001 pp.1–16.

Reminder of learning outcomes

By this stage you should be able to:

- explain the main tests which distinguish between a contract of employment (also known as a contract of service) and a contract for services or other non-employment forms of relationship
- explain in outline why this distinction matters
- outline the main sources of express contractual terms
- distinguish between a statement of written particulars and a contract of employment
- list the different types of implied terms which apply in the employment context and the main implied terms binding employers and employees
- explain the relationship between express and implied terms in the context of employment.

2.4 Variation and enforcement

Essential reading


We have already come across the issue of variation in cases such as Singh v BSC (see also Marley v Forward Trust). Employers are not entitled unilaterally to alter employees’ contractual terms. On the other hand, employers may be able to require alterations in the way in which employees work either where these alterations fall within the scope of the employees’ duty of co-operation (Cresswell) or where they are permitted by some express contractual term (United Bank v Akhtar, White v Reflecting Roadstuds).

A unilateral attempt by an employer to force through contractual change in the absence of agreement on the part of his or her employees will amount to a breach of contract, just as a refusal on the part of an employee to abide by his or her contractual terms would amount to a breach. How may the contract of employment be enforced in such cases? The normal contractual position is that, in a situation where one of the parties breaches one or more contractual terms, the other party may choose to:

- affirm the contract (that is, continue to perform his or her contractual obligations) and sue the other party for damages
- or, providing that the breach is sufficiently serious, treat the contract as at an end and sue for damages.
These rules generally apply as far as the contract of employment is concerned: where, for example, an employer commits a breach of contract by failing to pay wages the employee may continue to work for the employer and may sue for damages in respect of the unpaid wages (see *Rigby v Ferrodo*); or the employee may choose to treat the contract as at an end, claim constructive dismissal (see Chapter 5) and sue for the unpaid wages and for any other damages arising from the dismissal. Alternatively, the employee may seek an injunction to prevent continuing breach of contract by the employer (*Hughes v Southwark*). Where the employee breaches the contract the employer may equally choose to continue with the employment relationship and sue for damages (although this is very rare in practice) or to treat the contract as at an end and to sue (again, suit for damages on the part of employers is rare as employees are generally not worth suing). The only point to take note of here is that, even if the employer terminates in response to the employee’s breach of contract, the employee is still regarded as dismissed as a matter of law. Whether he or she will be regarded as unfairly or wrongfully dismissed is, however, another question which will be considered in Chapters 4 and 5.

The difficulty which does arise relates to employers’ attempts to dismiss employees in breach of their contracts of employment. Where an employer informs an employee that he or she is dismissed in a situation in which the contract of employment does not permit such a dismissal (where inadequate notice is given, for example, or dismissal occurs without the employer having put into action a disciplinary procedure required by the employee’s contract) the dismissal itself will be a breach of contract by the employer. This being the case, the normal rule is that the employee remains free:

- either to accept the employer’s breach, consider him or herself dismissed and sue for damages
- or to affirm the contract, refuse to accept the dismissal and continue to regard him or herself as employed (see *Gunton v Richmond-upon-Thames*).

This issue is considered further in Chapter 4.

### Activities 2.6–2.9

2.6 You are asked to advise Albert, whose employer has told him that his hours of work and pay are to be reduced by 20 per cent. Consider what questions you will need to ask to determine whether there has been any actual or threatened breach of contract by the employer.

2.7 Explain the difference between the unilateral and elective theories as they apply to dismissal in breach of contract. What does the partial survival theory add?

2.8 To what extent can employers force changes onto workers?

2.9 What is the effect on the contract of employment of unilateral changes imposed by an employer?

*Feedback: see pages 21 and 22.*
**Self-assessment question**

1 What is the legal status of a company rule book?

2 When may an employer change the express terms of a contract without breaching the contract?

**Sample examination questions**

**Question 1** Critically evaluate the tests which the courts use to determine whether a worker is an employee for the purposes of employment protection legislation.

**Question 2** Describe the operation in the contract of employment of express and implied terms. To what extent can implied terms control the operation of express terms (a) during, and (b) at the termination of employment?

**Question 3** How far, if at all, have implied terms developed over recent years to provide effective protection to employees?

**Question 4** How can the contract of employment lawfully be varied? Does the existing law adequately respond to the need of employers for flexibility in working conditions, and adequately protect workers who do not want to have their terms of employment changed?

**Question 5**: ‘In determining who is an “employee”, the courts have tended to swing between a contractual approach and one which is sensitive to the social policy aim of distinguishing the genuinely independent worker from the worker requiring employment protection.’

Is this a valid criticism of the case law? How successfully have recent statutes broadened the personal scope of employment protection laws?

**Question 6** What is the relationship in contracts of employment between express and implied contractual terms? How has the law in this area developed in recent years?

**Advice on answering the questions**

**Question 1** This question calls for a review of the rules distinguishing ‘employees’ employed under contracts of employment or of service from ‘workers’ employed under contracts for services. A good answer would take into account the historical tests (control and integration) and note the mixed test (Ready Mixed Concrete) and the rise of ‘mutual obligation’ (Kelly, Nethermere, Carmichael). It would point out the shortcomings of the current approach (in particular the potential for employee abuse since the employer can avoid incurring obligations in order to avoid incurring statutory responsibilities towards workers). It would also note when the test is applied (i.e. in relation to unfair dismissal and redundancy but not working time or discrimination other than that connected with trade union status) and perhaps suggest an alternative approach which might be adopted by the courts or the legislature.

**Question 2** A good answer to this question would begin with an introduction which outlined in brief the meaning of express and implied employment terms and the way in which they relate to each other as a matter of orthodox contract law. It would then go on to consider the operation of implied terms – in particular the

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3 Note that you are asked to critically evaluate the tests.
implied term relating to mutual trust and confidence, and explain
that the development of this term has begun to cast doubt, in the
employment context, on that orthodoxy inasmuch as the courts
have permitted the operation of express terms to be regulated by
the implied term relating to mutual trust and confidence.

The discussion of the operation of implied terms on express terms
during employment might be expected to focus on decisions such as
United Bank v Akhtar and Johnson v Bloomsbury, perhaps in
conjunction with a selection of more recent authorities, in which
the courts have limited the operation of express contractual terms.
The issue which arises in relation to the termination of employment
is, most significantly, the decision of the House of Lords in Johnson
v UNISYS in which their Lordships refused to allow the operation of
the implied term relating to mutual trust and confidence to give
rise to a claim for damages for the manner of dismissal. Some
consideration of this case would be expected together with, in a
good answer, some conclusion as to why the courts have restricted
the development of the implied term in this particular context.

Question 3 This is a fairly general question on implied terms and
gives you a fair degree of scope to create your own answer. Among
the issues which ought to be addressed are:

(1) the range of implied terms as they protect employees

(2) the extent to which they are balanced by terms imposing
obligations on employees

(3) the development of the implied term relating to mutual trust
and confidence, as this is the most significant term protective of
employees and to some extent appears to be swallowing up other
implied terms

(4) the extent to which implied terms – and particularly that
relating to mutual trust and confidence – regulates the express
terms of employment

(5) the restrictions recently imposed by the House of Lords in
Johnson v UNISYS on the operation of the implied term relating to
mutual trust and confidence in the context of dismissal.

A good answer would address most of these areas before reaching
some conclusion as to how effective the protection outlined is.

Question 4 This question first calls for an introductory section on
the circumstances in which contracts of employment can lawfully
be varied before asking for a critical engagement with that legal
position. The answer is that contracts of employment – like other
contracts – can only be varied by agreement. However, many
contracts are inherently flexible inasmuch as they incorporate
collective change mechanisms (collective agreements). Further,
many terms of employment are not regarded as contractual but
as entailing the exercise of managerial discretion and are therefore
subject to change at the behest of the employer.

