

## GLOSSARY

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**Administrator** An officer of the court (whether or not appointed by the court) appointed with the objective of rescuing the company as a going concern, achieving a better result for creditors than would be likely if the company were wound up, or to realize the company's property to make a distribution to secured and preferential creditors.

**ADR** Alternative forms of dispute resolution have been developed in an attempt to settle disputes between parties without recourse to litigation. The term is typically used when referring to mediation, conciliation, and arbitration techniques.

**Agent** A person who has the authority to act on another's (the principal) behalf, and will bind the principal in contracts with third parties as if the principal had personally made the agreement.

**Automatically unfair reasons to dismiss** Certain reasons used in choosing to dismiss (such as for pregnancy; trade union membership; enforcement of rights under health and safety legislation) are automatically unfair and as such the claimant is not required to satisfy the two years' continuous employment qualification.

**Balance of probabilities** The test used to establish liability/guilt in civil cases, which is a lesser test than of 'beyond reasonable doubt' used in criminal cases. The facts of the case and the evidence presented will be assessed to determine whether the court is satisfied that the claim has been proved.

**Band of reasonable responses** In determining whether an employer's decision to dismiss was a reasonable response to the alleged conduct, the tribunal will have regard to the Employment Appeal Tribunal's decision in *Iceland Frozen Foods v Jones* [1982] (see **21.2.6**).

**Breach of contract** When a party fails to complete their obligations under the contract, they may be in breach, allowing the injured party to seek a remedy.

**Breach of statutory duty** A statute may impose a duty but fail to mention any civil law sanctions. In order to claim under the statute, the claimant

must demonstrate that Parliament intended liability in tort to follow from the breach.

**Business efficacy** This expression has been used when describing how the courts may imply terms in order to produce an intended or anticipated result in the contract.

**Case law** These are reports of cases that have been decided by the courts. You can 'identify' case law as the report contains the names of each of the parties (e.g. *Donoghue v Stevenson* [1932], see **11.5.1.1**).

**Claimant/appellant** The 'party' (person/body) bringing the action and is named first in the proceedings (e.g. *Carlill v Carbolic Smoke Ball Co.* [1893], see **5.4.1**). Note that older cases refer to this party as the 'plaintiff' but from 26 October 1999 the term 'plaintiff' was replaced with 'claimant' under the Civil Procedure Rules 1999.

**Collective ministerial responsibility** Ministers with responsibility for government departments are members of the Cabinet. They have the ability, in Cabinet discussions, to contribute to policy. However, when the Cabinet collectively establishes a policy, each of the Ministers must follow this (or the convention is that if they cannot support the Government they must resign their Ministry).

**Common law** Law created through judicial decisions. It is a body of law that was being developed before a united system of government had been formed in England. Wrongful dismissal is governed by the common law, and hence the rules and remedies applicable with the common law are applied to the regulation of contracts of employment.

**Comparator** To found a claim of discrimination, the claimant must establish that they were discriminated on the basis of a protected characteristic. Therefore, they must have been a victim of less or (un)favourable treatment attributable to the protected characteristic; and this is evidenced when compared with how a person without the protected characteristic was or would be treated. Depending on the claim, a permissible comparator may be hypothetical, or in other instances a 'real' person may have to be used to demonstrate less favourable treatment.

**Consensus ad idem** This is the Latin term for an 'agreement as to the same thing' in English law, more commonly referred to as a 'meeting of minds' between the parties.

**Consideration** Simple contracts have to be a bargain rather than a gratuitous promise (that cannot be enforced). Consideration is something of value that makes the agreement a bargain 'the price paid for a promise'.

**Constitution** The constitution is a system defining the power of the State and State bodies, and regulating their actions, thereby ensuring accountability.

**Constructive dismissal** When an employer radically or fundamentally changes the contract to the employee's detriment, but has not dismissed the employee, the employee may treat this unilateral change as a repudiation, resign, and claim constructive dismissal. This may be best understood as a claim for unfair dismissal when the employee has not been dismissed.

**Consultation** Where an employer plans to transfer an undertaking they are required, under the TUPE 2006 Regulations, to consult with the employees and their representatives. A similar duty applies in cases of proposed redundancies.

**Consumer** Refers to an individual acting for purposes that are wholly or mainly outside of that individual's trade, business, craft, or profession. The significance of this definition is that it provides certainty and consistency between consumer protection legislation. Any trader who claims that the individual was not a consumer for the purposes of this law has the obligation to prove it. Such definitions remove the confusion present in the current/previous legislation relating to consumers and traders. The Unfair Contract Terms Act 1977, s. 12 sought to define what 'dealing as a consumer' and acting in 'the course of business' meant in real world scenarios.

