A Guide to UK Employment Law 2014

Over 15 years’ experience of one thing. Rapid change _
Foreword

March 2014

The past twelve months have seen a sea-change in employment law, with the introduction of Tribunal fees, the streamlining of the Tribunal process, changes to collective redundancy consultation, the cap on unfair dismissal compensation, TUPE, whistleblowing and the introduction of mandatory pre-claim conciliation in April 2014. With the economy starting to pick up, it becomes even more imperative for employers to make the best of their human capital and to instigate working methods which are as efficient and effective as possible.

This employment law guide is designed to help you stay on top of the various rules and regulations which can so easily trip up even the most accomplished of HR practitioners.

Whilst endeavouring to ensure that the guide is as concise and helpful as possible, it is of course no substitute for specific legal advice on more complex matters. The question is often not so much what the rules are, but what is the more appropriate and legally safest approach to achieving the aims of the business.

We work with a number of leading businesses, from a variety of sectors, although we specialise in providing cost-effective, practical and commercial advice to leading technology, digital media and communications businesses.

Should you require any assistance with any employment issues, we would of course be delighted to help. In addition, we also advise on taxation matters, including the establishment and operation of share incentive plans.

In the meantime, we hope that you find this updated guide useful.

David Williams
Head of Employment
Foreword

Employment law reforms update

Below is a summary of the changes that have been (or will shortly be) implemented by the Government:

- Section 147 of the Equality Act 2010 has been amended to clarify that settlement agreements can be used to settle discrimination claims;

- the loophole in the whistleblowing legislation which allows employees to blow the whistle about breaches to their own personal work contract has been closed;

- the current body of 17 different national minimum wage regulations will be merged into one single consolidated set;

- judges are allowed to sit alone for unfair dismissal claims and the maximum cost award in the tribunal has been increased from £10,000 to £20,000; and

- fees have been introduced for anyone wishing to bring a claim in an employment tribunal;

- the compensation for an unfair dismissal claim is now subject to a second cap of up to 12 months’ pay;

- a new ACAS statutory code of practice on settlement agreements has been introduced. Pre-termination settlement discussions are inadmissible as evidence in unfair dismissal proceedings, subject to an exception for improper conduct;

- the Employment Tribunal Rules have been reformed and from April 2014 claimants will have to lodge claims through ACAS for an attempt at conciliation before they can bring a claim in the Tribunal;

- the TUPE Regulations have been amended in a number of ways, making it easier to change terms and conditions and make certain dismissals in connection with a transfer; and

- the collective redundancy consultation period when making 100 or more redundancies in a 90 day period has been reduced from 90 days to 45 days.
Employment Team

The Kemp Little LLP employment team has an established reputation for expert, pragmatic and user-friendly assistance on all employment-related matters.

We understand the need to deliver commercial, efficient, timely and cost-effective advice to our clients, and have considerable experience helping them manage risk and implement strategic projects from a human resources perspective.

The team advises on all aspects of employment law, including:

- reorganisations and redundancies;
- dispute resolution, including advice on avoiding disputes and defending claims; and
- transactional support and outsourcing.

What others say about us:

Chambers Guide

The team “regularly acts for both emerging and established companies in the technology industry” and is “capable of acting in an advisory capacity, acting on the employment aspects of corporate transactions or handling substantial pieces of employment litigation”. “They offer really sound and commercial employment law advice” and are “modern and forward thinking; they feel more like colleagues than contractors.”

Legal 500

“The ‘very professional’ team at Kemp Little LLP has a particular focus on clients in the technology sector, including digital media agencies, software enterprises and e-commerce businesses”. They are “very strategic” in their approach.

For further information about the firm’s employment team and to view details about seminars and publications on UK employment law, please visit our website at www.kemplittle.com or contact a member of our team.
Contents

Foreword
Employment law reforms update

A Introduction
1 Sources of UK employment law
2 Types of worker in the UK
3 Employment disputes in the UK

B Business Immigration
1 Overview
2 Employing illegal workers

C Contractual Terms
1 Overview
2 Express terms
3 Implied terms
4 Varying terms

D Rights During Employment
1 Overview
2 Hours of work
3 Salary and benefits
4 Pensions
5 Holidays
6 Sick pay
7 Maternity leave
8 Paternity leave
9 Adoption leave
10 Expected changes in 2015
11 Parental leave
12 Time off for dependants
13 Flexible working
14 Union membership
15 Data protection rights
16 Disciplinary and grievance procedures
17 Monitoring/surveillance
18 Health and safety
19 Whistleblowing
20 The Protection from Harassment Act 1997
## A Introduction

### 1 Sources of UK employment law

1.1 Common law
1.2 Statute
1.3 European law

### 2 Types of worker in the UK

2.1 Self-employed people/independent Contractors
2.2 Agency Workers
2.3 Employees
2.4 Workers

### 3 Employment disputes in the UK

3.1 Employment Tribunals
3.2 High Court/County Court
3.3 ACAS Arbitration Scheme
Introduction

1 Sources of UK employment law

There are three main sources of employment law in the UK: the common law, statute and European law (in the form of both European Directives and decisions of the European Court of Justice).