Does the existing law adequately respond to the need of employers
for flexibility in working conditions? An answer to this entails
recognition of the situation outlined above and of the fact that
contracts of employment can generally be terminated by notice
with the effect that no wrongful dismissal claim will succeed
unless the employer has simply forced through change without
formal dismissals in which case the employees might successfully
claim constructive dismissal. Even damages for wrongful dismissal, however, is likely to result in little more than pay in respect of the proper notice period. An unfair dismissal claim is possible but more than likely will be successfully defended on the basis that there was some other substantial reason for dismissal. However, Rigby v Ferodo and sections 1–8 of the Employment Rights Act 1996 demonstrate that employers need to be careful about imposing unilateral changes especially in relation to wages.

This suggests that there is little protection for employees who – although their contracts cannot in theory be varied without their consent – can nevertheless find themselves jobless without recourse to significant remedy.

**Question 5** This question asks for a focused discussion of the case law concerning the definition of 'employee'. The ERA defines 'employee' as someone working under a contract of employment or service, as distinct from a contract for services or otherwise. A good answer should discuss the historical development of the law in this area very briefly (control/integration/mixed test) before discussing in some more detail the 'mutuality of obligation' test established in Nethermere and O'Kelly and applied by the House of Lords in Carmichael. Remember, however, to answer the question, and the theme you will need to focus on is whether you agree with the swing suggested by the question. Some evidence of it might be found in the recent cases concerning agency workers in which some sympathy has been shown by the courts (which have however tended to maintain a fairly strict contractual approach) as well as in cases such as Lane v Shire Roofing in which health and safety was at stake.

As to the second part of the question, this only requires a brief résumé of the recent trend to providing rights to 'workers' or (as in the recent discrimination provisions) 'employees' defined to include anyone working under a contract personally to perform any work or service (a definition which covers many independent contractors). While a broad approach has always been taken in the discrimination context it has recently been applied also to the NMW and working time regulation, though not in relation to fixed term workers or parental/maternity leave. Some mention should ideally be made of s.23 ERA.

**Question 6** This calls for a discussion of the orthodox position (that implied terms fill the gaps left by express terms) and a recognition that, in the context of contracts of employment, this position has been significantly compromised by the growth, in particular, of the implied term relating to mutual trust and confidence. A good answer to this question would discuss cases such as United Bank v Akhtar and Johnstone v Bloomsbury, in which the courts have allowed implied terms to regulate the exercise of express contractual powers by the employer; also the duty of fidelity as it has been applied in cases such as Secretary of State v ASLEF and Ticehurst v BT. It would then draw some conclusions as to where this leaves the contract of employment by comparison with the more general approach to contract.
Feedback to the activities: Chapter 2

Activity 2.1  
(a) Of particular significance here will be the decision of the Court of Appeal in Dacas.  
(b) Particularly helpful here is the article by Hepple listed in Useful further reading.  
(c) Especially useful here is the decision of the Court of Appeal in the O’Kelly case.  

Activity 2.2  No feedback provided.  

Activity 2.3  These should include any letter of appointment, collective agreement, and works rule book.  

Activity 2.4  Significant here is the fact that the written particulars, unless signed as a contractual document, are just the employer’s view of what the contractual terms consist of and are not conclusive as to the contract.  

Activity 2.5  
(a) Your answer should include (but not be limited to) (i) the duty relating to mutual trust and confidence, the duty to preserve the health and safety of the employee, the duty to pay wages, the duty to provide work, at least where the payment of wages is dependent on this; (ii) the duty of fidelity, the duty of confidentiality, the duty to co-operate.  
(b) This memo should take into account the decisions in United Bank and in Johnson v Bloomsbury as well as more recent developments in the case law.  
(c) These might include:  
- preventing an employer from relying on the express terms of the contract in such a way as to make the performance of the employee’s contractual duties impossible or nearly so (Akhtar)  
- preventing an employer from acting in bad faith in relation to the employee as regards allegations of incapability (Bliss) or enhanced terms and conditions: Transco plc v O’Brien [2002] ICR 721 (discussed in Collins, Ewing and McColgan)  
- preventing an employer from conducting itself in such a way as to damage the future employment prospects of its staff (Mahmoud v Bank of Credit and Commerce International)  
(d) Important here is the distinction between an attempt to utilise the term to control the manner of dismissal, and in relation to conduct prior to the dismissal.  
(e) No feedback provided.  

Activity 2.6  You will have to determine whether such a reduction is actually permitted by his contract. Documents which will assist are Albert’s written particulars (particularly if signed by him as a contract); any other documents issued which purport to be a contract; any letter of appointment and any collective agreement.
You will also need to consider whether any collective agreement is actually applicable to him and, if so, how.

**Activity 2.7** Particularly helpful here is the decision of the Court of Appeal in *Gunton*.

**Activity 2.8** You might like to distinguish between what is **lawful** in terms of enforced change and what employers can get away with. You will be able to deal better with the latter question after you have looked at remedies for dismissal. As to the former question, it really concerns the extent to which employers can lawfully demand flexibility whether by way of the duty of co-operation (*Cresswell*) or because the terms of the contract itself requires it (such as in the case of a mobility clause). Also significant here is the extent to which the implied terms (especially the term relating to trust and confidence) modify the operation of express terms.

**Activity 2.9** This is really a question about the **automatic** and **elective** theories of termination – see question 2 above.
Chapter 3 Statutory employment rights

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Introduction

Statutory regulation of the employment relation has become increasingly important over recent decades with the decline of collective bargaining and the increasing influence of European law. Much of this influence is seen in the discrimination law provisions, which are discussed in Chapter 4. But it is also manifested in provisions regulating working time and parental leave, which are discussed here, as are aspects of home-grown regulation such as minimum wage regulation. Also of great practical significance is the law relating to health and safety which is outside the scope of the syllabus.

Learning outcomes

By the end of this chapter and the recommended reading you should be able to:

- summarise the extent to which UK law regulates the payment of wages
- detail the extent to which the Wages Act 1986 prohibits deductions from wages
- explain the main provisions of the statutory entitlement to maternity and parental leave
- critically evaluate the Part-time Workers Regulations
- explain the operation of the Working Time Regulations.
3.1 The regulation of wages

Essential reading

- Collins, Ewing and McColgan, Chapter 2: ‘The employment relation’, sections 2.2.1 and 2.2.2; Chapter 4 ‘Protecting the work/life balance?’, section 4.5.

The UK was, until very recently, one of the few developed countries in which wages were regulated neither by a legal minimum wage nor by high levels of collective bargaining. This all changed with the implementation of the National Minimum Wage Act 1998. The Act operates by imposing a minimum wage which is enforceable by an Inspectorate and as an implied term of contract by workers themselves. The main criticisms levied at the minimum wage have related to its relatively low level and its limited application (and application at a lower rate) to younger workers. Early predictions that it would impact on employment rates appear not to have been fulfilled. The Act and associated Regulations deal variously with ‘time work’, ‘output work’ and ‘unmeasured work’.

The other statutory protection of wages consists in ss.13–27 ERA (formerly the Wages Act 1986), which prohibit unauthorised deductions from wages. The first important restriction on the protection afforded by ss.13–27 ERA consists of its non-application to deductions made on account of industrial action – see Miles v Wakefield, Wiluszynski v Tower Hamlets for the employer’s contractual powers in this respect. It is important to note here that, as we saw in Chapter 2, breach of implied duties such as fidelity can also amount to breach of contract by the employee (see British Telecom v Ticehurst). Such a breach will also entitle the employer to make deductions in line with Miles and Wiluszynski. Secondly, the protection of the ERA does not extend to deductions made from, or total non-payment of, monies due in respect of any notice period. This particular restriction has been of less importance, however, since the jurisdiction of the industrial tribunals was extended in the wake of the Trade Union Reform and Employment Rights Act 1993 to cover contractual claims such as a claim for pay in lieu of notice which arise on the termination of employment.