**Contra proferentem** This is a rule whereby the courts, generally, will interpret an exclusion clause narrowly and against the party that is seeking to rely on it.

**Corporation** A legal entity, such as a company, that possesses its own legal personality separate from the members.

**Course of employment** For an employer to be held liable for the torts of an employee, the tort must have been committed in the working hours and/or under the responsibility of the employer. The common law has demonstrated many examples, and established rules, to identify what will constitute 'course of employment'.

**Damages** Compensation awarded by the court in the form of a monetary payment.

**Debenture** Written evidence of a secured loan given by the lender to the company. It has been described as 'a document which either creates a debt or acknowledges it'.

**Defendant** The party defending the claim.

**Delegated legislation** Laws that enable an individual/body to pass legislation under the authority and control of Parliament. These include Statutory Instruments, Orders in Council, and by-laws.

**Direct applicability** A concept of EU law where the Treaty Article/Regulation becomes part of national law immediately following its commencement. Thus, its provisions are capable of being relied upon in UK courts without any action being necessary on the part of the Member State.

**Direct discrimination** Direct discrimination occurs when a person treats another less or (un) favourably because of a protected characteristic than they would a person without the characteristic.

**Discharge of contract** The contract may be brought to an end through performance of the obligations, through agreement between the parties, through frustration of the contract, or through one of the parties' breach and this being accepted by the innocent party.

**Dissolution** This is the process of ending a business relationship (such as a company or partnership).

**Dividend** The distributable profits of a company to shareholders.

**Doctrine** This term is used to refer to a body of thought and is used in legal theory to identify a principle of law, such as those developed through the common law.

**Duress** Compelling a party to enter a contract on the basis of a threat, which makes the contract voidable.

**Duty of care** The rule that places an obligation to take reasonable care not to injure your 'neighbour' or damage property.

**Economic, technical, and organizational reason** Where there has been a transfer of an undertaking regulated by TUPE 2006, the employee is transferred to the transferee with the terms and conditions of employment preserved. These terms and conditions may be altered, and the employee may even be dismissed, if there is an economic, technical, or organizational reason

connected with the transfer, to the satisfaction of the tribunal.

**Effective Date of Termination** A claim under unfair dismissal has to be lodged at a tribunal within three months (less one day) of the Effective Date of Termination. The Employment Rights Act 1996 (ERA), ss. 97 and 145 identify the mechanism to determine the date.

**Employee** A person who works under a 'contract of service'. These individuals, who perform the contract personally, have greater obligations placed on them (such as implied terms) but also have greater protection in employment, including the right not to be unfairly dismissed and the right to compensation upon redundancy.

**Employment Appeal Tribunal (EAT)** This is not a tribunal (despite its name) but is the court that hears cases of appeals from Employment Tribunals.

**Employment Tribunal** Tribunals are established to hear employment law complaints between the employer and individual. These tribunals were previously known as Industrial Tribunals and they hear employment cases (dismissals; discrimination; cases involving other statutory rights; and so on). They are presided over by an Employment Judge (formally a chairperson) and are assisted by two lay members representing (generally, rather than specific to the case) both employers and workers. However, from 6 April 2012, Employment Judges may sit alone in cases of unfair dismissal.

**Equitable remedy** Discretionary remedies granted by the courts, generally where damages would not provide an adequate remedy. Examples of equitable remedies include injunctions, rescission, and specific performance.

**Exclusion/exemption clause** A term that attempts to exclude a party's liability which would otherwise exist. There are common law and statutory rules regulating the use of such clauses.

**Executive** A broad concept that, whilst generally attributed to the Government (and specifically the Cabinet), can include any organ that administers power.

**Fiduciary duty** A fiduciary has authority belonging to another person/body, and they are obliged to exercise this for the other party's benefit. An example of a relationship establishing fiduciary duties is between solicitor and their client.

**Force majeure clauses** This is an element of frustration in determining how to deal with

events that are beyond the control of the parties (wars, acts of God, and so on).

**Freedom of contract** No one can be forced into an agreement, therefore the State did not regulate such agreements and allowed the parties to establish their own terms and conditions.

**Frustration** An event, that is neither party's fault, may render the contract impossible to perform or radically different from that agreed. This leads to the contract being frustrated (unable to be continued) and results in the parties being discharged from further responsibilities.

**Garden leave agreements** The employer may decide that instead of incorporating a restraint of trade clause and (possibly) having this rejected by the court, a 'safer' option may be to incorporate an extended period of notice where the employee, having given his/her notice or resignation, is paid to 'stay in the garden'—albeit that they cannot work in competition with the employer.