1.1 Common law

Since all employees in the UK work under a contract of employment with their employer, the common law (particularly the law of contract) forms the legal basis of the employer/employee relationship. A contract of employment need not be but is usually recorded in writing. The parties are free to stipulate which law will be the governing law of the contract. However, certain mandatory statutory employment protection rights will apply regardless of the law of the contract, provided that the employee is UK-based. In addition, the law of tort will govern matters such as an employer’s liability for the acts of its employees and liability for workplace accidents.

1.2 Statute

Since the early 1970s, there has been a dramatic growth in the amount of employment protection legislation in the UK which has significantly supplemented the common law rules. Some of the main employment law statutes are:

- Health & Safety at Work etc Act 1974
- Trade Union and Labour Relations (Consolidation) Act 1992
- Employment Tribunals Act 1996
- Employment Rights Act 1996
- Public Interest Disclosure Act 1998
- Data Protection Act 1998
- Human Rights Act 1998
- Employment Relations Act 1999
- Employment Act 2002
- Employment Relations Act 2004
- Equality Act 2010

In addition, there is a substantial amount of secondary legislation in the form of regulations which contain further provisions which affect the employment relationship. In some cases the legislation is supported by Codes of Practice drawn up by various government agencies. Although the Codes do not have direct legal effect, they are often, and in some cases have to be, taken into account by Employment Tribunals when deciding whether an employer has complied with its statutory obligations.
1.3 European law

If UK domestic law has failed to implement EC Treaty obligations properly, individuals may rely directly on the EC Treaty in the UK courts. EC legislation has been particularly important in the areas of equal pay, discrimination and employees’ rights on business transfers. In addition, since the European Court of Justice is the final arbiter in matters of interpretation of European legislation, its judgments are important when it comes to questions relating to the interpretation of obligations derived from European Directives.

2 Types of worker in the UK

There are traditionally three main categories of worker in the UK:
(i) the self-employed or independent contractors;
(ii) agency workers or temps; and
(iii) employees

with each category experiencing different employment protection rights.

In recent years a fourth category, called ‘workers’ has also become established, primarily from European law developments. However, confusingly, this fourth category overlaps with the others.

2.1 Self-employed people/independent contractors

In essence, someone who is self-employed or an independent contractor is someone who is in business on their own account and who is responsible for making their own decisions as to how the job is performed. There are advantages for both the employer and the individual in having a relationship of this nature; the employer is freed from most statutory employment protection legislation, and the individual enjoys a favourable tax position. However, these types of relationship have come under increasingly closer scrutiny by the courts and HM Revenue & Customs (“HMRC”). The fact that an individual is labelled an independent contractor by both parties to the relationship will not be the determining factor. Case law suggests that the most important considerations are whether there is mutuality of obligations and an obligation on the part of the contractor to do the work personally. If there is, then the court and/or HMRC are likely to find that the relationship is actually one of employer/employee.

2.2 Agency Workers

Some workers are employed or engaged by an employment agency which then supplies their services to the hirer. Although the hirer will owe certain statutory duties (e.g. duties under discrimination and health and safety legislation) it will not owe the agency worker many of the employment protection rights enjoyed by employees (but see the note below regarding the changes introduced by the Agency Workers Regulations 2010).
Agency workers are generally used for temporary engagements although it is not uncommon for engagements to last for several months or even years. While it is possible that an agency worker may not be an employee of either the employment business or the hirer, case law has established that in some circumstances, an employment relationship could be found to exist between an agency worker and the hirer where it is necessary to give effect to the reality of the relationship (i.e. if the way the contract is performed is not consistent with agency arrangements). In these cases, agency workers may be able to claim employment rights directly against the hirer even if there is no contract between the agency worker and the hirer directly.

Under the Agency Workers Regulations 2010, agency workers are, upon completion of a 12 week qualifying period, entitled to the same basic working and employment conditions (i.e. those relating to working time, overtime, breaks, rest period, night work, holidays and pay) as comparable workers doing broadly similar work in the same organisation.

2.3 Employees

The majority of workers in the UK are employees of the company to which they provide their services. Unlike in some EU countries, there is no legal distinction between blue collar workers, white collar workers and senior directors, other than whatever may be written into their employment contracts. The basic principles of the common law and statutory employment protection legislation apply to all employees regardless of their status. As long as they satisfy the relevant qualifying conditions, employees will benefit from greater statutory employment protection rights than independent contractors and agency workers. In particular, after satisfying the relevant qualifying length of service, an employee will benefit from the right not to be unfairly dismissed. The qualifying period is now two years' service (which is effectively two years less 1 week as the employee can count the statutory one week's notice to which they are entitled under the Employment Rights Act 1996.

