University of Leicester

EWL Seminar 2013

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1) The concept of pay/wage

Sources of Labour Law and the Laws which regulate pay in the UK

Labour Law in the UK is not in one codified labour document or legislation or guidance- it is contained in a mixture of areas. These can be both legal and non legal ones.

Formal sources of labour law include-

The common law- the employment relationships are significantly governed by case law. For example, case law originally governed rules about tips.

Legislation- For example the national minimum wage is regulated by statute.[1]

Collective Bargaining- wages are still set by a number of collective agreements incorporated in the contract of employment

Contract of employment- It is most likely to determine the amount and method of payment

Company's Handbook- Where details of pay and conditions of employment can be found

Public Law is another source of labour law- the scope of this is a little hazy. It seems odd as the relationship between an individual and their employer may appear to be private but this distinction is blurred when the employer is a public authority. In cases where public authorities are involved, this may even be subject to judicial review.

Pay as a fundamental right:

In the United Kingdom, there is no fundamental right to pay. English Law is based on common law and in the absence of a constitution, guidance is provided by reference to case law. As the United Kingdom is a member of the European Convention of Human Rights, some rights may be afforded to workers. The Human Rights Act 1998 incorporated the European Convention of Human Rights into United Kingdom Law. Article One of the First Protocol of the Human Rights Act provides a right to the protection of property. It states,

[1] National Minimum Wage Act 1998

'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' Although this provides some rights to individuals, the extent of these are limited as the provisions do not limit the State's power to enforce laws that they see fit with regards to the payment of taxes or penalties.

Article 4(1) of the Council of Europe's social charter of 1961 provided that member states should, 'recognise the rights of workers to a remuneration such as will give them and their families a decent standard of living.' [2] All Member States except the United Kingdom adopted Article 5 of the European Community Charter of Fundamental Social Rights which said that, 'all employment shall be fairly remunerated in accordance with the arrangements applying in each country.' [3]

The employer has an obligation to pay wages as it is a basic term of the contract of employment. The employee has a statutory right to receive in writing, details of the scale, rate or method of calculation of the remuneration and a right to an itemised pay statement when the wages or salary are paid. [4] This is provided for by section 1 of the Employment Rights Act 1996 and employees should receive the written statement not later than two months after commencing employment. [5]In the contract of employment, the promise to perform work in return for a promise to pay wages is an essential element and become legally enforceable obligations. [6] Without such promises, there would be no consideration and therefore no contract. However, wages are not the sole definition of consideration and at common law there can be a valid contract of employment without a set rate of wages where the employee may be paid by commission, fees or merely the chance to earn a salary. [7]

There is no fundamental right to pay but for a contract to be legally enforceable, the employee must perform work and the employer must provide wages. The obligation to pay wages is usually covered by an express term within the contract but if not there is usually an

[2] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.307
[3] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.308
[4] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.174
[5] M. Sergeant & D.Lewis, '*Employment Law'* (6th edition, Pearson Education Limited, 2012) p.51
[6] H Collins, KD Ewing, A McColgan, '*Labour Law'* (CUP, 2012) p.228
[7] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.175

implied duty to pay a wage.[8] In a circumstance where no wage is agreed, the employee might have an implied right to 'reasonable remuneration,' as suggested in *Way v Latilla.*[9] The meaning of wages is extremely broad in its nature.

Definition of Wage:

Wages are defined under section 27 of the Employment Rights Act as 'any sums payable to a worker by an employer in connection with the worker's job'. The Act provides clarification on various items coming within the definition of wages. This can include, 'benefits in kind' (but only where these take the form of a voucher of a fixed monetary value which can be exchanged for money, goods or services.) Payments which do not come within the definition of wages are loans, advances of wages, expenses incurred in employment, redundancy payments, pensions, allowances, gratuities in connection with retirement, compensation for loss of office and any payments to a worker. [10]

The concept and right to minimum and sufficient wage:

A national minimum wage was implemented in the United Kingdom a relatively short time ago. Between 1909 and 1933, wage fixing was only present in a small number of industries and sectors and was undertaken by Wages Councils. This was to prevent exploitation of people who received low pay, usually those who worked in, 'sweated labour.' [11] The term, 'sweated labour' applies to those workers who work for long hours and in poor working conditions for a very low pay. [12] The Tradeboards Act 1909 provided protection for individuals by wage fixing mechanisms if they worked in industries where the pay was so low that it was barely enough for existence. [13] Thus, any set standard for wages was only extended to a limited number of people and did not cover the majority.

The progress of the Wages Council system between 1960 and 1980 was halted by the Conservative government. The Wages Act 1986 restricted the powers of the council until

[8] IDS Employment law handbook 1.22
[9] *Way v Latilla* [1937] 3 ALL ER 759 (HL))
[10] Employment Rights Act 1996
[11] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.306
[12]http://www.lse.co.uk/FinanceGlossary.asp?searchTerm=&iArticleID=1958&definition=sweated_labour [Accessed: 12/03/13]
[13] H Collins, KD Ewing, A McColgan, '*Labour Law*' (CUP, 2012) p.249

eventually, in 1993, they were abolished. [14] The need for a minimum national wage had been recognised and was articulated by Winston Churchill when he said, 'it is a national evil that any class of Her Majesty's subjects should receive less than a living wage in return for their utmost exertions. Where these conditions prevail you have not a condition of progress but a condition of progressive degeneration.' [15] Prior to the National Minimum Wage Act 1998, the United Kingdom was one of the only western countries to not have sufficient protection regarding a minimum wage. [16] The concept of the National Minimum Wage was something that the Labour Government strived to achieve and it was prioritised in the manifesto of 1992 and 1997. In June 1998, the Low Pay Commission found that there were certain categories of workers that were more likely to be paid less than others. These included women, young people, ethnic minorities, those with disabilities, part time workers, lone parents and temporary and seasonal workers. [17] Once the Labour Party came into power, setting a national standard that applied to everyone became a primary focus of employment law reform. [18]