**Gross misconduct** The 'gross' element is a one-off, serious, event that would justify a summary dismissal such as theft, assaults, and so on.

**Gross negligence** To justify a summary dismissal this would involve a serious act of negligence such as endangering customers, colleagues, and so on.

**Harassment** Harassment involves 'unwanted conduct' related to a protected characteristic, which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment.

**Heads of claim** For an action to succeed on the basis of direct sex discrimination in pay, the claimant must choose one of the three 'heads' of claim identified under the Act—like work, work rated as equivalent, or work of equal value.

**Indemnity** The Civil Procedure Rules define indemnity as a right of one party to recover from a third party the whole amount that they themselves are liable to pay. This is particularly apt in situations involving the liability of partners.

**Independent contractor** A person who works under a 'contract for services'. These individuals have the ability (and option) to work for several employers, and have better tax benefits, but lack many elements of employment protection that employees enjoy.

**Indirect discrimination** Indirect discrimination involves the application of a seemingly neutral provision, criterion, or practice that is applied

to everyone. However, it particularly affects people who share a protected characteristic and it puts them (or would put them) at a particular disadvantage.

**Individual ministerial responsibility** A government Minister has responsibility for the actions of themselves, and their department.

**Innominate/intermediate terms** Where the parties attempt to identify in advance a term as a condition or warranty and this is impossible as it requires knowledge of the consequence of the breach.

**Intellectual property** This is a product of someone's intellect that has commercial value and may be exploited. It provides legal rights of ownership and control and is typified by copyright of artistic and literary works, patents, trademarks, and design rights.

**Intention to create legal relations** A legally enforceable contract must be one where the parties understand and accept that failure to fulfil obligations under the agreement may result in legal consequences.

**Inter alia** The Latin phrase meaning 'among other things'.

**Judiciary** The body of the judges. They interpret and apply the law. The 'judiciary' often refers to the senior judges in the Court of Appeal, the Supreme Court, and the judicial wing of the Privy Council.

**Law reports** Case law is reported in law reports, which identify the facts of a particular case and the rulings/judgment of the court. Those that are reported have some importance in developing precedent or identifying the interpretation of statutes and so on. These reports are published by commercial organizations and as such the case may be produced in any or all of the available reports including the Law Reports (Appeal Cases, Chancery Division, Family Division and Queen's Bench Division); the Weekly Law Reports; the All England Law Reports; and, increasingly, specialized reports for specific areas of law such as the Family Law Reports and Butterworths's Medico-Legal Reports.

**Legal personality** The rights attached to a natural person and/or an artificial thing, such as a corporation.

**Legislation** Law created through, or under the authority of, Parliament. It is the highest form of law and is not subject to challenge by the courts.

**Legislature** The body that passes legislation. In terms of the concept of separation of powers, this is generally Parliament.

**Limitation clause** This is often used to describe terms such as exclusion/exemption clauses that seek not to completely exclude any potential liability, but rather to limit or restrict a liability which would otherwise exist. For example, a clause could be included into a contract which provides that an individual/corporation is liable for specific loss or damage, but that this is restricted to a monetary award.

**Liquidated damages** These are damages that are determined in the contract in advance of a breach. They must be a pre-estimate of loss and not a penalty clause.

**London Gazette** This is the official newspaper that provides, in the context of this chapter, legal and regulatory information regarding companies, disqualification of directors' notices, and so on.

**Material factor** To defend an action against an equal pay claim, the employer may demonstrate that the difference in pay is not due to the sex of the individual, but is based on some objective, justifiable, reason (e.g. responsibility or qualifications).

**Misrepresentation** A false statement of fact inducing the innocent party to form the contract.

**Mitigation** In the event of a breach of contract, the injured party has an obligation to limit his/her losses as far as is reasonably possible.

**Mutuality of obligations** There is an obligation for the individual to offer their services to the employer (attend work) and there is a mutual obligation for the employer to provide work/pay. This is an essential component of 'employee' status.

**Non-delegable duties** Certain responsibilities are imposed by statute or the common law and they cannot be delegated to another body/person. For example, in an employment context duties exist and are applied to the employer who is unable to delegate these to sub-contractors, and the employer will remain responsible, jointly or severally, for any subsequent torts.

**Nudum pactum** This is a promise made with no consideration to support it.

**Nuisance** This is an unlawful interference that prevents an owner/occupier's enjoyment of their land.

**Obiter dicta** These are statements made by judges that are not part of the ratio, and hence are not part of the judgment of the case. They are not binding on lower courts but they are of persuasive authority and may be followed in future cases where the issue has been raised.