In addition to the statutory protections available in respect of the payment of wages, contract provides that, where one of the parties breaches one or more contractual terms, the other party may continue to perform his or her contractual obligations and sue the other party for damages or, providing that the breach is sufficiently serious, treat the contract as at an end and sue for damages. These rules apply to permit an employee to continue to work for the employer and sue for damages in respect of the unpaid wages in a case in which the employer breaches the contract by reducing wages unilaterally (see Rigby v Ferrodo).

1 The minimum wage is paid at a reduced rate in the case of workers aged under 22 and in some training contexts, and was inapplicable until October 2005 to those aged 16–17.
Activities 3.1–3.2

3.1 Find out what the current rates of the NMW are and to whom they apply.

3.2 Prepare a short verbal presentation explaining employers’ ability to penalise limited industrial action by withholding wages.

Feedback: see page 33

Summary

UK law imposes a national minimum wage under the 1998 Act, and, in addition, provides workers with protection against unauthorised deductions from their wages.

Self-assessment questions

1 How may an employee challenge a unilateral pay cut by the employer (a) under the ERA, and (b) at common law?

2 How is the NMW enforced?

3 What is the present rate of the NMW for those over 21?

3.2 The regulation of working time

Essential reading

- Collins, Ewing and McColgan, Chapter 4: ‘Protecting the work/life balance?’, sections 4.1, 4.2 and 4.5.


The regulation of working time – in particular, the protection of workers against over-long working hours – has increasingly become a concern over recent years, not least in the UK whose workers have the longest average hours in the EU.

The Regulations impose limits on maximum daily and weekly hours and night work and entitle all workers to a minimum four weeks’ annual paid leave. In their original form they excluded many workers from their scope but many of these have subsequently been brought within the Regulations. The Regulations operate through workforce agreements or, by way of default, through detailed provisions set out therein. Their most controversial aspect is the scope they provide for ‘contracting out’ and their limited application to ‘voluntary’ overtime work. At European level much attention has been focused on the application of the Directive to ‘on call’ work – see SIMAP and, more recently, the Jaeger case (discussed in Collins, Ewing and McColgan, section 4.5.4). The recent proposals for amendment to the Directive are also discussed there.
The ever-lengthening average hours of full-time workers have been accompanied in the UK, and elsewhere, by an increase in part-time working. Women account for the vast majority (over 80 per cent) of part-time workers, and almost half of all women in the paid workforce work part-time. The increase in part-time working, and the prevalence thereof, is not evenly spread across industrial or occupational sectors. Many part-time jobs are low-paid and low-status.

At the European level, efforts have been made to increase part-time working as an aspect of ‘flexibility’, which is currently a high priority for the EU. It was in this context that Council Directive 97/81/EC was agreed. The Directive, transposed into the UK by the Part-time Workers Regulations, proscribes some forms of discrimination against part-time workers. It must be understood in conjunction with the prohibitions on indirect sex discrimination, further considered in Chapter 4. Neither the Directive nor the implementing Regulations require that jobs be made available on a part-time basis, though they do prohibit some forms of discrimination against part-time workers who have (narrowly defined) full-time equivalents.

Activity 3.3

(a) Explain the extent to which the Working Time Regulations protect workers from excessive hours of work. Are the protections offered by the Regulations sufficient to protect workers?

(b) See if you can find out what has happened to the proposals to amend the Working Time Directive so as to alter or remove the ‘individual opt out’ and to deal with its application to ‘on call’ time.

(c) Outline the role played by ‘workforce agreements’ in the application of the Working Time Regulations and explain the relationship between such agreements and (a) collective agreements, and (b) individual opt-outs.

(d) Explain the operation of the Part-time Workers Regulations. In particular, to what extent do they require that a part-time worker make his or her claim by reference to a comparator?

(e) To what extent is the Part-time Workers Directive, as transposed into domestic law in the UK, adequate to deal with the disadvantages suffered by part-time workers?

Feedback: see page 33.

Summary

The Working Time Regulations provide a number of protections from excessive working time, and entitle workers to periods of rest and annual leave. There is a degree of uncertainty at the time of writing over the future content of these Regulations as a result of proposed amendments to the Directive on which they are based. The Part-time Workers Regulations provide part-time workers with some protection from discrimination associated with their part-time status.

2 The typical ‘working family’ pattern in the UK involves men working long full-time hours, and women working relatively short part-time hours.
Self-assessment questions

1 How can employers avoid the application of the 48 hour maximum week?
2 To whom do the Working Time Regulations apply?
3 What is the significance of the SIMAP and Jaeger cases?
4 To what extent are the Part-time Workers Regulations adequate to implement the UK’s obligations in respect of the Directive?

Useful further reading


Reminder of learning outcomes

By this stage you should be able to:

- summarise the extent to which UK law regulates the payment of wages
- detail the extent to which the Wages Act 1986 prohibits deductions from wages.

3.3 Time off rights

Essential reading

- Collins, Ewing and McColgan, Chapter 4: ‘Protecting the work/life balance?’, sections 4.3–4.3.5.

The Maternity and Parental Leave etc. Regulations 1999 provide that pregnant women employees are entitled to 26 weeks’ ordinary maternity leave (OML) in respect of childbirth. This is paid at 90 per cent of salary for six weeks followed by 20 weeks’ statutory maternity pay. Those who have 26 weeks' qualifying employment at the beginning of the fourteenth week before the expected week of childbirth (EWC) are entitled to an additional (unpaid) 26-week AML period. Leave is available to adoptive parents (one of a couple) on an equivalent basis to maternity leave save that there is no enhanced pay for the first six weeks.

In addition, the Parental Leave Directive, implemented in the UK through the Employment Relations Act 1999 (Schedule 4) and the Maternity and Parental Leave etc. Regulations 1999 provides a right to parental leave for those with children aged under five. The Regulations ought to be read with s.57A Employment Rights Act 1996 which provides a right to (unpaid) time off for domestic emergencies. The Regulations have been criticised on the basis, inter alia, that the leave is unpaid (though two weeks’ paternity leave is payable at the basic rate of statutory maternity pay) and, unless otherwise agreed by the employer, is permitted to be taken only in blocks of between one and four weeks. Proposed extensions of paid maternity leave are likely to involve some period (as yet undetermined) which will be transferable to the mother’s partner.

3 For details of statutory maternity pay, see http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp
Activity 3.4

(a) List the periods of time off, and the rates of pay relevant to each, which are available in connection with childbirth and parenthood.

(b) Try to find out what the current rate of basic statutory maternity pay is.

(c) Advise Mary, who is three months pregnant and has been employed for two years, of the notice requirements with which she ought to comply with respect to maternity leave.

(d) Try to find out what changes have been made to maternity (or paternity) leave since the publication of this subject guide.

(e) Under what circumstances may a person take time off work to look after someone else?

(f) Read Qua v John Ford Morrison Solicitors [2003] ICR 482. What does the decision in Qua tell us about the right to emergency leave?

Feedback: see page 33.

Summary

Time off rights in connection with childbirth include maternity leave, paternity leave, adoptive leave and parental leave. These do not, however, allow the reconciliation of working and family life after one or both parents have resumed work. For this we must turn to the provisions regulating working time and access to flexible work (above and below).

Useful further reading


3.4 Flexible working rights

Essential reading

- Collins, Ewing and McColgan, Chapter 4: ‘Protecting the work/life balance?’ section 4.3.6.

Section 80F ERA, inserted by the Employment Act 2002, provides that an employee may apply to have his or her terms relating to hours, timing and/or place of work permanently varied in order to care for a child under the age of six (under 18 if the child is disabled).4

An employer who receives an application in the appropriate form must consider it in accordance with a procedure which requires a meeting between employer and employee, the provision of reasons for the employer’s decision and the possibility of an appeal. The employer may reject a request for flexible working on a number of

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4 The government announced, in June 2004, its intention to extend this right to carers of elderly or disabled relatives.
grounds. An employee whose request is refused may complain to an employment tribunal that the appropriate procedure was not followed or that the employer's refusal was based on 'incorrect facts'. But the tribunal will not scrutinise whether, in the absence of factual mistakes, an employer's refusal of a request for contractual change is justified on the grounds given by the employer and the remedy is limited to eight weeks' pay at a (current) maximum of £270 per week.