The National Minimum Wage Act 1998 was passed by the Labour Government and sets out a entitlement for any worker to be remunerated by their employer at a rate not less than the national minimum wage which are fixed by regulations by the Secretary of State. [19] As the Act refers to, 'workers' it explicitly applies to a large amount of people. It covers employees and any other person under a contract (whether express or implied, written or not) for another party to a contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer of any profession or business undertaking carried on by the individual. [20] Agency workers qualify for the national minimum wage if it is clear who the employer is. The person paying the salary has the responsibility of paying the national minimum wage. [21]

[14] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.306
[15] H Collins, KD Ewing, A McColgan, '*Labour Law'* (CUP, 2012) p.248
[16] ibid
[17] H Collins, KD Ewing, A McColgan, '*Labour Law'* (CUP, 2012) p.249
[18] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.308
[19] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.212
[20] s.54(3) National Minimum Wage Act 1998
[21] M. Sergeant & D.Lewis, *'Employment Law'* (6th edition, Pearson Education Limited, 2012) p.251

The Act provides for a minimum basic hourly rate of pay but there are certain exceptions with regards to whom it applies to. [22] Workers under compulsory school age, workers participating in designated government run training schemes and workers receiving training at a higher education institution are not included. [23] Prisoners do not qualify for the national minimum wage and workers employed by a charity or voluntary organisation will only receive expenses in respect of work done. [24]

To work out the current hourly rate for the particular individual, the total of the remuneration for the reference period must be subtracted from the total of the reductions to be made and then divided by the hours worked. [25] Currently, the minimum hourly rate for workers aged 21 or over is £6.19 (€7.08) and for workers aged between 18 and 21 the hourly rate is £4.98 (€5.70). For those between 16 and 17 years old, the national minimum wage is £3.68 (€4.20) per hour. [26]

The Act formed the Low Pay Commission which is given responsibility for advising the government on how much should be paid. H&M Revenue and Customs enforces the payment of wages and prosecutes offenders. [27] The right to receive the national minimum wage is part of the worker's contract. The Act states that, 'if a worker who qualifies for the national minimum wage is remunerated for any reference period by his employer at a rate which is less than the national minimum wage, the worker shall be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, the amount to which he is entitled to by virtue of the act.' [28]

There is some dissatisfaction with the amount of pay the National Minimum Wage provides as many say that it is not adequate enough. When it was introduced in 1999, the National Minimum Wage revolutionised pay and provided one million workers with an average pay rise of 10-15%. However, the total employment accounted for by the low paying industry sectors is 26%, identical to when the National Minimum Wage was implemented.[29] The

[22] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.309
[23] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.310
[24] M. Sergeant & D.Lewis, *'Employment Law'* (6th edition, Pearson Education Limited, 2012) p.251
[25] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.214
[26] https://www.gov.uk/national-minimum-wage-rates [Accessed: 25/03/13]
[27] M. Sergeant & D.Lewis, *'Employment Law'* (6th edition, Pearson Education Limited, 2012) p.250

[28] National Minimum Wage Act 1998
[29] H Collins, KD Ewing, A McColgan, '*Labour Law'* (CUP, 2012) p.263

Living Wage Campaign asks for, 'every worker in the country to earn enough to provide their family with the essentials of life.' [30] The Citizens who launched it have won over £70 million of living wages which has allowed 10,000 families to escape from working poverty. The Living Wage it set independently and in London the current rate is £8.30 (€ 9.49) per hour and outside of London the current rate is £7.20 (€8.23) [31]

Payment in Absence of Work:

Section 27(1) of The Employment Rights Act provides a list of payments that are covered by the definition of, 'wages.' These include, holiday pay, statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay. [32]

Holiday Pay

Holiday pay, also known as annual leave applies to workers and provides an entitlement to a statutory minimum per year. [33] Details of holiday pay entitlement should be found in the written contract and a written statement with information regarding employment particulars. This is given by employers to employees and is required by law. [34] The Working Time Regulations 1998 gives workers the right to 5.6 weeks paid leave each year and this has been in force since the 1st April 2009. [35] In order to calculate the amount of holiday pay, the amount of days the worker works in the week must be multiplied by the annual entitlement of 5.6 weeks. Therefore, if a worker works five days a week, they are entitled to 28 days paid annual leave per year. [36] Statutory paid holiday entitlement is limited to 28 days and even if a worker works six days per week, they will still only be entitled to 28 days' of paid holiday. [37] For public and bank holidays, the question of pay depends on the terms of the employee's contract.

[30] http://www.citizensuk.org/campaigns/living-wage-campaign/ [Accessed: 12/02/2013]
[31] ibid
[32] Employments Rights Act 1996
[33] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.212
[34] http://www.acas.org.uk/media/pdf/p/4/Holidays-and-Holiday-Pay-accessible-version.pdf [Accessed: 13/02/13]
[35] ibid
[36] https://www.gov.uk/holiday-entitlement-rights/entitlement [Accessed: 13/02/13]
[37] ibid

Statutory Sick Pay:

Statutory sick pay is paid to employees who cannot undertake work because of illness. Some companies will have a sick pay scheme, where sick pay is a term covered by the contractual agreement between the employer and employee and is agreed between the two parties. [38] The benefit of having a well drafted contract of employment is that there will usually be a clear term regarding sick pay entitlement. [39] Since 1983, statutory sick pay came into force under the Social Security and Housing Benefits Act 1982 and is now part XI of the Social Security Contributions and Benefits Act 1992. [40] There is now a legal obligation on all employers to pay statutory sick pay, regardless of whether there is an agreement between them or not. [41]

This benefit is available to those who are, 'employed earners', which is defined as 'a person who is gainfully employed in Great Britain…under a contract of service.' [42] One of the complexities in ascertaining who is eligible is that the definition of 'employed earner' does not necessarily coincide with the definition of 'employee' which is found in the Employment Rights Act. The meaning of 'employed earner' which is used in broader contexts such as social security and tax, is much wider and may include casual work, or agency work. [43]

Sick pay is payable after four consecutive days of incapacity for a maximum of 28 weeks. The current rate payable is £85.85 (€100.61) per week. Statutory sick pay is paid by the employer, but in order for the employee to qualify, they must have average weekly earnings of at least £107 (€122.38) during the previous eight weeks. This is the threshold at which point the employee begins to pay National Insurance Contributions. [44]

Those who are not entitled to statutory sick pay or as an employed earner have already received the maximum amount of statutory sick pay may be entitled to the 'Employment and Support Allowance.' This benefit is payable to those who have made National Insurance

[38] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.180

[39] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.181

[40] ibid

[41] I Smith and A Baker, '*Smith & Wood's Employment Law'* (10th edition, Oxford University Press, 2010 p.183

[42] s.2(1)(a) Social Security Contributions and Benefits Act 1992.