**Occupational Requirement** This provides a defence to a claim of discrimination where (e.g.) there is discrimination between men and women, but this is not due to their sex per se, but rather is necessitated by the nature of the employment.

**Offeree** The party(s) to whom an offer has been made.

**Offeror** The party making an offer and setting out the terms by which they are willing to be bound.

**Official Receiver** This is a civil servant of the Insolvency Service (part of the Department for Business, Innovation & Skills) and an officer of the court. They are appointed on a bankruptcy or winding-up order and administer the initial stages, and possibly a longer period, of the insolvency of the company.

**Pari passu** An interpretation from the Latin means 'with equal step' and can be considered as meaning shares that rank without preference.

**Parliament** Parliament consists of the House of Commons, the House of Lords at Westminster, and also the monarch. All three institutions are involved in the legislative system, and Parliament assists in scrutinizing the work of the Government and holding it to account.

**Parliamentary supremacy** Parliament at Westminster is where primary legislation is created. A key element of the constitution is that Parliament has the power to make or repeal any legislation, and it cannot bind successive (future) Parliaments. Therefore, tyranny and abuse of power is avoided, as the public may elect a new Parliament at a general election (which must be held within at least five years following the election of the Government).

**Parol evidence** This rule prevents extrinsic (outside) factors being introduced into a contract or being used to vary the written terms.

**Penalty clause** A clause which seeks to stop the other party from breaching the contract by imposing the threat of a penalty, which is not a genuine pre-estimate of loss, will be considered a penalty and be held void.

**Precedent** This is a system where the decisions of higher courts (through case law/common law) bind lower courts due to the hierarchical system of the court structure. Precedent is established from the *ratio decidendi* of the case. The judges in a case will spend time explaining, with reference to previous cases, how and why they have arrived at a decision, and whether the case establishing the precedent should be followed or distinguished.

**Pre-emption rights** This is the right of shareholders to be offered new issues of shares before they are made available to non-shareholders.

**Primary victim** A person who was not physically injured in an incident, but was in the zone of physical danger. Typically, this has been related to a claimant's fear for their personal safety that caused some psychiatric injury.

**Principal** The person who instructs the agent to work on their behalf.

**Privy Council** The Privy Council has a function as an appeal court used by some former Commonwealth countries.

**Promisee** The party to whom a promise is made.

**Promisor** The party making the promise.

**Promissory estoppels** A doctrine providing an equitable defence preventing a party who has made a promise to vary a contract for the other party's benefit from later renegeing on it and attempting to enforce the original contract.

**Proximity** The close relationship between the parties to a negligence action which is essential to establish a duty of care.

**Pure economic loss** This is where the claimant's losses are not connected with any physical loss or damage. This is typically in the case of negligent advice or information provided to the claimant.

**Quoted company** This is a company whose equity share capital has been included in the Official List in accordance with the provisions of Part 6 of the Financial Services and Markets Act 2000, or is officially listed in an EEA state, or admitted for dealing on the New York Stock Exchange or Nasdaq.

**Ratification** Where the agent acts without the express or implied authorization of the principal, or in excess of this authority, the principal may ratify the contract and be bound by it as though authorization had been given from the start of the contract.

**Ratio decidendi** This is the part of the judicial decision that is binding on all lower courts. The judiciary explain the previous case law and establish the legal principle on which the case is being decided. The ratio is not identified as such, but rather it has to be 'found' through reading the judgment and identifying the salient factors leading to the decision.

**Red-circle agreement** An employer who has conducted a job evaluation study to make pay structures transparent may protect the pay of a group of affected workers where, following assessment, they are to be downgraded.

**Redundancy** This occurs when employment at the place of business has ceased or the nature of the business/industry has changed and the

employee's role in the organization is surplus to requirements.

**Reorganization of the business** An employer has the ability to reorganize their business. This may be due to changes in competition; to respond to the needs of the organization, and so on. Such reorganization, if resulting in dismissals, may lead to claims for redundancy payments.

**Representations** Statements in the negotiations of a contract that do not amount to a term. Breach of a representation may lead to a claim for misrepresentation.

**Repudiation** To end or reject a contract, usually in response to the other party's breach.

**Rescission** An equitable remedy where the party misled has the option to set aside the contract.

**Restraint of trade clause** This is a contractual clause that prevents or restricts an employee from competing with the employer for a specific duration and a specific region/area of industry. To have the clause enforced the employer must demonstrate the necessity for the clause and that it protects the employer's legitimate proprietary interests.