Proposals have recently been made to extend the right to request flexible working to the parents of older children and those caring for dependent adults.

Activities 3.5–3.8

3.5 You are asked to advise Cedric who wishes to work from home two days a week in order to co-ordinate the care of his young child. What information do you need to obtain from him in order to advise him as to his statutory rights? If he is covered by s.80F ERA, what obligations will a request by him place on his employers?

3.6 Find out what changes, if any, have been made to the scope of the s.80F ERA right since the publication of this subject guide.

3.7 List the grounds upon which an employer may refuse a request for flexible working.

3.8 (a) How successful has the right to request flexible working been since its introduction?

(b) What are the shortcomings, if any, of the right to request flexible working as a mechanism for allowing workers to balance work and family life?

Feedback: see page 33.

Summary

Section 80F ERA, inserted by the Employment Act 2002, provides that workers are entitled to request changes to the patterns of work in order to accommodate caring responsibilities in relation to young children. The right is, however, a procedural rather than a substantive one.

Reminder of learning outcomes

By this stage you should be able to:

- explain the main provisions of the statutory entitlement to maternity and parental leave
- critically evaluate the Part-time Workers Regulations
- explain the operation of the Working Time Regulations.
Sample examination questions

**Question 1** Is part-time work most appropriately regulated as a form of atypical work, or as an element of 'family-friendly' employment policies, or as a matter of sex discrimination law?

**Question 2** How far is it true to say that British labour law has recognised as basic principles that the working week should be subject to a maximum number of hours and a minimum hourly wage?

**Question 3** ‘The “family-friendly” agenda of the UK government exists only in so far as such policies do not interfere with the agenda of promoting business.’

Discuss, with reference to the regulation of maternity leave, parental leave and flexible working rights.

Advice on answering the questions

**Question 1** A good answer to this question would have started with an introduction touching on the incidence of part-time work together with some information about part-time workers (the fact that they are overwhelmingly female, for example, and that almost 50 per cent of women who work in the UK do so on a part-time basis). It would have mentioned the Part-time Workers Directive and the Part-time Workers Regulations, as well as the extent to which part-time workers have been protected by the Sex Discrimination Act 1975.

Answers should then have moved on to consider the three areas referred to in the question in some more detail. Some issues which might be covered include the following:

- **Part-time work as a form of atypical work.** What is meant by atypical work? Is part-time work properly considered 'atypical' if almost one-quarter of the workforce are engaged in it? What other forms of atypical work are there? Is part-time work properly considered alongside forms of atypical work such as fixed-term work, home-working and casual/seasonal work? Are there good reasons (such as the indefinite nature of these other forms of work) which mean that part-time work should be treated as a typical, rather than atypical, form of work? Some discussion of the shortcomings of the Part-time Workers Regulations would be useful, in particular the flaws of that legislation, which requires a comparison with very narrowly defined full-time comparators.

- **Part-time work as ‘family friendly working’.** This calls for some discussion of the typical nature of part-time workers: that is, women working part-time in order to balance work and family life. What are the advantages and disadvantages of dealing with part-time work as an aspect of the work-life balance? This approach to part-time work places it in a spectrum of working from short-hours part-time working to the very long hours associated with (particularly male) full-time workers in the UK. Dealing with part-time work in this context might result in more radical approaches to working hours more generally and a good answer might touch on the inadequacies of the Working Time Regulations which, because of the individual opt-out provision and their non-application to many workers, do little to manage men’s long

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working hours and so exacerbate the problem that women face in trying to balance work with caring responsibilities.

**Part-time work and sex discrimination.** Here some consideration of the strengths and weaknesses of the Sex Discrimination Act as it applies to protect part-time workers is required. Problems with the Act include the fact that only female part-time workers will be protected by the concept of indirect discrimination, though men could challenge discrimination against them as men if they are treated less favourably.

**Question 2** This calls for a discussion of the national minimum wage and the Working Time Regulations and, more particularly, the exceptions and qualifications thereto. A good answer would start with a brief introduction to the National Minimum Wage Act and the Regulations, noting that the latter but not the former were required by European law and that the implementation of the Regulations was a fairly minimalist response to the Working Time Directive, particularly insofar as the Regulations take advantage of the individual opt-out.

The next part of a good question would turn in a little more detail to consider the Working Time Regulations. The focus should be on maximum weekly hours and on the extent to which the Regulations do not regulate this: in particular because of their non-application to particular sorts of workers and to ‘voluntary’ overtime, together with the individual opt out. On the other hand, the Regulations are wide inasmuch as they apply to ‘workers’ rather than ‘employees’.

The next aspect of the question should deal with the national minimum wage, again in an analytical way in order to determine how rigorous is the commitment of British labour law to the principle of minimum rates. Among the aspects of the National Minimum Wage Act which might be considered here are the non-application of the wage to young workers, the existence of lower rates for younger workers and trainees, and enforcement mechanisms. Again, however, the Act is wide inasmuch as it applies to ‘workers’ rather than ‘employees’.

A conclusion should balance any criticisms of the Act and Regulations against their overall strengths to reach some kind of answer to the question posed.

**Question 3** This requires a discussion of the relevant subject areas (maternity leave, parental leave and flexible working rights) not in general terms but with a focus on the question raised, that is, whether they provide support to the assertion that the UK government’s ‘family-friendly’ agenda ‘exists only in so far as such policies do not interfere with the agenda of promoting business’. In order to do this a critical engagement is required with the various rights, and a good answer would draw out those aspects of each which are supportive of and inconsistent with the statement. Among these would be:

- **maternity leave**: the applicable notice periods, the fact that maternity pay is low and the cost of it is borne by the state (supportive), on the other hand that the period of leave has been extended over recent years and this trend seems set to continue (unsupportive)

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5 You will not be able to attempt the third element of the answer until you have covered the material in the next chapter.

6 This should not consist in copying out the provisions of the Regulations from a statute book, or listing them one after the other in summary.
- **parental leave**: the many procedural restrictions, the fact that leave is unpaid and available only in one week blocks unless the employer agrees otherwise and the fact that the government only acted on parental leave so far as was necessary to comply with EC law (supportive). It is difficult to see any aspect of parental leave at present that is unsupportive of the statement except the bare fact that it exists – which was, in any event, required by EC law.

- **flexible working rights**: their introduction might be seen as unsupportive of the statement but it is worth stressing that the right is only a right to request, and not to be afforded, flexible working. The right is only a procedural one in that there is no remedy for a refusal, as distinct from a failure to go through the procedure.

Finally, the remedy for procedural breach is minimal.
Feedback to activities: Chapter 3

Activity 3.1 No feedback provided. Remember that the ability to search Internet and web resources is an essential part of your legal education.

Activity 3.2 This presentation should note the non-application in the context of industrial action of the prohibitions on deductions from wages and should set out the common law position as illustrated by the decisions in Miles v Wakefield and in Wiluszynski v Tower Hamlets.

Activity 3.3 (a) This explanation should pay attention in particular to the availability of the individual opt out and the non-application of the Regulations to 'voluntary' unmeasured overtime work.

(b) See: http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp.

(c) You should have dealt with the operation of 'workforce agreements' in relation to the calculation of the 48-hour week in particular.

(d) Here you ought to have considered the narrowness of the comparator required by the Regulations and the circumstances under which a worker can compare his or her current terms and conditions with those he or she enjoyed as a full-time worker.

(e) This calls for an understanding of the fact that the Regulations apply to 'workers' rather than 'employees' and that their scope has been extended in recent years to many previously excluded workers (but not to many transport workers).

Activity 3.4 (a) Your answer should consider maternity, parental, paternity and adoptive leave.

(b) Check this using the Internet.