[43] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.124

[44] https://www.gov.uk/statutory-sick-pay/eligibility [Accessed: 13/02/13]

Contributions and to those who have not. The amount of payment is determined to individual circumstances. [45]

Statutory Maternity Pay:

Statutory Maternity Pay is provided by an employer to a female employee when she takes time off work to have a baby. The employer can recover some or all of the money that they pay to a female employee from the state by deducting the value from pay as you earn and National Insurance contributions. Statutory Maternity Pay is therefore a benefit from the state that is controlled via employers. [46] The main provisions of the benefit are located in Part XII of the Social Security Contributions and Benefits Act 1992. [47]

To be eligible for Statutory Maternity Pay workers must have worked for their employer for at least 26 weeks up to the 15th week before the expected week of childbirth, earn on average at least £107 (€122.38) a week, provide the correct notice and proof that they are pregnant. [48]

If the criteria are met, Statutory Maternity Pay is paid for up to 39 weeks. For the first six weeks, the pay is 90% of the woman's average weekly earnings before tax. For the remaining 33 weeks, the employer must pay them either the flat rate of £135.45 (€154.92) or 90% of their average weekly earnings, depending on which sum is lower. [49] A company may have extra provisions for Maternity Pay and an employee is entitled to more than the statutory minimum but not less. [50]

An employee who does not meet the criteria, may be entitled to the state Maternity Allowance from the benefits agency. [51]

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[45] Department of Work and Pensions, 'Employment and Support Allowance: help if you are ill or disabled',
https://www.gov.uk/statutory-sick-pay/eligibility [Accessed: 13/02/13]
[46] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.240
[47] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.249
[48] https://www.gov.uk/statutory-maternity-pay/eligibility [Accessed: 13/02/13]
[49] http://www.hmrc.gov.uk/paye/employees/statutory-pay/smp-overview.htm [Accessed: 13/02/13]
[50] https://www.gov.uk/statutory-maternity-pay/what-youll-get [Accessed: 13/02/13]
[51] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.250

Statutory Paternity Pay:

Statutory Paternity Pay is a recent development and has provided fathers with rights in order to care for the child or support the child's mother in the weeks following childbirth. [52] The right was introduced by the Employment Act 2002 and provides for two weeks of paid leave to be taken within eight weeks of childbirth . The rate of pay is £135.45(€155) or 90% of average weekly earnings, depending on which is lower. [53] Additional Statutory Paternity Pay may be available if the employee's wife, partner or civil partner is returning to work. The rate is the same as Ordinary Statutory Paternity Pay but may be paid for a longer duration of time. [54]

To be eligible for Statutory Paternity Pay, there are certain criteria that must be met. The individual must have been continuously employed for at least 26 weeks without a break by either the end of the 15th week before the start of the week when the baby is due. The man must also be the biological father of the child, the mother's husband or partner and be earning an average of at least £107 (€122.38) per week before tax. [55] Those whose earnings are less than this will not qualify for Statutory Paternity Pay but may be able to gain income support whilst taking paternity leave. [56]

Statutory Paternity Pay will be paid by the employer in the same way as the payment of wages and tax and national insurance will be deducted from the total amount. [57] The employer will normally be able to recover part or the entire amount of this sum from the State.

[52] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.253
[53] https://www.gov.uk/paternity-pay/overview [Accessed: 13/02/13]
[54] Ibid
[55] https://www.gov.uk/paternity-pay/eligibility [Accessed: 13/02/13]
[56] I Smith and A Baker, '*Smith & Wood's Employment Law*' (10th edition, Oxford University Press, 2010 p.255

[57] https://www.gov.uk/paternity-pay/what-youll-get [Accessed: 13/02/13]

2) Mechanisms for determining pay

Collective bargaining used to be the main mean by which pay was established. There is however very little tradition of national pay bargaining. Further, the law does not provide for mechanisms which 'organise' the level of collective agreements or for any hierarchy of agreements. For example, a national agreement is not superior to a sectoral or company agreement as usually only one sort of collective agreement determines pay and conditions of the workers. There has also been a decentralisation of bargaining which resulted in mainly company agreements rather than sectoral negotiations (also referred to as single employer bargaining rather than multi-employer)[58].

However, the decrease in trade unions membership, together with the shrinking of the sectors where unions were strongly established (public sector, manufacturing) has lead to a reduction in the number of contracts covered by collective agreements. Union influence over pay has always been very limited in the private sector but public sector employees tended to have their terms and conditions regulated by collective agreements. The latest figures show that this trend remains in the private sector but there has also been a dramatic decline of the scope of collective bargaining in the public sector over the last 10 years.[59] 'By 2011 only 6% of private sector workplaces bargained with unions over pay for any of their employees and just under one sixth of private sector employees (16%) had their pay set by collective bargaining'[60]. Collective bargaining takes place in 58% of public sector workplaces, setting pay for 44% of public sector employees, down from over two thirds in 2004[61]. In some sectors (for example, Health), this is explained by the replacement of collective bargaining by a Pay Review Body. The UK has now one of the lowest collective bargaining coverage in the EU 27 (Lithuania, Latvia and Estonia having a smaller percentage)[62].

However, where unions negotiate pay, employees are still more likely to get a pay increase than when remuneration is not negotiated with a union[63].

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[58] See *Benchmarking Working Europe 2012*, (ETUI 2010) p.57
[59] *Workplace Employment Relations Survey 2011*, Initial findings January 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/68684/13-535-the-2011-workplace-employment-relations-study-first-findings.pdf
[60] ibid p.22
[61] ibid
[62] *Benchmarking Working Europe 2012*, (ETUI 2010) p.59
[63] ibid p.23

Law plays little part in the determination of pay. The state used to intervene in sectors where the workforce was paid very low wages. At the beginning of the 20th century, Wage Councils were established in certain sectors to ensure that minimum levels of remuneration were fixed. However, they were abolished in the 1990s. More recently, statute created a National Minimum Wage[64] which is applicable to all workers.