2.4 Workers

The idea of a separate legal category of 'workers' is a relatively new one in UK law. The concept derives from European law. In broad terms, a worker is someone who works under an employment contract, or some other contract under which they agree to provide services personally. In addition, to qualify as a worker, the organisation to which the individual is providing their services must not be a client/ customer of their profession or business. So, for example, some independent contractors may qualify as workers. Workers enjoy fewer rights than employees, but still benefit from, for example, rights relating to the number of hours they work, the amount of annual leave they can take, and the amount they are paid.
3 Employment disputes in the UK

There are three types of forum which can decide legal disputes between an employee/worker/etc and whoever 'employs' them: Employment Tribunals, the common law courts (High Court or County Court) and the arbitration scheme operated by a government body called the Advisory Conciliation & Arbitration Service ("ACAS").

3.1 Employment Tribunals

These are specialist employment courts which hear the majority of disputes which arise between employers and the staff they engage. They deal mainly with claims brought under employment protection legislation such as unfair dismissal and discrimination claims. They also have jurisdiction to hear contractual claims (subject to a maximum award of £25,000) provided the claim arises or is outstanding on the termination of employment.

Employment Tribunals usually comprise of three members: an Employment Judge and two lay members (one with a Trade Union background and one with a human resources/management background). Although with effect from 6 April 2012, unfair dismissal claims have been added to the previously limited list of cases that may be heard by an employment judge sitting alone. Unless ordered otherwise the Tribunal's decisions can be appealed to the Employment Appeal Tribunal, the Court of Appeal and finally the United Kingdom Supreme Court.

3.2 High Court/County Court

An employee who wishes to bring a contractual claim (such as for unpaid notice pay) may elect to pursue it in the common law courts, either the High Court or the County Court, instead of in an Employment Tribunal. In general, a claim may only be brought in the Employment Tribunal if its value is less than £25,000. The process in the High Court and the County Court tends to be more formal and lengthy than in the Employment Tribunal, although the successful party can usually recover most of their costs from the unsuccessful party, which they cannot do as a matter of course in the Employment Tribunal.

3.3 ACAS Arbitration Scheme

This is a voluntary scheme and is intended to provide a fast, non-legalistic and more cost-effective alternative to the Employment Tribunal. It is currently only available for the resolution of straightforward unfair dismissal complaints, and in relation to flexible working disputes. Both parties must agree to opt for the scheme. The other advantage is that the hearing is conducted in private before a single ACAS arbitrator. They can award exactly the same remedies as would be available in an Employment Tribunal. This is separate from the mandatory pre-claim conciliation being introduced from April 2014.

See our Tribunal Guide for more information about bringing and defending claims in the Employment Tribunal.
## Business Immigration

1. **Overview**
   - 1.1 General principles
   - 1.2 Who requires permission to work?

2. **Employing illegal workers**
   - 2.1 Penalties
   - 2.2 Race discrimination
Business Immigration

1 Overview

1.1 General principles

Certain categories of persons do not require permission to work in the UK (although they may still require a visa in some circumstances) – these include nationals of the European Economic Area ("EEA"), Commonwealth citizens with leave to enter or remain in the UK on the basis of recent UK ancestry, persons with indefinite leave to remain in the UK, Gibraltarians, and persons wishing to engage in certain specified occupations (e.g. representatives of overseas firms who are seeking to establish a UK branch or subsidiary).

1.2 Who requires permission to work?

Generally speaking, non-EEA nationals must obtain permission under the Points Based System to be able to take up employment in the UK as well as obtaining a visa. The Points Based System is administered by the UK Border Agency on behalf of the Home Office and comprises five different routes of entry into the UK for work and/or study (five “Tiers”). Tier 1 of the Points Based System relates to highly-skilled individuals, entrepreneurs and investors; Tier 2 to skilled workers with a job offer; Tier 3 applies to low-skilled workers filling temporary shortages identified by the government; Tier 4 relates to students; and Tier 5 to temporary workers and youth mobility schemes. To apply under Tiers 2 and 5, individuals must be sponsored in the UK by an employer/education provider.

Please refer to our Immigration Guide for further information regarding Business Immigration and the Points Based System.

2 Employing illegal workers

2.1 Penalties

An employer who negligently employs someone who is not entitled to work in the UK is liable to a civil penalty (currently a fine of up to £10,000 in respect of each individual illegally employed).

An employer who knowingly employs someone who is not entitled to work in the UK will commit a criminal offence. The employer could be liable to a custodial sentence of up to two years and/or an unlimited fine.

An employer will have a statutory defence to the civil penalty (but not the criminal offence) if it has checked the original and kept a copy of one or more of a number of specified documents verifying the individual’s right to work in the UK (check the UK Border Agency website for a full list) before the commencement of employment. If the employee only has limited leave to remain in the UK, and they commenced employment on or after
28 February 2008, their documents should be checked every 12 months.

For further information please refer to our Immigration Guide.