**Revocation** An offer may be withdrawn (revoked) by the offeror before being accepted by the offeree.

**Rule of law** A theory that identifies fundamental principles which provide for a just and fair system of law, and which ensures tyranny and abuse is avoided. For example, everyone is equal before the law.

**Secondary victim** A person who was not injured physically in an incident or in fear of their own safety, but was closely related to a victim, which caused them psychiatric injury.

**Secured loan** This refers to a loan where the borrower provides the lender with some collateral (through charges over property).

**Separation of powers** To ensure too much power is not vested in one body, and a system of accountability through 'checks and balances' exists, the three elements of the State (the executive, the legislature, and the judiciary) must have clear demarcation between them. This ensures there is sufficient independence in these three branches of government.

**Share warrant** Companies may, where authorized by the articles, issue in respect of fully paid-up shares, a warrant that states the bearer is entitled to the shares specified in it.

**Solvency statement** The directors formally state that they have formed an opinion that the

company will be able to repay its debts where the company wishes to reduce its share capital.

**State** Includes the activities of any government department or local or public authority.

**State of prior art** In patent law, an invention may be refused a patent because it is not novel. Therefore, if it can be demonstrated that 'prior art' existed before the patent applied for (through documents and other evidence) then the patent will not be granted.

**Statute** A law created through Parliament, and also referred to as legislation.

**Statutory interpretation** The wording of legislation is precisely drafted but this still requires interpretation and application by the judiciary. There are various methods of interpreting these laws.

**Strict liability** Liability is imposed where, in the case of the Consumer Protection Act 1987, a product contained a defect. There is no requirement for the claimant to demonstrate negligence on the part of the defendant.

**Subscriber** When, in relation to company law, the subscriber is the person who has agreed to start the company and take a proportion of the original issue of shares.

**Summary dismissal** This is an immediate dismissal (without any notice).

**Supreme Court** The judicial function of the House of Lords became the Supreme Court on 1 October 2009. It more clearly separates the (previous) legislative and judicial functions held by the Lords.

**Tortfeasor** The party who has committed the tort.

**Trader** Refers to a person (both natural (human) and artificial (corporation)) acting for purposes relating to their trade, business, craft, or profession. The term trader applies whether they are acting personally or whether another person is acting in the trader's name or on their behalf.

**Transposition** A process by which the Member States give effect to a Directive by passing an implementation measure—such as an Act of Parliament. For example, the Working Time Directive was transposed into UK law through the Working Time Regulations. It is intended that following the correct transposition, individuals in the Member State will rely on the implementing law rather than the parent Directive.

**Undue influence** Where a party unfairly exploits its relationship with the other party to enter

a contract, this may also render the contract voidable.

**Unfair dismissal** A statutory-based right. Legislation provides protection for employees against certain dismissals, and it establishes methods in which a dismissal must take place to be considered fair.

**Unliquidated damages** The court calculates an award of damages as they are incapable of being pre-determined.

**Unsecured loan** These are loans that are not secured on the company's property/assets.

**Vicarious liability** Holding another party (usually an employer/principal) jointly responsible/liable for the actions of the tortfeasor (usually an employee/agent).

**Victimization** The offence of victimization occurs where an individual has brought a claim under the Equality Act 2010 or they intended to claim under the Act(s); or gave evidence at a hearing and has suffered less favourable treatment from the employer as a result.

**Void contract** The law will not recognize the agreement and therefore it has no legal effect (such as an illegal contract or one established through mistake).

**Voidable contract** This is an agreement that can be a legally binding contract at the option of the injured party or which such party can have set

aside (such as with contracts established under misrepresentation or duress).

**Volenti non fit injuria** The Latin phrase relating to a voluntary assumption of risk. Where a person engages in an event and agrees and accepts to the inherent risks, if injured, they are prevented from recovering damages.

**Winding-up** This is the process of bringing a company to an end. As a corporation possesses its own separate legal personality, it must be formally wound up to 'die'.

**Worker** This is a legal term referring to an individual who is subject to the control of their employer and has to undertake the work personally, but who fails the final *Ready Mixed Concrete* test and so does not have 'employee' status.

**Written resolution** This is a mechanism for the board of directors to make a decision without having to meet in person. The resolution is valid and effective as if it had been agreed and passed at a meeting, if signed by all the directors entitled to receive notice of it.

**Wrongful dismissal** (A claim under the common law.) This involves a breach of contract when, for example, insufficient notice is provided to the individual. As it is a contractual claim, it is, significantly, available to all workers rather than the strict criteria that must be satisfied to qualify for rights under the unfair dismissal protections.