Most wages are therefore determined by the contract of employment.

Case law does not intervene in the determination of pay except for the enforcement of statutes that protect wages. The Employment Rights Act 1996 prohibits unlawful deduction of wage (*see question 6*), the National Minimum Wage Act 1998 requires the payment of minimum wage or the Equality Act 2010 provides for equal pay (*see question 3*).

[64] Through the National Minimum Wage Act 1998

3) The principle of equal treatment in terms of pay

The principle of equal treatment in terms of payment among men and women for doing equal work is embedded in British law and European Union law. After a sequence of Acts and Regulations the British Law introduced in 2010, the Equality Act, which replaced the numerous Acts and Regulations, which formed the basis for anti discrimination law in the UK and aims to address inequalities with new measures to tackle pay secrecy and eliminate the gender pay gap. It is the legislative instrument by which UK implements into domestic law the right to equal pay contained in Article 157 Treaty of Functioning of the European Union (TFEU). Thus, tribunals and courts applying and interpreting the Act must do so by reference to the equal treatment provisions of the Treaty, the legislation made under them and the case law of the ECJ.

The issue of equal treatment in terms of pay was first considered in *Defrenne v SA Belge de Navigation Aerienne (SABENA)*[65] where a female flight attendant argued that she was paid less than her male colleagues who did the same work; thus her right to equal pay on grounds of gender under art 119 of the Treaty of the European Community (now article 157 TFEU) was infringed. The Court upheld her right to equal pay as her male comparators while *Defrenne* and *Van Gend and Loos*[66] identified the horizontal and vertical direct effect of Treaty provisions which could be invoked in national courts and hence, they would be bound to protect individual rights.

The Equality Act 2010 forbids direct[67] and indirect discrimination[68] in any aspect of employment on the grounds of nine protected characteristics: age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race, religion/belief, sex or sexual orientation.[69] This section will deal with equality law in terms of payment when employees (including fix term employees, part time and agency workers) argue that they are treated less favourably in relation to pay because of a protected characteristic at the UK level in accordance with EU law. A woman doing equal work with a man subject to the definition of equal work under section 65 of the Act is entitled to equality in payment and other

[65] (1976) E.C.R. 455
[66] (1964) C.M.LR. 423
[67] Chapter 2, Part 2, s. 13
[68] Chapter 2, Part 2, s. 19
[69] Chapter 1, Part 2, s. 4

contractual terms, except where the employer can show that the inequality in payment is based on a material reason which does not discriminate on the basis of her sex.

Concept of pay

Article 157 TFEU gives an obligation to all Member States to ensure that 'the principle of equal pay for male and female workers for equal work or work of equal value is applied.' Under the provisions of the article pay is defined 'as the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind which the worker receives directly or indirectly, in respect of his employment, from his employer.' As the term of equal pay is related to equal remuneration on the grounds of same work same pay, article 157 TFEU defines equal pay without discrimination based on sex to mean that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and that pay for work at time rates shall be the same for the same job irrespective of gender.[70]

The importance of art 157 TFEU lies on the fact that it defines the concept of pay more widely than that of the Equality Act 2010 as it covers both contractual and non-contractual rights, meaning that a discretionary bonus or *ex gratia* payment made by the employer to the worker will constitute 'pay' for the purposes of Article 157 but will not be covered by the equality of terms in the Act thus giving the chance to claimants to rely on the EU legislation through British courts were they can obtain no redress under UK law.[71]

Equality Act 2010

The main purpose of the Act is to protect and safeguard the right to equal treatment in terms of pay were equal work does not give equal remuneration based on discrimination on one of the protected characteristics listed in section 4. The concept of pay as defined in the Act covers 'non-pay' contractual terms (which are not included in the definition by the Treaty) such as holiday entitlement, guaranteed overtime working and privileged access to sporting and social facilities. Chapter 3, Part 5 of the Act under the 'equality of terms' gives a full guidance as to what the UK law forbids as discriminatory payment based on sex. The Act

[70] IDS Employment Handbook Volume 4, Equal Pay, chapter 3, Article 157 TFEU, parag: 3.5
[71] Ibid 6 parag: 3.7

gives a broader definition in employment than that contained in the Employment Rights Act 1996 aiming in protecting a wider range of employees who may be treated unfairly on the basis that they do not have a valid contract as to fall in the Employment Rights Act provisions.

The Equality Act 2010 implies a provision into every contract of employment giving a woman or man the same right to contractual pay and benefits. The 'equal pay for equal work' provisions of the Equality Act apply to all employers regardless of size of their enterprises. According to section 65(1), a woman can claim equal pay and other contractual terms with a male comparator if she does the 'same or broadly similar nature' work (like work section 65(2), (3)), different work but rated under the same evaluation scheme as being work of equal value (work rated as equivalent section 65(4) and section 80(5)) or different work but of equal value 'by reference to factors such as effort, skill and decision making' (work of equal value section 65(6)). This applies provided that the comparator is in the same employment as the claimant.[72] Even where it can be shown that a claimant is employed on like work, work rated as equivalent or work of equal value with her comparator, it must be remembered that the Act is only concerned to remove inequalities in terms of pay between the claimant and her comparator if such inequalities are attributable to sex discrimination.