(c) Mary is obliged 'no later than the end of the fifteenth week before her expected week of childbirth or, if that is not reasonably practicable, as soon as is reasonably practicable' to notify her employer of (i) her pregnancy; (ii) the expected week of childbirth, and (iii) the date on which she intends her ordinary maternity leave period to start. Mary does not have to provide any notice of her intention to return after maternity leave unless she wishes to do so prior to the end of that leave, in which case she must give 28 days' notice of her intention to do so.

(d) No feedback provided.

(e) Your answer needs to indicate the narrowness of the right to emergency leave in its current form: in particular, the fact that it is not intended to permit workers themselves to care for dependent others for more than a few days (that is, until other arrangements can be made).

(f) Qua reinforces this point.

Activity 3.5 You will need to find out information such as the age of Cedric's child and why he says he needs to be at home, as well as the job he does (this to appreciate the arguments the employer is likely to make as regards the practicability of meeting the request).
If he is covered by s.80F ERA, the obligations placed on his employers are procedural only but include a hearing, a written response and an appeal.

**Activity 3.6** No feedback provided.

**Activity 3.7** These are:

(1) cost
(2) ‘detrimental effect on ability to meet customer demand’
(3) ‘inability to re-organise work among existing staff’ or
(4) ‘to recruit additional staff’
(5) ‘detrimental impact on quality’ or
(6) ‘performance’
(7) ‘insufficiency of work during the periods the employee proposes to work’ or
(8) ‘planned structural changes’.

The Secretary of State may add additional grounds.

**Activity 3.8** This answer might pay particular attention to the fact that the right is procedural rather than substantive (i.e. a tribunal will not challenge the decision reached by an employer who has gone through the correct procedure) and that the remedy for breach is very limited.
Chapter 4 Discrimination

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Introduction

Discrimination legislation has become increasingly significant in the regulation of employment over recent years. This chapter is concerned with British anti-discrimination law: that is, with the Equal Pay Act 1970 (EqPA), the Sex Discrimination Act 1975 (SDA), the Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA), the Employment Equality (Sexual Orientation) Regulations 2003 (SO Regs) and the Employment Equality (Religion or Belief) Regulations 2003 (the RB Regs).

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- describe the grounds upon which discrimination is regulated in the context of employment
- explain what is meant, in particular, by ‘racial grounds’, ‘sex’, ‘disability’ and ‘religion or belief’
- list and explain the various different types of ‘discrimination’ regulated in the context of employment
- distinguish with confidence between ‘direct’ and ‘indirect’ discrimination
- describe the main acts of discrimination regulated in the employment context
- outline the operation of vicarious liability in the discrimination context
- explain the operation of the Equal Pay Act 1970
- outline the main loopholes and flaws in the discrimination legislation
- describe the main differences in approach to discrimination between the DDA and the other discrimination legislation.
4.1 Prohibited grounds of discrimination

Essential reading

- Collins, Ewing and McColgan, Chapter 3 ‘Equality’, sections 3.2, 3.2.

4.1.1 Background

The regulation of employment-related discrimination in the UK has started from modest beginnings, the Equal Pay Act 1970 having originally been concerned primarily with the prohibition of overt sex discrimination in male and female pay scales. That Act was joined in 1975 by the Sex Discrimination Act, which regulated discrimination against men, women and married persons in employment more generally, then in 1976 by the Race Relations Act which was concerned with discrimination ‘on racial grounds’. 1995 saw the adoption of legislation, long resisted by the then incumbent Conservative government, of the Disability Discrimination Act which was at first very much the ‘poor relation’ of the sex and race legislation, peppered as it was with exceptions and inapplicable to employers of fewer than 20 staff. More recently, the adoption by the EC of Council Directive 2000/78 (the Employment Directive) required the UK to introduce legislation prohibiting discrimination on grounds of sexual orientation and religion or belief, which it did in the form of the Employment Equality (Sexual Orientation) Regulations 2003 (SO Regs) and the Employment Equality (Religion or Belief) Regulations 2003 (the RB Regs).

The same Directive resulted in the introduction of significant amendments to the DDA which have served to bring that Act broadly into line with the other legislation insofar as it deals with employment, and will in 2006 result in the regulation of age discrimination in the employment context. The RRA has been amended to give effect to the Race Directive (Council Directive 2000/43) and in October 2005 the SDA was amended to give effect to the Equal Treatment Amending Directive (Council Directive 2002/73).

Directives), in relation to which the RRA, DDA, SO Regs and RB Regs must be interpreted.

### 4.1.2 Twenty-first century developments

Until 2003 domestic law provided express regulation of discrimination on grounds of sex, race and disability alone. 2003 saw the introduction of the SO Regs and the RB Regs which regulate discrimination on grounds of sexual orientation and religion or belief respectively, as well as significant amendments to existing legislation. Legislation to be introduced in 2006 will extend regulation of employment-related discrimination to the ground of age.

The SDA regulates discrimination on grounds of sex, discrimination against married people and discrimination in connection with gender-reassignment. Arguments that the SDA ought to be interpreted to cover sexual orientation discrimination met with no success (see, in particular, *MacDonald*), though ‘sex’ does include pregnancy (*Webb*). The significance of *MacDonald* is limited as a result of the introduction of the SO Regs.

The RRA prohibits discrimination on ‘racial grounds’. For the scope of this see *Mandla v Dowell Lee*, *Weathersfield v Sargent* and the application of *Mandla* in *Dawkins v Department of the Environment*. These cases illustrate that the RRA did catch some instances of discrimination related to religion but protection was patchy until the introduction of the RB Regs.

The DDA, by contrast with the SDA and RRA, applies asymmetrically, that is, only to those who qualify as ‘disabled’ under the Act (see Chapter 3 section 3.25 of Collins, Ewing and McColgan and note, by contrast, that men as well as women and majority ethnic as well as minority ethnic groups are protected by the SDA and RRA respectively).

### Activities 4.1–4.4

4.1 Summarise in no more than 50 words the test set out by the House of Lords in *Mandla* to determine whether or not the protection of the RRA extends to any particular group of people. Once you have done this, then list:

(a) three groups of people likely to be excluded by the test

(b) three groups of people likely to be included within the test

(c) one reason why the restrictions imposed by *Mandla* are now of limited significance in the employment context.

4.2 Summarise in no more than 100 words the main difference between the DDA on the one hand and the other discrimination provisions as regards the grounds on which discrimination is regulated, and outline the main features of the Act’s concept of ‘disability’.

4.3 Explain the significance of the difference between the use of the term ‘on the ground of her sex’ in the SDA and the term ‘on racial grounds’ in the RRA? Which approach is most common in the UK’s discrimination legislation?
4.4 Describe the extent to which people are protected by the DDA from discrimination on the grounds:

(a) of medical conditions which do not impact on their ability to function

(b) of perceived disability.

Feedback: see page 49.

Self-assessment questions

1 What is meant by ‘racial grounds’ for the purposes of the RRA? To what extent does ‘race’ in this context overlap with ‘religion’.

2. What, in your view, are the main shortcomings of the approach taken to ‘disability’ by the DDA?

Useful further reading


4.2 Forms of discrimination

Essential reading


Discrimination is categorised as ‘direct’ or ‘indirect’, or as occurring by way of ‘victimisation’ or ‘harassment’.

‘Direct discrimination’ occurs where ‘but for’ the fact of the claimant’s sex, race, sexual orientation, etc., he or she would have been treated more favourably. For the application of this test see James v Eastleigh and the Roma Rights case. For the application of this test to pregnancy discrimination see Webb v EMO (No 2) and see Pearce for the application of direct discrimination to harassment in connection with the prohibited grounds.
Note now the embrace of an express statutory prohibition on harassment in the wake of the Racial Equality and Employment Directives (see Collins, Ewing and McColgan, section 3.3.1.3).

See Schmidt v Austicks and DWP v Thompson for the application of direct discrimination to clothing and appearance rules (see also critique by Skidmore, below).

‘Victimisation’ occurs where a person is penalised for complaining or taking action in relation to alleged discrimination. For examples of the operation of the law in this context see Nagarajan, Khan and, most recently, the St Helen’s case.