2.2 **Race discrimination**

An employer who carries out checks on potential employees who look or sound foreign which are more rigorous than checks carried out on other employees may be found liable for unlawful race discrimination. Therefore, it is important that all applicants are treated in the same way. The Government has issued detailed guidance on the measures which employers are expected to take in order to comply with their obligations and to avoid unlawful race discrimination. This guidance is available from the UK Border Agency website.
C  Contractual Terms

1  Overview  16

2  Express terms  16
  2.1  Statement of particulars  16
  2.2  Contract of employment  17
  2.3  Notice period  19
  2.4  Policies and procedures  19

3  Implied terms  19

4  Varying terms  20
Contractual Terms

1 Overview

Although it is not mandatory to enter into a written contract of employment, in practice, most employees in the UK have a written contract. As a minimum, employers are obliged to give employees written particulars of the main terms and conditions of their employment. The contract will comprise both express and implied terms and may also incorporate terms contained in other documents, such as an employee handbook or a collective agreement. The contract does not have to be in a particular form – the terms may be contained in a letter although it is common for them to be incorporated into a formal contract. In practice, the more senior the employee, the more detailed their contract is likely to be.

2 Express terms

2.1 Statement of particulars

Section 1 of the Employment Rights Act 1996 requires employers to issue employees with written particulars of the main terms and conditions of their employment. These particulars have to be issued within two months of the commencement of employment. Some employers treat the statement of particulars as the contract of employment. However, it is usual for the written particulars to be incorporated into a formal contract (in which case it is not necessary to provide a separate statement of particulars). The written particulars which must be given are set out below:

(a) the name of the employer and of the employee;
(b) the employee’s job title or a description of the work they are employed to do;
(c) the employee’s place of work. If the employee works in various places, details of this must be given together with the address of the employer;
(d) the date on which the employment began and when the period of continuous employment is treated as having begun;
(e) the scale or rate of remuneration or method of calculating remuneration including the intervals at which it is paid (e.g. weekly or monthly);
(f) terms and conditions relating to hours of work (e.g. start and finish times, overtime pay etc.);
(g) terms and conditions relating to public holidays, annual leave entitlement, sickness absence and sick pay;
(h) terms and conditions relating to pension schemes (including whether or not there is a contracting-out certificate in force relating to participation in the state earnings related pension scheme);
(i) if the employment is not intended to be permanent, the period for which it is expected to continue or, if the contract is for a fixed term, the date on which it will end;
(j) details of any disciplinary rules and procedures applicable to
the employee;

(k) details of the person to whom the employee can apply if they
are dissatisfied with any disciplinary decision or with any
decision to dismiss them;

(l) details of the person to whom the employee can apply for
the purposes of redressing any grievance and how any such
application should be made;

(m) the length of notice of termination required to be given by
both the employer and employee;

(n) details of any collective agreements which directly affect the
employee’s terms and conditions; and

(o) the following details relating to any assignment outside the
UK – length of the assignment, remuneration package
(including details of the currency in which payment is to be
made and any expatriate allowance) and any terms relating
to returning to work in the UK.

Changes to any of the written particulars must be notified to
employees within four weeks of the change having taken place.

If an employee has brought certain other proceedings before an
Employment Tribunal and the employer is in breach of its duty to
issue an employee with written particulars, or of its duty to notify
the employee of changes to them, Tribunals will be required to
award the employee compensation of between two and four
weeks’ pay. (For these purposes, a “week’s pay” is currently
capped at £450, although this is increasing to £464 from 6 April
2014). Where the other proceedings are an unfair dismissal
claim, this award will be included within the compensatory award
and the usual upper limit on compensatory awards will apply.

2.2 Contract of employment

As mentioned above, instead of relying on the statement of
particulars, it is common for employers to issue all their
employees with formal contracts of employment. The advantage
of this is that it enables the employer to cover all the relevant
terms in more detail and thereby reduce the risk of a dispute
arising out of any uncertainty or ambiguity. In addition to the
matters listed above, it is common for a contract of employment
to cover the following additional issues:

(a) probationary period – contracts of employment often provide
that the initial period of the contract (typically the first three
months) will be on a probationary basis so that the employer
can evaluate the suitability of the employee for the position.
During this time, the notice of termination which either party
is required to give will normally be shorter and the employee
may not be entitled to certain benefits (such as membership
of the employer’s pension scheme). The contract can provide
for the probationary period to be extended if further time is
required to evaluate the employee. It is unusual for senior
executives to be subject to a probationary period;

(b) benefits – in addition to basic salary, many employers offer
additional benefits such as contributions to a pension
scheme, a bonus or commission scheme, private medical insurance, long term disability insurance, death-in-service insurance, a company car (or car allowance), gym membership and share options. Brief details of all of these would normally be included in the contract of employment with the exception of share options which are usually dealt with in a separate share option agreement;

(c) confidentiality / intellectual property rights – if the employee is likely to have access to the employer’s confidential information, it is advisable for the employment contract to include specific provisions identifying the information and providing that the employee must not use it for personal gain or disclose it to any unauthorised person at any time during their employment or after its termination. Further, if the employee’s work is likely to give rise to intellectual property rights (“IPR”) then the contract can include provisions requiring the employee to assign any rights to the employer;