The Act in order to safeguard the principle of equal work - equal pay automatically implies a sex equality clause into the woman's contract of employment, modifying it where necessary to ensure her pay and all other contractual terms are no less favourable than the man's (section 66). Where a woman doing equal work shows that she is receiving less pay or other less favourable terms in her contract, or identifies a contract term from which her comparator benefits and she does not (for example he is entitled to a company car and she is not), the employer will have to show why this is. If the employer is unable to show that the difference is due to a material factor which has nothing to do with her sex, then the equality clause takes effect.[73] Once the equality clause takes effect her pay and contractual terms are levelled up to that of the man's. The equal pay provisions apply to all contractual terms including wages and salaries, non-discretionary bonuses, holiday pay, sick pay, overtime, shift payments, and occupational pension benefits, and to non-monetary terms such as leave entitlements or access to sports and social benefits. Other sex discrimination provisions apply

[72] I. T. Smith, A. Baker, *Employment law*,10th edition 2010, Oxford university press, pg:327
[73] Equality and Human Rights Commission, Equality Act 2010 Code of Practice available at: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/equalpaycode.pdf s.29

to non-contractual pay and benefits such as purely discretionary bonuses, promotions, transfers and training and offers of employment or appointments to office.[74]

Moreover, the Act makes provisions for equal pay in terms of occupational pension scheme and includes a sex equality rule under section 67. The rule safeguards that men and women are treated equally to comparable members of the opposite sex in access to and benefits of an occupation pension scheme. In cases where an occupational pension scheme, or a term of it, it is discriminated against a woman in a way that it is less favourable to her in comparison with a male comparator, then the term is modified putting both in the same position. The exclusion of part-time workers from an occupational pension scheme has been held to be indirectly discriminatory and unlawful because the majority of part time workers are women.[75]

Gender pay gap

In an attempt to eliminate sex inequalities in terms of pay the Equality Act lays down a mechanism for highlighting indicators of unequal pay. Gender pay gap is usually defined as the average difference between men's and women's hourly earnings[76]. Equality Act 2010, in an attempt to eliminate this gap has inserted a provision under section 78 which 'requires employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees'. According to the context of section 78 (2) private sector employers with more than 250 employees are required to report on gender pay gaps within their organisation. However, no regulations have yet been made under section 78 and the Labour Government made a commitment to pursue a voluntary approach to gender pay gap reporting and to not use this power before April 2013, although such provision is not included in the Act. In the 'Equality Strategy- Building a Fairer Britain' published in 2010, the Coalition Government is taking a voluntary approach and developed a broader framework for voluntary gender equality reporting (launched in September 2011) that goes beyond pay to include a range of equality indicators (for example proportion of women in workforce,

[74] Ibid s.32.
[75] *Preston and ors v Wolverhampton Healthcare NHS Trust and ors* (No. 3) [2004] ICR 993; B*ilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 ECJ
[76]Available at: http://www.ccsr.ac.uk/research/genderpaygaptheory.html

proportion returning from maternity leave). Private sector employers with more than 150 employees are encouraged to report one or more of the indicators.[77]

In addition to the Act, the UK Labour law follows three major European Union Directives; The Equal Treatment Directive[78], The Racial Equality Directive[79] and the Employment Equality Framework Directive[80]. The Directives adopted and implemented the definition of pay as given in the article 157 TFEU, more widely than the Act, and they reinforce the aim of eliminating discrimination in terms of payment on a protected characteristic.

Moreover, the UK Labour law has also adopted a series of EU Directives and Regulations aiming to protect part time and agency workers as well as fixed term employees of being discriminated in terms of payment in comparison with full time comparators who do the exact same work.

Part-time Workers (Prevention of Less Favourable Treatment) Regulation 2000 SI 2000/1551

The Regulation aims to eliminate any discrimination in terms of pay that part time workers may face as they are being treated less favourably than their colleagues who are full time workers. The Regulation implements EU Directive 97/81/EC[81], and forms part of the European Union programme to combat discrimination of atypical workers. As many part time workers are female it is also a contributory attempt to combat sex discrimination. There is no exemption for small employers to treat part time employees less favourably in terms of pay however, there is an exception allowing Member States to make access to particular conditions of employment subject to a period of service, time worked or earnings

[77] Simpson Millar, TUC, Guide to Equality Law 2011 p:24

[78] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation *Official Journal L 204 , 26/07/2006 P. 0023 - 0036*

[79] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *Official Journal L 180 , 19/07/2000 P. 0022 - 0026*

[80] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *Official Journal L 303 , 02/12/2000 P. 0016 - 0022*

[81] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work *Official Journal L 014 , 20/01/1998 P. 0009 – 0014*

qualification' where this is 'justified by objective reasons' according to clause 4 of the EU directive.[82]

The Regulation defines part time workers under regulation 2 as if 'he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract is not identifiable as a full time worker'. Regulation 5 of the Regulation safeguards the right not to be treated less favourable on the basis that they are a part time workers than their full time comparators, while the particular section also includes workers who are becoming part time and workers returning part time after absence. All of them can bring a claim at an employment tribunal for difference in payment under regulation 8 and in cases of successful claims they may obtain remedies under regulation 8(7) which include (a)a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates; (b)ordering the employer to pay compensation to the complainant and (c) recommending that the employer take action, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

Fixed Term employees (prevention of less favourable treatment) regulations 2002, SI 2002/2034

It is a UK statutory instrument which aims to protect employees who have fixed term contracts. It is meant to implement Directive 99/70/EC[83] on fixed termed employees. The Regulation 3 indicates that fixed term employees cannot be treated differently as regards the terms of the contract. The European Court of Justice and UK courts have indicated that this includes pay.

The European Directive talks of comparing 'employment conditions'. The scope of this term was disputed in the European Court of Justice and in the United Kingdom tribunals. It was argued in both cases that pay was not part of 'employment conditions'. This was a technical and legal point put to the European Court of Justice. As pay is not a matter for

[82] Available at: http://www.emplaw.co.uk/lawguide?startpage=data/972u24.htm

[83] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175, 10.7.1999, p. 43–48*

European legislation, as clearly stated in what was Article 137(5) TEC (now art 153(5) TFEU), pay could not be included in employment conditions. This argument was used by the Spanish government and supported by the UK and Ireland in the case of *Del Cerro Alonso v Osakidetza-Servicio Vasco de Calud*[84]. However, the European Court of Justice took a purposive approach to the interpretation of the Directive. Pay is the most important employment condition and excluding it from the scope of the equal treatment principle would seriously undermine the aim of the Directive [para 37]. In the UK, in *Coutts and Co plc and anor v Cure and anor*,[85] the Employment Appeal Tribunal found that excluding fixed term employee from accessing bonus payment available to permanent employees was directly in breach of regulation 3 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002[86].

