Chapter 16: Introduction to unfair dismissal and substantive fairness

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1. What does it mean to say that in the way the judiciary have approached the unfair dismissal legislation, the 'primary focus ha[s] shifted from the *substantive fairness* to the *procedural fairness* of an employee's dismissal'? Why do you think that the judiciary are more comfortable with reviewing the procedural fairness of a dismissal, rather than its substantive fairness?

Author's answer: When judges harness the unfair dismissal legislation to review the substantive fairness of an employer's decision to dismiss an employee, they are essentially scrutinising the substance of the employer's decision to dismiss. This would involve questioning whether the employer had options or sanctions other than dismissal at their disposal that would be available to call the behaviour of the employee to account. In essence, it entails interference in the substance of the employer's decision to dismiss. The harsher the sanction of dismissal seems to the judiciary, the more likely that they will overturn the employer's decision. This can be distinguished with the situation where judges review the procedural fairness of the employer's decision to dismiss. In such a case, the judges are not examining the substance of the decision-making of the employer and whether the sanction of dismissal was a fair one in the circumstances. Instead, they are assessing whether the pre-dismissal process adopted by the employer was fair to the employee and enabled the employee to present his/her case in advance of the dismissal. For example, pursuant to standards of procedural fairness, judges will expect employers to conduct an independent and impartial investigation into the employee's behaviour. They will also expect a disciplinary hearing to be held, as well as conferring a right of appeal in favour of the employee. In terms of the statutory unfair dismissal regime, the judges are less likely to overturn decisions to dismiss as unfair on the basis of standards of substantive fairness. Rather, most tribunal or court rulings that an employee's dismissal was unfair are rooted in a breach by the employer of the standards of procedural fairness. The judges are more comfortable with reviewing the procedural fairness of a dismissal than its substantive fairness for the reason that they are well-equipped to deal with issues of process and procedure than matters of management such as managerial decisions to dismiss. The judiciary tend to eschew interfering in managerial decision-making on the basis that they are not businesspersons or economists.

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1. If a contract of employment states that it will terminate on the occurrence of some event, is that a 'limited-term contract' under section 235 of the ERA, notwithstanding that the stipulated event never actually happens?

Author's answer: Yes: see the terms of section 235(2B)(c) which do not require the limiting event to ever occur, i.e. so long as the contract itself prescribes that it will come to an end on the occurrence of a particular event, the contract will still be a limited-term contract.

2. Imagine that a contract of employment provides that it is to endure for three years and either party has an option to terminate early after 18 months. Is the employment contract a 'limited-

term contract' for the purposes of section 235 of the ERA? Does it make a difference that neither of the parties exercised the option to terminate early?

Author's answer: Yes: see *Dixon v BBC* [1979] ICR 281. It is irrelevant whether a party has exercised the option to terminate early.

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1. If Collins is correct that the range test should be replaced by a proportionality test, what would the effect be on employers? Would this result in an unwarranted intrusion into the decision making prerogative of the employer?

Author's answer: The introduction of a proportionality test to replace the range of reasonable responses test would have a major impact on the substantive evaluation of the fairness of an employee's dismissal. It would require an employer to establish that the exercise of its contractual power to dismiss the employee was a necessary and proportionate means of achieving a particular legitimate commercial aim. This would entail balancing the employer's requirement to dismiss the employee to achieve the aim off against the severity of the harm done to the employee by dismissal. The more serious the impact of the dismissal on the employee, e.g. in terms of his/her health, wage earning capacity, career trajectory and prospects, etc., then the more pressing the employer's reason must be for the dismissal to meet the legitimate objective. As such, it entails a very intrusive evaluation of the conduct of the employer. This can be contrasted with the range test, which simply asks whether the sanction of dismissal was one that was open to a range of reasonable employers in response to the employee's conduct. As such, it involves a particularly forgiving measure of scrutiny of the employer's actions. The question is whether the replacement of the range test with the proportionality standard would represent a desirable policy choice. On the one hand, there is much to be said for the view that the range test is a 'paper tiger' in substantive terms and should be removed. However, the alternative view is that proportionality would invite courts and tribunals to interfere too much into commercial judgment and decision-making and enable them to second-guess decisions of managers more readily with the benefit of hindsight bias.