‘Indirect discrimination’ is concerned, essentially, with the application of the same rule to groups who are differently affected by it. Obvious examples would include the application of the same height or strength requirements to men and women, or the application to all prospective employees of a rule concerning residence where the relevant geographical area is racially segregated. The definition of indirect discrimination in the domestic legislation has changed significantly as a result of the implementation of Directives 2000/43, 2000/78 and 2002/73, and it is crucial to grasp this. Much of the case law on indirect discrimination is now obsolete and you should concentrate instead on the cases decided post-amendment of the legislation. The changes in this context are examined in detail in section 3.5 of Collins, Ewing and McColgan and among the few cases decided on the new test at the time of writing are Cross v BA, Elias and Hardys.

The DDA does not utilise the concept of indirect discrimination, but imposes a duty of reasonable adjustment on employers the breach of which is classified as disability discrimination. For the operation of this duty see Archibald v Fife and Chapter 3 of Collins, Ewing and McColgan, section 3.6.2.

Note that neither direct disability discrimination nor a failure to make reasonable adjustment is capable of justification since October 2004. The test for justification of disability-related discrimination (see Clark v TDG) differs significantly from that of indirect discrimination under the other statutory regimes. See, in particular, Post Office v Jones and contrast Allonby v Accrington.

Note also, in the context of disability discrimination, the concept of ‘reasonable accommodation’ discussed at Collins, Ewing and McColgan, Chapter 3, section 3.6.2.

Turning to the legality of positive discrimination note the symmetrical approaches of the SDA and RRA (not the DDA) and the very limited exceptions for positive action. In the EU context, see Collins, Ewing and McColgan, Chapter 3, section 3.8 and the decision of the ECJ in Abrahamsson.

Activities 4.5–4.10

4.5 List the forms of discrimination regulated by the DDA, on the one hand, and the SDA, RRA, SO Regs and RB Regs, on the other.

4.6 Describe how the new approach to indirect discrimination differs from that originally adopted by the RRA and the SDA.

4.7 List the circumstances under which positive discrimination is permitted by UK law.
4.8 Describe how disability-related discrimination differs from direct discrimination.

4.9 What is meant by ‘harassment’? What is the significance of its express prohibition in discrimination legislation?

4.10 Explain the concept of ‘reasonable adjustment’ under the DDA’s employment provisions.

Feedback: see pages 49 and 50.

Summary

The statutory regulation of discrimination is complex, encompassing as it does concepts of direct discrimination, disability-related discrimination, indirect discrimination (of no fewer than three varieties), victimisation and breach of a duty to make reasonable accommodation. It is essential to grasp these fundamental concepts in order to understand this difficult area.

Self-assessment questions

1 What are the most significant differences between the types of discrimination regulated by the DDA, and the other discrimination legislation?

2 How satisfactory is the current legislative approach to indirect discrimination? What significant changes have been made in this context in recent years?

3 To what extent is ‘positive’ discrimination permitted under (a) UK law, and (b) EC law? How has the implementation of Article 141(4) TEC changed the position with respect to the latter (see Abrahamsson)?

4 To what extent is ‘harassment’ prohibited under the various anti-discrimination Acts? How has this changed in recent years?

5 Under what circumstances may employers adopt sex-specific clothing and appearance rules? Would courts adopt a similar approach to race-specific rules?

Useful further reading

### 4.3 Prohibited discrimination

**Essential reading**


With the exception of the DDA, which provides (s.3A(5)) that direct discrimination requires comparison with a person ‘whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person’, all the other discrimination provisions contain specific exceptions permitting direct discrimination where GOQ or GOR (genuine occupational qualification or genuine occupational requirement) defences apply. The RRA contains both GORs and GOQs (see Collins, Ewing and McColgan, section 3.9 for discussion) whereas the SDA contains only GOQs (these have recently been amended to comply with the Equal Treatment Directive in its amended form and the SO Regs and the RB Regs contain only GORs). See *Lambeth v CRE* and *Tottenham Green v Marshall (No 2)* for the approach of the courts to the GOQ defence and the *Amicus* case for an early (unsuccessful) challenge to the scope of the GOR defence in the SO Regs. It is important to consider the way in which Reg 7 of both the SO Regs and the RB Regs provides a (limited) space in which the employer’s religious obligations or beliefs may be balanced against the sexual orientation and the religious beliefs respectively of (prospective) employees. This has proved perhaps the most controversial aspect of the Regulations and it remains to be seen how significant in practice will be the space accorded to (prospective) employers to discriminate in this context.

Turning to the scope of the prohibited employment-related discrimination see s.4 RRA, ss.6 SDA and DDA and Regs 6 SO Regs and RB Regs. For the limits of the protection see *Mirror Group Newspapers v Gunning* and *Kelly v Northern Ireland Housing Executive*. See *De Souza v Automobile Association* for the problems which the requirement for ‘detriment’ can create in the harassment context; *Driskel v Peninsular Business* for a more recent approach (and note the new statutory definitions of harassment). See *Tower Boot v Jones* for vicarious liability on the part of employers.
**Activity 4.11**

Describe when employers may be liable for harassment conducted by their staff and/or others.

*Feedback: see page 50.*

**Summary**

Discrimination will breach the relevant legislation only where it (a) is connected with a regulated ground, (b) takes a regulated form and (c) occurs in a regulated context. Loopholes as regards (c) have been filled in recent years (notably as a result of the extension of the legislation to cover post-employment discrimination such as in the context of references). It is worth noting, however, that employers are able to justify certain acts of direct discrimination and to escape liability for the actions of their workers if they have taken steps to prevent such discrimination.

**Self-assessment question**

How satisfactory is the approach of UK law to the regulation of harassment? To what extent has the answer to this question changed in the last five years?

**Reminder of learning outcomes**

By this stage you should be able to:

- describe the grounds upon which discrimination is regulated in the context of employment
- explain what is meant, in particular, by ‘racial grounds’, ‘sex’, ‘disability’ and ‘religion or belief’
- list and explain the various different types of ‘discrimination’ regulated in the context of employment
- distinguish with confidence between ‘direct’ and ‘indirect’ discrimination
- describe the main acts of discrimination regulated in the employment context
- outline the operation of vicarious liability in the discrimination context
4.4 Pay discrimination

Essential reading


The last substantive area to be considered concerns pay discrimination. Where this concerns sex it is governed by the EqPA rather than the SDA (where it concerns other protected grounds it falls within the relevant discrimination legislation). Note that the EqPA does not solely regulate pay but deals also with discrimination on grounds of sex in other contractual terms.

The first thing that the applicant must do is select a comparator – see Scullard v Knowles for the ability of Article 141 to widen the search beyond the immediate employer (but of Lawrence v Regent Office Care, Allonby v Accrington). Levertor v Clwyd and British Coal v Smith illustrate the circumstances under which a worker can compare herself to a comparator beyond her workplace. Note also the three types of equal pay claims and the meaning of ‘equal’ (Hayward v Cammell Laird). The employer can defend a disputed pay differential by demonstrating that it is due to a material factor ‘not the difference of sex’ – see Rainey v Greater Glasgow; Ratcliffe v North Yorkshire; Strathclyde v Wallace; Glasgow v Marshall.

Activities 4.12-4.13

4.12 List the differences in approach in relation to a pay-related claim according to whether the ground on which discrimination is alleged is sex or race. Which regime is more favourable and why?

4.13 How does the concept of discrimination fit into the EqPA?

*Feedback: see page 50.*

Self-assessment question

When must an employer objectively justify, under s.1(3) EqPA, a pay difference between comparable workers? What is the justification test?
Reminder of learning outcomes

By this stage you should be able to:

- explain the operation of the Equal Pay Act 1970
- outline the main loopholes and flaws in the discrimination legislation
- describe the main differences in approach to discrimination between the DDA and the other discrimination legislation.