Agency Workers Regulations 2010, SI 2010/93

The Regulations aim to combat discrimination of people who work for employment agencies, by stating that agency workers should be no less favourably treated in pay and working time than their full-time counterparts, who do the same work (regulation 5) after 12 weeks in a given job (regulation 7). An agency worker may bring a claim in employment tribunals under regulation 18 where their rights covered under regulation 5 and 6 are being infringed. If the tribunal's outcome is in favour of the claimant, the employer is obliged to pay compensation to the agency worker. The Regulations give effect in UK law to the Temporary and Agency Workers Directive[87] which aims to ensure that temporary agency workers enjoy the same employment law rights throughout the EU, and that they are not being discriminated against because they are temporary workers.

Regulation 5 establishes the rights of the agency workers in relation to basic working and employment conditions in a combination with regulation 6 which indicates that the relevant terms and conditions to compare include pay which is defined as 'any sum payable to a worker of the hire in connection with the worker's employment, including any fee,

[84] (C-307/05 [2007] 3 CMLR 54).
[85] [2004] UKEAT 0395_04_1709
[86] P. Lorber 'Protecting Fixed Term workers – using the Directive purposefully' (2012/3) Revue de Droit Compare du Travail et de la Securite Sociale, Electronic English Edition 88.
[87] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work *Official Journal L 327 , 05/12/2008 P. 0009 - 0014*

bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise but excluding payments or rewards within paragraph 3 of the Regulation'.

The Equality Act 2010 brought all of the grounds of discrimination into one statute, extended anti-discrimination protection to a roughly similar scope of coverage (eg. employment) and harmonised definitions and concepts throughout. It introduced new requirements and concepts while increasing the responsibilities of employers to correct gender pay imbalance[88]. The UK law also adopts and implements all the EU Directives and Regulations to safeguard the right to equal pay for part time, fixed term and agency workers; and as the present statistics[89] shows, the inequality in terms of pay has been reduced in all spheres.

[88] I.T Smith, A. Baker, *Employment Law*, 10th edition, Oxford university press, p:274

[89] National Statistics, Annual Survey of Hours and Earnings, 2012, available at: http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2012-provisional-results/stb-ashe-statistical-bulletin-2012.html

4) Flexible Pay Systems

Payment systems are usually quite specific to the particular occupation. Those who work in industry are more likely to be paid by a piece work basis or on a time rate. Professional, managerial and clerical workers usually receive salaries that are calculated without considering items of completed work or hours spent working and are normally paid at monthly intervals. [90]

Entitlement to bonuses, commission and overtime pay will normally be expressly agreed by the parties and should be recorded in the written statement of terms and conditions issued under s.1 of the Employment Rights Act. [91]

Bonuses and incentive pay can be counted as part of a wage. However, it has been established that money from tips given to workers cannot contribute towards the payment of a wage. [92] In the absence of an express agreement, courts and tribunals may imply entitlement to a bonus on the basis of the practice and custom of the employer. In ***Frischers Ltd v Taylor***, a Christmas bonus was held to be an implied term of the contract because it had been paid to employees for several years. It would be a breach of contract if the employer withheld this bonus. [93] If an employer wants to ensure that any discretionary bonus does not become a contractual right, they should insert a term stating that the scheme does not give the employees this right. [94]

A company may give their employers an opportunity to partake in share ownership schemes which allow them to buy a share in the company at a discounted or subsidised prices. The amount of pay received is directly related to the profitability of the employer. The idea linking pay to profits is to encourage employee participation. [95]

[90] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.304

[91] IDS Employment Law Handbook 1.43

[92] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.312

[93] *Frischers Ltd v Taylor* EAT 386/79

[94] IDS Employment Law Handbook 1.48

[95] S Deakin & G.S Morris, *'Labour Law'* (6th edition, Hart Publishing, 2012) p.329

Many employees are contractually entitled to extra pay if they work overtime, but employees have no general implied right to be paid for overtime worked voluntarily. [96]

Employers can choose to pay workers depending on the individual's performance or the profit of the company as a whole. Since the early 1980's there has been an increase in the use of flexible payment systems which are used to motivate employees and enhance their performance. [97] Employees within a company may be graded according to their skills and is allocated a wage by reference to a system of job evaluation. [98] Employees may have performance targets that they must meet. If the performance targets are vague, courts and tribunals are likely to favour the employee. [99]

[96] IDS Employment Law Handbook 1.58
[97] ibid
[98] H Collins, KD Ewing, A McColgan, '*Labour Law*' (CUP, 2012) p.230
[99] IDS Employment Law Handbook 1.58

5) Variation of pay in time of crisis- Changing individual remuneration (contract amendment); changing collective agreements remuneration (collective agreement and its impact on the contract).

Introduction

Contracts are varied often, for numerous reasons. Crisis in the company or generally in the financial market can be one of those reasons. Consequently, in the economic crisis we are in today, which has resonated not only on a European level but affected the global markets to, inevitably employers and establishments are being forced to take difficult decisions. Collective agreement is one of the ways in which a contract can be varied, but others shall also be explored, which are more prominent in the UK.

Why vary a contract?

Contract variation can be triggered for a number of reasons. From an employer's point of view, changed economic circumstances or a reorganisation of the business could necessitate a review of pay. From an employee's perspective, change may be requested to bring about improvements in pay or working conditions, such as additional annual leave, flexible working or again a change of location. One can consequently deduce that in times of crisis, variation on pay rate, stipulated in the contract, is more likely to be varied upon the insistence of the employer.

How to vary a contract?

Contracts are capable of variation. They can be varied only with the agreement of both parties. Unilateral variation of the contractual terms on the employer's part will usually result in a fundamental breach constituting a repudiation of the contract as pay is a fundamental term of the contract. However the main remedy for the employee is a claim for constructive dismissal in the employment tribunal if this is what occurs.

Variation may occur by statute. Statute may vary any and all contracts of employment. This can be on anything, and often secondary legislation can even be passed which introduces further variation. An example of this is the National Minimum Wage Act 1998 which the secretary of state can issue secondary legislation on, which could amend the pay stipulated in contracts.