(d) termination – since most disputes between employers and employees arise on the termination of the relationship, it is often a good idea for the contract to specify the circumstances in which the employer will be entitled to terminate it without notice (such as gross misconduct or gross negligence). Many contracts give the employer the option of making a payment in lieu of notice and/or placing the employee on “garden leave” during any period of notice. A garden leave clause enables the employer to require the employee not to attend work or contact clients/other employees during their period of notice but to stay at home “on call”. It is often used as an alternative to, or in conjunction with, restrictive covenants, to ensure the employee’s knowledge of confidential information/clients is not current when they leave; and

(e) post-termination restrictions – if an employee’s access to the employer’s confidential information, customers and/or other employees is such that they would pose a risk to the business following the termination of their employment, it is sensible to include post-termination restrictions in the contract. The most common types of restriction are a ban on working for a competitor for a period of time and a prohibition on the solicitation of customers and employees. The courts will not enforce a post-termination restriction unless it is both reasonable and necessary to protect the legitimate interests of the business. The court will look at all aspects of the restraint including its duration, geographical coverage and the precise nature of the prohibited activities. If any part of the restriction is too wide, the whole clause may be declared void. As a general rule, the more senior the employee the more likely it is that a restriction will be considered reasonable. In normal circumstances, restraints lasting more than 12 months after termination are unlikely to be enforceable. Restraints of 12 months’ duration should only be used for the most senior employees or those who pose the greatest threat to the business and who will continue to do so for 12 months following termination of their employment.
2.3 Notice period

Although some employees are engaged on a fixed-term basis (normally senior executives or staff hired for a particular project), most employees are hired on an indefinite contract which is terminable at any time by either party giving a specified period of notice. If the contract does not specify a period of notice, the common law implies that it will be terminable on “reasonable” notice. What is reasonable in this context will depend on factors such as the employee's seniority and the custom and practice within both the company and the relevant industry. In any event, the Employment Rights Act 1996 provides that all employees are entitled to a minimum of one week’s notice after four weeks’ service. This increases to a minimum of two weeks’ notice after completion of two years’ service and a further one week’s notice for each additional year of service up to a maximum of 12 weeks’ notice after 12 years’ service.

2.4 Policies and procedures

In addition to the contract of employment, many employers publish separate policies and procedures (which may or may not be incorporated into the contract) dealing with various aspects of the employment relationship. Typical policies include those concerning equal opportunities, harassment, health and safety, maternity and other family leave, data protection issues and email and internet use. Further, many employers have written procedures for dealing with matters such as employee grievances, breaches of the disciplinary rules and poor performance. These types of policies and procedures are often incorporated into an employee handbook which is issued to all staff at the start of their employment.

3 Implied terms

In addition to the express terms, all UK employment contracts are subject to various implied terms which impose additional duties and obligations on both the employer and employee. For example, an employee will be subject to an implied obligation of fidelity and obedience, a duty to work with due diligence and care and an obligation not to use or disclose the employer’s trade secrets or confidential information. In some circumstances, senior employees (and, in particular, directors) may also be under a duty to disclose their own wrongdoing to their employer. The employer will, amongst other things, be under an implied duty not to destroy the relationship of trust and confidence between the employer and employee and to take care of the employee’s health and safety.
4 **Varying terms**

Any changes to an employee’s contract require the employee's consent. Typically, an employee would be asked to consent expressly, by confirming either orally or preferably in writing, that they agree to the changes. However, sometimes it may be possible to imply that an employee has consented if the employee continues to work for the employer for a significant period without protesting after a change has been made. If an employer makes significant changes to an employee's contract to which the employee does not consent, then the employee may be able to resign and claim constructive dismissal (see Termination of Employment). Where an employer tries to make changes following a business transfer, these may be ineffective, even if the employee consents.
D  Rights During Employment

1  Overview

2  Hours of work
2.1  Maximum working hours
2.2  Opt-out agreements
2.3  Night workers
2.4  Rest periods
2.5  Exemptions
2.6  Young workers

3  Salary and benefits
3.1  National Minimum Wage
3.2  Itemised pay statements
3.3  Tax and Social Security Contributions
3.4  Deductions from wages
3.5  Non-cash benefits

4  Pensions
4.1  Stakeholder pension schemes
4.2  Automatic enrolment
4.3  Retirement

5  Holidays
5.1  Public and bank holidays
5.2  Minimum annual leave
5.3  Annual leave and sick leave

6  Sick pay
6.1  Statutory sick pay ("SSP")
6.2  Contractual sick pay

7  Maternity leave
7.1  Time off for ante-natal care
7.2  Maternity leave
7.3  Maternity pay
7.4  Rights on returning to work
7.5  Contractual maternity rights
7.6  Bonuses during maternity leave