Sample examination questions

Question 1
Farzana, an observant Muslim woman who wears a headscarf, seeks employment at Purple Ltd as a receptionist. She is told by the Managing Director that he would ‘strongly prefer’ to employ someone who did not wear a scarf, but that he would employ Farzana if she was ‘much better’ than any of the other candidates. In the event Sheila, one of the other candidates, is judged to be broadly similar in terms of qualifications, aptitude, etc., and is offered the job.

Advise Farzana as to any remedy she might have. How would your answer differ, if at all, if the events had taken place prior to the implementation of the Employment Equality (Religion and Belief) Regulations 2003?

Question 2
Advise the following workers of any legal remedies available to them, drawing attention where relevant to any further information you might need in order to advise them properly:

(a) Sally, a secretary employed by Busted plc, who wishes to challenge the fact that she is paid less than Doug, a male secretary who is also employed by Busted

(b) Petunia, a female personal assistant employed by Chuckle Ltd, who wishes to challenge the fact that she is paid less than Maria, also a female personal assistant employed by Chuckle

(c) Rita, an executive director of the Royal Ballet Company, who wishes to challenge the fact that she is paid less than Mark, an executive director of the Royal Opera House. The two organisations are separate but are both funded by the Department for Culture and the Arts, which regulates staff salaries.

Question 3
Suliman, a Muslim of Pakistani origin, works at Robust Exteriors Ltd which manufactures garden furniture. He is concerned about the way he is treated by some of his fellow workers who have taken to making comments about Islamic terrorists in his presence. He speaks to a manager about the matter but is told he is being ‘over-sensitive’.

Advise Suliman as to his possible courses of action. How, if at all, would your answer differ if the events had taken place before the implementation of the Employment Equality (Religion and Belief) Regulations 2003?

Question 4
In the legal control of discrimination (sex, race and disability) in employment, is the more significant role played by the prohibition of direct discrimination or of indirect discrimination? Discuss, with reference both to legislative measures and to case-law.

Question 5
Harry, Ingrid and James are all employed as teachers at Nickleby Academy, a secondary school with a strong Christian ethos.

Harry is gay, but neither the head teacher, Keith, nor the school governors of Nickleby Academy are aware of Harry’s sexual orientation until a photograph of him leaving a well-known gay pub is published in the local newspaper. Harry is informed by Keith that his continued employment at the school will not be

1 Note that Sally, Petunia, Maria and Rita are women; Doug and Mark are men.
tolerated, as this would undermine the Christian values which the school was founded to promote. Harry is dismissed with notice.

Ingrid, who has recently married, requests leave to celebrate the Muslim festival of Eid. She is not Muslim herself, but her husband is, and she wishes to mark Eid with him. Her request for leave is denied.

James has recently converted to Hinduism and is growing his hair long so that he can wear a Shika (small knotted tuft of hair worn at the back of the head). Keith, however, requests James to cut his hair, in order to comply with the teachers’ dress code banning ponytails on men.

Advise Harry, Ingrid and James as to their rights, if any.

Question 6 ‘The Disability Discrimination Act 1995 offers a model of anti-discrimination law, based as it is on the duty on employers to make reasonable adjustments, which other anti-discrimination laws could usefully adopt.’

Discuss.

Advice on answering the questions

Question 1 This question raises the issue of discrimination on grounds of religion or belief as dealt with by the Employment Equality (Religion or Belief) Regulations 2003. In essence, a good answer would be expected to spot that the treatment to which Farzana has been subjected might amount to indirect discrimination on grounds of religion or belief within the definition adopted by the Regulations, and to explain this by reference to the Regulations. This aspect of the question is fairly straightforward. The more difficult part of the question is the second part: how would the answer differ if the issue had arisen prior to the implementation of the Regulations. Here two questions arise:

(1) are Muslims protected as a racial group for the purposes of the Race Relations Act 1976? The answer to this requires the application of the House of Lords decision in Mandla v Dowell Lee and an explanation as to why Muslims do not count as a protected group under this test. A good answer might, however, note that she could be protected as a Muslim from indirect race discrimination on another ground – if, for example, she belonged to a racial group which was predominantly Muslim.

(2) A good answer ought to deal with the fact that the ‘no scarf’ is a preference rather than an absolute requirement or condition – this would have caused problems under the RRA’s original definition of indirect discrimination but not under the new definition which took effect in July 2003, in so far as the discrimination alleged is on grounds of ‘race or ethnic or national origin’ as would probably here be the case.

Question 2 This question requires consideration primarily of the EqPA which regulates pay discrimination between men and women. Other legislation ought also to be referred to in connection with the pay difference between the women Petunia and Maria, since the EqPA requires a comparison with a person of the opposite sex.

Taking first Sally and Doug, you are told that both are secretaries and both employed by Busted plc. On the face of it looks as if a like work claim might be appropriate. Among the information which will be required is whether the jobs are broadly similar or only
share a job title and, if there are significant differences between them, whether they have been rated as equivalent for the purposes of a s.1(2)(b) EqPA claim. The employer's GMF defence ought to be mentioned but there is no information as to what it might be based on.

Taking next Petunia and Maria: they appear to be engaged in similar work for the same company. No claim is available under the EqPA so it would be necessary to find out whether there is any difference between them which might suggest an alternative claim (i.e. race, sexual orientation, religion or belief). A good answer would state that pay discrimination is challengeable under the discrimination legislation other than the SDA (sex-related claims falling within the EqPA) and would point out that the difference would only breach the law if it was by reason of any relevant difference, rather than merely coincidental with it.

Rita's claim under the EqPA is likely to be for work of equal value if anything, since it is unlikely that she would be doing a very similar job to someone employed by a different employer. Her problem is that the EqPA only allows comparisons with workers employed (s.1(6)) by the same or an associated employer, the latter being limited to connected companies. The heart of this question is a discussion of the decisions in Scullard and, more recently, Lawrence and/or Allonby (in the ECJ) in order to ascertain the position under Article 141. The conclusion ought to be that she is likely to succeed in an Article 141 claim assuming the jobs are sufficiently similar in value.

**Question 3** This question raises the issue of harassment on grounds of religion or belief as dealt with by the Employment Equality (Religion or Belief) Regulations 2003. In essence, a good answer would be expected to spot that the treatment to which Suliman has been subjected might amount to 'harassment' on grounds of religion or belief within the definition adopted by the Regulations, and to explain this by reference to the Regulations. It would also be expected to touch on the question of employer liability. This aspect of the question is fairly straightforward. The more difficult part of the question is the second part: how would the answer differ if the issue had arisen prior to the implementation of the Regulations. Here two questions arise, as in question 1:

1. are Muslims protected as a racial group for the purposes of the Race Relations Act 1976? The answer to this requires the application of the House of Lords decision in Mandla v Dowell Lee and an explanation as to why Muslims do not count as a protected group under this test. A good answer might, however, note that he could be protected as a Muslim from indirect race discrimination on another ground – if, for example, he belonged to a racial group which was predominantly Muslim.

2. The question would be whether he has suffered a ‘detriment’ within s.4(2)(c) of the Race Relations Act. Here some discussion of the decision in de Souza v AA would be of assistance.

**Question 4** This question requires, by way of introduction, an outline of the scheme adopted by the Race Relations Act, the Sex Discrimination Act and the Disability Discrimination Act. The main point to be raised at this stage is that, whereas the sex and race legislation utilise the concepts of direct and indirect discrimination,
the disability legislation does not, dealing instead with ‘discrimination’ which is defined as a hybrid of direct and indirect discrimination (Clark v TDG) and a duty of reasonable adjustment. Secondly, direct and indirect discrimination should be outlined with note taken of the recent changes implemented in relation to the definition of indirect discrimination by (in the context of sex) the Burden of Proof Regulations and (for race) the Race Regulations (2003). Thirdly (and this is the bulk of the answer), consideration needs to be given to the impact of the prohibition on direct and indirect discrimination. What does it mean to be prohibited from discriminating directly on grounds of race or sex? How common might such discrimination be in employment? How satisfactory are the enforcement mechanisms? As for indirect discrimination, a good answer would note the potential of this prohibition to make a real difference by tackling (for example) the impact on employment of women’s unequal burden of childcare responsibilities. Here some discussion is necessary of the shortcomings of the definition pre-amendment (Perera is an obvious example). Finally, a very good answer might note the relationship between ‘direct’ and ‘indirect’ discrimination and the definitions of discrimination employed by the Disability Discrimination Act and comment, perhaps, on the relative merit of these and the definitions to be found in the sex and race legislation.