One of the ways in which a contractual term can be varied, is via the written statement. Under section 4 of the Employment Rights Act 1996, an employer can vary the original section 1 statement. However, as this section 1 statement is not technically a contract, simply evidence of the contents of the contract, any changes to the statement will not automatically change the terms of the contract. In order for pay to be varied in this way, the employer would be relying on each individual employee not voicing any objections to the change. Their continuance of work would be seen as consenting to the change. Nonetheless, the court has been reluctant to uphold this, and most likely would not in something as fundamental as pay. This can be seen in the *Jones v Associated Tunnelling Case Ltd* (1981)[100] where the court said that issuing a section 4 statement cannot by itself be evidence of contract variation where the term is of no immediate practical importance the court may choose not to uphold it. Additionally, in these scenarios, the employees may continue to work, but under protest.[101]

Furthermore, as mentioned previously, often employee handbooks can allow for variation of pay too. This can be seen in the Bateman v Asda Stores Ltd case[102]. In this case Asda sought to rely on a provision in its staff handbook (the variation clause) which stated `The company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time.' The Employment Appeals Tribunal made some key points. They said that Asda did indeed have the right to use the wording in the handbook to change this term. Although this appears to give wide discretion to employers to change fundamental terms including pay unilaterally, it was stressed that the wording of the handbook must be precise. Furthermore, it has been argued that the outcome of this case may have been different if the employees had argued a breach of the implied term of trust and confidence in relation to the pay change.

The final way in which terms and conditions within a contract can be varied are through dismissal and re-engagement on new terms. This is covered by the Employment Rights Act 1996; section 141, which considers renewal of contract or reengagement. The statute lays out the provisions for how to re-engage on new terms as well as the course that should be taken if the new terms are refused and redundancy is necessary.

[100][100] IRLR 477 EAT
[101] *Burdett Coutts v Hertfordshire County Council* (1984) IRLR 91
[102][102] (2010) IRLR 370 EAT

Although unilateral variation is not permitted, and any variations can be challenged; the courts may accept these kinds of dismissal and re-engagement methods, if they are deemed to be necessary for `sound business reasons'. Another case, upon which similar law has been formulated, is the Garside and Laycock Ltd v Booth (2011)[103] which further clarified what would be acceptable in this area. It was held that dismissal and re-engagement would even be permitted if it was just a case of `business efficacy' and the company did not need to be desperate in any way for this to be permissible and furthermore employees are under a duty to adapt.[104]

Contract variation can be implemented in many ways, and it is difficult to challenge under UK employment law.

How collective agreements are important in the variation of pay and are they enforceable?

If variation of pay was conducted through collective bargaining, it would determine three things. The group of employees who will be covered by what is agreed, aspects of the employment rulebook and rules about how future collective relations should be conducted.

Enforceability of collective agreements is covered by TULRCA 1992. This is outlined in section 179. This section indicates that in order for a collective agreement to be enforceable it must be intended to have been a legal document and be in writing.

However, usually no party wishes to legally enforce the agreement, but legal consequences can still stem from them. A collective agreement can be incorporated into a contract, thus giving it legal status in that way. Some contracts expressly allow for incorporation with the contract stipulating that the contract will be subject to a particular collective agreement so wages for example may become legally enforceable express terms of the contract.

However, if there is no express term the issue becomes trickier. If this is the case, the courts will look to the joint intention of the employer and the employees, and whether or not they had intended for it to be incorporated into the contract, as was done in

[103] UKEAT/0003/11
[104] *Hollister v National Farmers Union* (1979) ICR 542 CA

Alexander v Standard Telephones and Cables Ltd (No 2)[105]. The court must therefore draw inferences from the conduct of the parties in order to decide whether the incorporation was indeed implied. The court may look to custom, or course of conduct when making this decision.

Another issue is whether the term of the collective agreement is `apt for incorporation' into the specific employee's contract. Whether it is deemed apt or not is entirely dependent on the facts of the case brought before the court as held in *Anderson v Pringle of Scotland Ltd*[106].

As for enforcement by the employees, it is usually accepted that the collective agreements which deal with core obligations such as pay have indeed been incorporated into the contract of employment. A leading case which concerned the enforceability of collective agreements was *Malone v British Airways Plc*[107]. This was about a term on minimum staffing on a plane in a collective agreement. The union failed to agree with the airline and the change was introduced unilaterally to reduce the number of personnel on a flight. The question which arose was whether the term was apt for incorporation. The court refused the agreement that this change had a direct impact on working conditions, indicating that the parties could not have wanted this term to be binding.

[105] [1991] IRLR 286 QBD
[106] [1998] IRLR 64 CS.
[107] [2010] EWCA Civ 1225; [2011] ICR 125 (CA)

6) Consequences of non payment of wages by the employer/ enforcement of payment

The UK law through the Employment Rights Act 1996 safeguards the rights of the employees and aims to strengthen their position in cases of infringement of their rights. The Act is enforceable for anyone who fulfils the definition of an employee or a worker under section 230 depending on the right infringed. This section will examine and analyse how the law protects the right of employees to wages due under the contract of employment. Then we will turn to evaluate the available remedies before the court in cases where a valid claim is established, as well as the available defences for employers in circumstances that may lawfully deduct wages. As one of the main themes of UK Employment law concerns issues on constructive dismissal and remedies available to successful claimants, it will hereby also analysed how the UK law protects employees from being treated unfairly.

Wages

There are two main methods of enforcing the NMW; enforcement by an individual worker and enforcement by the enforcement agency (Her Majesty's Revenue and Customs) on behalf of the Department for Business, Innovation and Skills (BIS). Every worker has a legal right to be paid for his work performed. A worker who is not paid the NMW will be deemed to be entitled under his or her contract of employment to the higher of either:

- The difference between what he or she is paid and the NMW, or
- The NMW arrears adjusted to take account of any increase in the NMW rate at the time the arrears are determined by applying the formula as stated in section 17 NMWA 1998.