8  Paternity leave
8.1  Paternity Leave
8.2  Procedure for taking paternity leave
8.3  Rights on returning to work
8.4  Additional paternity leave
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
</tr>
<tr>
<td>Business Immigration</td>
</tr>
<tr>
<td>Contractual Terms</td>
</tr>
<tr>
<td>Rights During Employment</td>
</tr>
<tr>
<td>Termination of Employment</td>
</tr>
<tr>
<td>Discrimination</td>
</tr>
<tr>
<td>Business Transfers</td>
</tr>
<tr>
<td>Collective Rights</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>9 Adoption leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1 Adoption leave</td>
</tr>
<tr>
<td>9.2 Procedure for taking adoption leave</td>
</tr>
<tr>
<td>9.3 Rights on returning to work</td>
</tr>
<tr>
<td>9.4 Interrelation with paternity leave</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10 Expected changes in 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1 The government changes to family leave and pay</td>
</tr>
<tr>
<td>10.2 Shared parental leave and pay</td>
</tr>
<tr>
<td>10.3 Adoption pay</td>
</tr>
<tr>
<td>10.4 Appointments</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11 Parental leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.1 Entitlement to parental leave</td>
</tr>
<tr>
<td>11.2 Procedure for taking parental leave</td>
</tr>
<tr>
<td>11.3 Rights on returning to work</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>12 Time off for dependants</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1 Entitlement to time off</td>
</tr>
<tr>
<td>12.2 Definition of dependant</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>13 Flexible working</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.1 Rights to request flexible working</td>
</tr>
<tr>
<td>13.2 Procedure for requesting flexible working</td>
</tr>
<tr>
<td>13.3 Adult carer</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>14 Union membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 Data protection rights</td>
</tr>
<tr>
<td>--------------------------</td>
</tr>
<tr>
<td>15.1 Recent developments</td>
</tr>
<tr>
<td>15.2 Processing of personal data</td>
</tr>
<tr>
<td>15.3 Sensitive personal data</td>
</tr>
<tr>
<td>15.4 Employees’ right of access</td>
</tr>
<tr>
<td>15.5 International transfer of data</td>
</tr>
<tr>
<td>15.6 Code of practice</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>16 Disciplinary and grievance procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.1 ACAS code of practice</td>
</tr>
<tr>
<td>16.2 The right to be accompanied</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>17 Monitoring/surveillance</th>
</tr>
</thead>
<tbody>
<tr>
<td>17.1 Privacy rights</td>
</tr>
<tr>
<td>17.2 Interception of communications</td>
</tr>
<tr>
<td>17.3 Data Protection Act 1998</td>
</tr>
</tbody>
</table>
18 Health and safety
18.1 Duty to take care for safety of employees 43
18.2 Stress claims 44
18.3 Health and safety policy statement 44
18.4 Consultations with employees 44

19 Whistleblowing
19.1 Right not to suffer detriment or be unfairly dismissed 45
19.2 Qualifying disclosures 45

20 The Protection from Harassment Act 1997
20.1 Liability 46
20.2 Vicarious liability 47
20.3 Impact of the Act on the workplace 47
Rights During Employment

1 Overview

The position under common law is that the parties to an employment contract are entitled to agree such terms as they wish. However, over time, various pieces of legislation have been introduced which require employers to observe certain minimum requirements in relation to the working conditions of their employees. In particular, regulations have been introduced regulating the number of hours employees can be required to work and providing for a minimum amount of annual leave, maternity leave, parental leave and other similar types of leave, and the right to take time off work to deal with emergencies involving dependants. In addition, legislation guarantees a minimum hourly rate for all workers aged 16 and over.

2 Hours of work

2.1 Maximum working hours

The Working Time Regulations 1998 provide that employers must take all reasonable steps to ensure that workers do not work more than an average of 48 hours in each week. This average is taken over a reference period of 17 weeks (which is extended to 26 weeks for certain workers). Employers must maintain records for two years to show compliance with these provisions. Recent cases have suggested that time which a worker spends at work but “on-call” may constitute working time, and therefore count towards the 48 hour limit, even if the individual is not doing any actual work at the time.

2.2 Opt-out agreements

Workers may opt out of the 48 hour weekly limit by written agreement. The opt-out agreement must give the worker the right to terminate it by giving no more than three months’ notice. Opt-out agreements must be entered into voluntarily and it is unlawful to victimise or dismiss a worker for refusing to sign an opt-out agreement. For example, it would be unlawful to require a prospective employee to enter into an opt-out agreement as a condition of offering them a position.