**Question 5** This question requires discussion of the Employment Equality (Religion or Belief) Regulations and the Employment Equality (Sexual Orientation) Regulations in the context of the particular questions raised.

Taking Harry first, the primary question is whether the SO Regs protect him from dismissal in these circumstances. The relevant provision is Reg 7 which permits discrimination where sexual orientation is a GOR. The question here is whether 7(2) or 7(3) applies, which in turn requires consideration of whether Harry is employed ‘for the purposes of’ an organised religion. Depending on the answer to this, is being of a particular sexual orientation a genuine and determining requirement for the job? Or (if Reg 7(3) applies) has the employer applied ‘a requirement related to sexual orientation…so as to comply with the doctrines of the religion, or because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers’. Some mention might also be made of the unfair dismissal provisions, though the width of the ‘range of reasonable responses’ test is such that a challenge under the ERA is unlikely to succeed.

Turning to Ingrid, the question here is whether the RB Regulations provide her with a right to time off. A refusal to grant such time off is challengeable only as indirect discrimination and the problem for Ingrid is that she is not less able, by reason of her religion/belief, to comply with the requirement to work Eid than are persons of other religious faiths.

As far as James is concerned, the question is whether imposing a dress code on him breaches the RB Regs. Assuming there is no direct discrimination, the question is whether the ‘no ponytail’ rule is one:
‘(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons, (ii) which puts B at that disadvantage, and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim’.

**Question 6** This question requires a specific discussion of the DDA rather than ‘all I know about disability discrimination’ (a common answer). Answers should focus on the duty of reasonable adjustment and compare it with the approach taken by other discrimination legislation, in which the equivalent concept is that of indirect discrimination. A good answer would detail the shortcomings of the indirect discrimination concept – in particular, the technical rigidities which have plagued it over the years, and consider whether the approach set out in the DDA is better, or whether recent amendments to the definition of indirect discrimination are as good as (or better) in relation to other protected grounds. Some mention should be made of the fact that a failure to make a reasonable adjustment cannot be justified, whereas indirectly discriminatory measures can be. Having said this, the question what is ‘reasonable’ will perform much the same function as the notion of justifiability.
Feedback to activities: Chapter 4

Activity 4.1 This answer should mention briefly the tests suggested by both Lord Templeman and Lord Fraser (the former suggesting two requirements and a number of options, the latter three requirements). Then the answers might include:

(a) Muslims, Christians, Bhuddists, new age travellers, Rastafarians
(b) Jews, Hindus, Gypsies
(c) because of the implementation of the RB Regs.

Activity 4.2 This answer should focus on the fact that the DDA adopts an asymmetrical approach in that it protects only the disabled (except in the case of victimisation) whereas the other legislative provisions protect everyone who is discriminated against on the relevant ground: that is, because of race, sex, sexual orientation, etc., whether the claimant is black or white, male or female, homosexual or heterosexual. As far as the concept of disability is concerned, the main features are that it is medically based (i.e. it requires a mental or physical impairment) and also demands (except in a few limited cases) that the disabled person is functionally impaired. Accordingly, it does not protect against discrimination on grounds of perceived illness/disability or perceived impairment.

Activity 4.3 The point here is that, whereas the RRA (and the SO Regs and the RB Regs) protect from discrimination 'on racial grounds' (and, respectively, on grounds of sexual orientation/religion or belief) the SDA protects from discrimination 'on grounds of her sex' (the DDA protects from discrimination 'on grounds of the disabled person's disability'). Thus, whereas Weathersfield v Sargeant has the effect of protecting from discrimination on grounds of someone else's race (the race of someone's spouse, or child, or that of a customer against whom the claimant has been instructed to discriminate) the same is not true of the SDA. The former approach is more commonplace, the latter applying only to the SDA and the DDA.

Activity 4.4 (a) Not generally, save in the case of severe disfigurement (schedule 1 para.3(a)) and, since 2005, HIV, multiple sclerosis and most forms of cancer.
(b) Not at all.

Activity 4.5 The DDA: direct discrimination, disability-related discrimination, failure to make a reasonable adjustment, victimisation. The rest: direct discrimination, indirect discrimination, victimisation. You could include ‘harassment’ in each case, though it is not entirely clear whether this is regarded as a species of discrimination or regulated independently.

Activity 4.6 ‘Requirement or condition’ has been replaced by ‘provision, criterion or practice’; the requirement that the claimant experience ‘detriment’ as a result of the condition etc. has been removed; the stipulation that the condition etc. be one with which a considerably smaller proportion of the claimant's group than of others can comply has been replaced with one that it ‘puts or would put' persons of that group 'at a particular disadvantage when compared with other persons'; and the test for objective
Activity 4.7 The SDA, RRA, SORs and RBRs all provide some limited scope for positive action. Section 48 SDA permits employers to provide single sex training, and to encourage female or male applications, in respect of jobs in which, over the previous year, that sex has been significantly under-represented. Section 38 RRA uses similar terms and regulations 26(1) of each the SORs and the RBRs also permit the encouragement of applications from persons of a particular sexual orientation or religion or belief respectively. Section 47 SDA, section 37 RRA and regulation 26(2) of each the SORs and the RBRs permit targeted training by persons other than employers along lines similar to those provided by sections 48 and 38 SDA and RRA respectively and regulation 26(1). In addition, section 47(3) of the SDA permits training to be targeted at those ‘in special need of training by reason of the period for which they have been discharging domestic or family responsibilities to the exclusion of regular full time employment’. Although gender-neutral in form, this provision permits indirect discrimination in favour of women.

Activity 4.8 The answer to this lies in the decision in Clark v Novacold and the fact that disability-related discrimination (as distinct from the newly regulated direct disability discrimination) does not require a comparator. Hence discrimination for a reason related to the disabled person’s disability (because of an absence from work, for example, or a requirement to work part-time) will be regulated (subject to justification) even where a non-disabled person with the same absence or need or desire for part-time work would have been similarly treated.

Activity 4.9 This calls for a discussion of the statutory test for harassment and of the difference it makes. In particular, it is important to note that the express provisions on harassment do not require less favourable treatment on the regulated grounds.

Activity 4.10 The duty of reasonable adjustment imposes an obligation on employers to accommodate, so far as is reasonable, the needs of disabled employees as regards issues such as access, working conditions and (to a degree) job content. It applies only where the disabled person is put at a ‘substantial disadvantage’ by a ‘provision, criterion or practice applied by or on behalf of an employer’ or by a physical feature of the employer’s premises.

Activity 4.11 Note here the statutory provisions establishing vicarious liability and the exceptions thereto. Also, note the overruling of the decision in Burton by the House of Lords in Pearce and the test there established for liability for third party harassment.

Activity 4.12 A sex-related claim under the EqPA requires that the claimant compare herself to an actual comparator engaged in like work, work rated as equivalent, or work of equal value to a comparator employed by the same employer or an associated employer in the same workplace or at a workplace in which the
same terms and conditions apply. A claim can be brought under Article 141 in a case in which the employers are not the same or associated but a single source exerts control over the wages of the claimant and her comparator. Under the RRA a claim can be made of discrimination by comparison with a real or hypothetical comparator (i.e. 'I would have been paid more but for the fact of my race').

**Activity 4.13** The concept of discrimination fits in through the GMF defence which allows an employer to defend a pay difference which is 'not the difference of sex' (i.e. neither directly discriminatory nor indirectly discriminatory in the absence of objective justification).