The worker will therefore be able to bring a claim alleging an unauthorised deduction from wages before an employment tribunal under the protection of wages provisions contained in Part 1 of the Employment Rights Act 1996 to recover the difference. For the purposes of the complaint, it will be presumed that the worker qualified for the NMW and that he or she was paid less than the NMW, unless the contrary is shown (section 28(1) NMWA).

As the definition of worker under the NMWA is wider than that provided in the ERA, section 18 NMWA provides that an individual who is a worker under the NMWA will be deemed to be a worker under the ERA. This prevents an employer arguing that an individual who is a worker under the NMWA, but not the ERA, is not entitled to bring a claim under the

protection of wages provisions in the ERA.[108] This provision guarantees the right of employees to be paid for wages due, leaving no grounds for employers to deny or restrict such a right on the basis that they do not fall within the definition of employee given by ERA.

Unlawful deduction

It is fundamental to any employment relationship that the employee carries out work for the employer and in return the employer must pay for wages due. There are special provisions relating to wages under section 13 of the Employment Rights Act 1996 which are aimed at ensuring that employers do not withhold or make deductions from wages without authorisation. Any unlawful deduction is illegitimate for the purposes of the Employment Rights Act 1996.

However, the Act makes provisions in order to protect employers from incurring liability in specific circumstances where the deductions of wages may be deemed to be made legitimately if it falls within the provisions of section 13 (1). These circumstances are:

- The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract
- The worker has previously signified in writing his agreement or consent to the making of the deduction
- They are required by statute (e.g. tax and national insurance)
- To recover previous salary overpayments
- The employee has participated in strike action or other industrial action
- In consequence of disciplinary proceedings where those holding the proceedings have the power to order deductions under statute
- To discharge a court order/tribunal judgement where written consent is provided by the employee

[108] IDS Employment Handbook, Volume 4, Chapter 5, National Minimum Wage, enforcement parag: 5:119.

- In retail work, where a cash shortage or stock deficiency comes to light within 12 months of it arising (and the first deduction is made within that 12 months), it is permissible to deduct up to 10% of the employees gross salary so long as it is not the employee's final salary.

- To pay third party's specified amounts where written consent has been provided by the employee.

The purpose of the appropriate provisions of the Act is to provide a statutory remedy, through the employment tribunal system, where an employer makes an unlawful deduction from wages and not in a situation where gross wages might be calculated incorrectly. Any dispute about an error of computation of gross wages which cannot be resolved directly between the parties is a matter for determination by the civil courts, specifically Country Court and High Court. Where the employer has taken a deliberate decision to make a deduction for some reason, and this action does not comply with the provisions of the Act, the matter can be referred to an employment tribunal.

Constructive Dismissal

An employee who is not expressly dismissed can sometimes claim that the employer's conduct amounts to a constructive dismissal under section 95(1)(c) of the Act. Employees often allege that their employer has breached its implied duty not to destroy or seriously damage the trust and confidence inherent in the employment relationship.[109] For the purposes of the Act, dismissal is defined only if 'The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.

The Department of Trade and Industry UK, in *Courtaulds Northern Textiles Ltd v Andrew*[110] stated: 'A tribunal may rule that an employee who resigns because of conduct by his or her employer has been 'constructively dismissed. For a tribunal to rule in this way the employer's action has to be such that it can be regarded as a significant breach of the employment contract indicating that he or she intends no longer to be bound by one or more terms of the

[109] IDS Brief Volume 4, Chapter 9
[110] [1979] IRLR 84, EAT

contract: an example of this might be where the employer arbitrarily demotes an employee to a lower rank or poorer paid position.'

Remedies

If section13 for unlawful deduction can be satisfied under the circumstances of each case then the worker can complain to an employment tribunal within a certain time limit. In more straightforward situations the time limit is 3 months (section 23 (2)); in case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received. If the Tribunal considers that the complaint is well founded it must order the employer to repay the amount of any unlawful deduction made or payment received. A tribunal will not order repayment where the worker has already been reimbursed by the employer prior to the hearing.

Claims of constructive dismissal can be brought to an Employment Tribunal under section 95(1) (c) and section 111. If the outcome of the hearing is in favour of the employee, the remedies are re-instatement, re-engagement, or compensation. Re- instatement or re-engagement orders are very rare. The tribunal may order for reinstatement under section 114 where 'the employer shall treat the complainant in all respects as if he had not been dismissed' and any amount payable by the employer the period between the date of termination of employment and the date of reinstatement. Moreover, the tribunal may order for re engagement under section 115. It is an order on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment. However in cases where the court orders are not being fully complied with, section 117 may enforce compensation subject to section 124 and in cases where there is no compliance the tribunal shall made an award for compensation for unfair dismissal[111] in accordance with section 118.

[111] S.117 (3)

The Employment Tribunals is the jurisdiction that will consider most disputes about wages[112]. However the British Law offers the option to bring a claim for breach of contract in civil courts in cases where the time limit has passed, as the time limit in a court action is six years. In such proceedings, it will be presumed that the worker qualified for the NMW unless the contrary is proved section 28(1) NMWA. If the employer dismisses the worker or takes some other action against the worker for asserting his or her right to the NMW, or dismisses or victimises the worker because he or she is, or is going to become, eligible for the NMW, the worker may also be able to claim unfair dismissal or unlawful detriment.

According to the statistics[113], the claims for unlawful deduction of wages is the second highest head of complains, after the claims for unfair dismissal. The unlawful deduction complaints for the year from 1 April 2011 to March 2012 reached the enormous amount of 36,200, (although there has been a significant decrease than the previous year); from which only the 14% of them was successful at hearing. In general, the NMW has had the positive effect of reducing low pay that was hoped for, whilst avoiding significant damage to levels of employment. The remaining concerns about the Act are principally directed at problems of effective enforcement.[114] The Employment Rights Act 1996 reinforced the rights of the employees especially in the areas of unfair and constructive dismissal as well as for unlawful deductions of wages giving to employees a safer and fairer field for employability.

[112] S. Corby, P. Latreille Employment tribunals and the civil courts: isomorphism exemplified, I.L.J. 2012, 41(4), 392

[113] Employment tribunal annual statistics available at: http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb

[114] H. Collins, K.D Ewing, A. McColgan, Labour Law, Cambridge University Press, pg: 230