2.3 Night workers

Employers must also take all reasonable steps to ensure that the normal working hours of night workers do not exceed an average of eight hours in any 24 hour period over a 17 week reference period. Night workers must also be given the opportunity to undergo a free health assessment before they take up night work and thereafter at regular intervals. If a registered medical practitioner advises the employer that a worker is suffering from health problems connected to the night work, the employer is required, if possible, to transfer the worker to suitable day work.
### 2.4 Rest periods

Subject to certain exceptions, adult workers (i.e. those over the age of 18) are entitled to a rest period of at least 11 consecutive hours in each 24 hour working period. In addition, adult workers are normally entitled to an uninterrupted weekly rest period of at least 24 hours (which may be made up of two weekly rest periods of at least 24 hours in each 14 day period or a single rest period of at least 48 hours in each 14 day period). Finally, workers who work for at least six hours in a 24 hour working period are entitled to a rest break away from their workstation. In the absence of a workforce or collective agreement specifying the duration, the rest break should be at least 20 minutes. Case law suggests that time which a worker spends on-call does not amount to a rest break. In addition to these specific obligations, there is a general requirement that adequate work breaks should be offered to workers if the work pattern puts their health and safety at risk.

### 2.5 Exemptions

None of the above provisions apply to workers who can determine their own working hours or whose working time is not measured or predetermined (such as managing executives).

### 2.6 Young workers

Employers are required to take all reasonable steps to ensure that young workers (i.e. those aged under 18 but over compulsory school age) do not work more than eight hours a day or 40 hours a week. Unlike the 48 hour weekly limit which applies to adult workers, these limits are not averaged over a reference period. There is no provision for young workers to opt-out of the limits. Employers are also required to take all reasonable steps to ensure that young workers do not work between 10pm and 6am. Additionally, young workers are usually entitled to a minimum weekly rest period of 48 hours, minimum daily rest of 12 hours and a minimum 30 minute rest break after 4½ hours of continuous work.

### 3 Salary and benefits

#### 3.1 National Minimum Wage

Under the National Minimum Wage Act 1998, most workers, including home and piece workers, are entitled to a minimum gross hourly wage. The rate is usually increased annually, based on the recommendations of the Low Pay Commission. The rate for workers aged 21 and over is currently £6.31 per hour; for workers aged 18 to 20 it is £5.03 per hour; for workers aged 16-17 it is £3.72 per hour and for most apprentices, £2.68. The hourly amount is calculated as an average over the relevant
pay reference period, which is usually the actual pay period (i.e. usually one week or one month). The calculation of “pay” includes bonuses paid in the reference period, but does not include tips, or advances or loans made to the worker. As a general rule, the value of benefits in kind is not included for the purposes of calculating pay.

3.2 Itemised pay statements

All employees must be provided with an itemised pay statement at or before the time payment is made, setting out the gross amount of wages, the amounts of any deductions (such as for tax and national insurance contributions), the net wages payable and, where parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

3.3 Tax and Social Security Contributions

Under the Pay as You Earn system (“PAYE”) employers are required to deduct income tax direct from employees’ salaries and pay it monthly to HMRC. In addition, both employers and employees have to pay National Insurance Contributions (“NICs”) on the cash remuneration paid to employees. The standard NICs for employees is currently 12% of the excess of their weekly cash remuneration over £149 (subject to a weekly earnings limit of £797). A 2% contribution is made by the employee in respect of their salary above £797 per week. The standard NICs for employers is 13.8% of the excess of the employee’s total weekly cash remuneration over £149 (with no upper limit on weekly earnings). If the employer operates an occupational pension scheme which is contracted out of the state earnings related pension scheme, the contribution rates are lower. The various thresholds are reviewed annually, usually with effect from April.

3.4 Deductions from wages

Subject to certain exceptions (such as when the deduction is made to reimburse the employer for any overpayment of wages or expenses) no deduction from a worker’s wages may be made unless either the deduction is required or permitted by a statutory or contractual provision or the worker has given their prior written consent to the deduction. Not only may sums wrongfully deducted be ordered to be repaid to the worker, but the employer may also lose the right to recover the sums which it was seeking to deduct. Therefore, it is advisable for an employee’s contract to include a provision giving the employer the right to make deductions from wages in order to recover any sums due from the employee. This will be particularly relevant on termination of employment if the employee has taken more than their accrued holiday entitlement and the employer wishes to recover the excess from the employee by deducting it from their final salary payment.
3.5 **Non-cash benefits**

With the exception of pensions (see below) there is no statutory requirement for employers to provide non-cash benefits to employees. However, many contracts expressly provide for the provision of a number of benefits in addition to basic salary. Benefits that are commonly given to employees in the UK include private medical expenses insurance, long-term disability insurance (which is often called permanent health insurance), death in service benefit, a company car (or a car allowance) and participation in schemes such as a commission, bonus or profit-sharing scheme.

4 **Pensions**

4.1 **Stakeholder pension schemes**

Previously, employers that had more than five employees but did not already provide appropriate pension arrangements were required to designate a stakeholder pension scheme that employees could join if they want to. This system no longer exists and the pension system in the UK has undergone an overhaul in recent years, see 4.2 below.

4.2 **Automatic enrolment**

From October 2012, new pension laws started to come into force requiring employers to automatically enrol most of their employees into workplace pension schemes. The new laws oblige employers to automatically enrol eligible jobholders in a qualifying pension scheme and make mandatory minimum pension contributions from the date that the jobholders become eligible.

Employers will be obliged to contribute a minimum of 3% of an employee’s earnings into their pension each year. These changes are being phased in over a period of 5 years, with larger employers being required to comply first. Employers can use existing pension schemes, provided they meet certain statutory requirements, or enrol eligible jobholders in NEST, a central scheme set up by the government.

All UK employers have been separated into a large number of bands according to their size, with each band being assigned a particular staging date from which they will be obliged to start the enrolment processes. The band the employer falls into depends on the number of workers that were in its PAYE scheme on 1 April 2012. The Pensions Regulator has published a staging timetable, which employers can use to verify their staging date.
4.3 Retirement

The default retirement age of 65 was abolished with effect from 6 April 2011, subject to transitional provisions. As of 1 October 2011, any dismissal because of age will constitute direct age discrimination under the Equality Act 2010, unless it falls within the transitional provisions, which apply where notice of resignation was issued before 5 April 2011.

The removal of the default retirement age has left employers with two options:

(a) abandon fixed retirement ages altogether; or

(b) retain a fixed retirement age.

If fixed retirement ages are to be retained, the employer will need to be able to justify the retirement age, whether it is company-wide or used for particular roles.

If fixed retirement ages are to be retained, the employer will have to be able to show that:

(a) a real business need (that is a legitimate aim) is being met;

(b) having the particular retirement age meets that aim; and

(c) it is proportionate to use a retirement age as a means of meeting that aim.

The employer will need to show that a balancing act has been carried out, weighing the discriminatory effect on the employee against the benefits achieved for the business and considering whether the aim can be met by less discriminatory means.

Legitimate aims may include: (a) workforce planning; (b) facilitating the recruitment and retention of younger employees; (c) contributing to a pleasant workplace and protecting the dignity of older workers by not requiring them to undergo performance management procedures; (d) avoiding adverse impact on pension and benefits; (e) ensuring a high quality of service or; (f) ensuring continued competence and having an age-based balanced workforce. The case law relating to this area is developing, but it is clear that employers need to properly consider the issues and record the thought processes and if appropriate consult with employees or their representatives about the way forward.

5 Holidays

5.1 Public and bank holidays

Although employees do not currently have a statutory entitlement to paid leave for bank and public holidays, most employment contracts provide for this. In England, Wales and Scotland these holidays are: 1 January, 2 January (Scotland only), Good Friday, Easter Monday (except Scotland), the first Monday in May, Spring Bank Holiday (usually the last Monday in May), the August Bank Holiday (usually the last Monday in August), 25 and 26 December.
5.2 Minimum annual leave

Under the Working Time Regulations 1998, agency workers and employees have a statutory right to a minimum of 5.6 weeks’ annual paid holiday (28 days for a worker who works 5 days per week). Public and bank holidays may count towards this entitlement. During the worker’s first year of employment, the right accrues on a pro rata basis. Since the Regulations set only the minimum requirements, more generous provisions relating to annual leave may be included in the contract of employment. The contract of employment may set out the procedure to be followed when the employee wishes to take annual leave. In the absence of any contractual provisions, the employee must give notice of at least twice the period of leave they are proposing to take. The employer may also require the employee to take all or part of their leave on certain dates by giving them notice of that requirement and such notice must be at least twice the length of the period of leave that the employee is being ordered to take. Where a worker’s employment is terminated and they have not taken all of their accrued minimum leave entitlement, the employer must pay them in lieu of that untaken leave. Equally, the contract of employment may include an obligation for the employee to reimburse the employer if they have exceeded their accrued annual leave entitlement.

5.3 Annual leave and sick leave

It is now a well-established concept that workers on sick leave continue to accrue statutory holiday under the Working Time Regulations 1998.

In addition, a payment made in lieu of a worker’s untaken statutory holiday on the termination of their employment should not be affected by any periods of sickness absence that they may have taken.

With regards to workers who fall ill prior to (or during) periods of pre-booked annual leave, the European Court of Justice ruled in Pereda v Madrid Movilidad SA that under the Working Time Directive, a worker who is incapacitated before a period of pre-arranged statutory holiday should have the right to reschedule the holiday for a later date. If the worker remains sick until the end of the relevant leave year, they should be allowed to reschedule their holiday in the next leave year.

In the more recent case of Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and others C-78/11, the ECJ also confirmed that the Directive entitles workers who become sick during a period of statutory holiday to take the sickness affected holiday at a later date.

Workers in Great Britain are not entitled to enforce the “rights” set out in the Directive directly, as they are implemented into English law by the Working Time Regulations 1998. The Working
Time Regulations 1998 do not appear to allow workers to reschedule statutory holiday or to carry over the first 20 days of statutory holiday into the next leave year, as required by the ECJ in Pereda and ANGED. Nevertheless, courts and tribunals are obliged, if possible, to interpret the WTR 1998 in the light of the ECJ’s decisions and therefore we would recommend that employers follow this case law.

6 Sick pay

6.1 Statutory sick pay (“SSP”)

All employees earning over the weekly lower earnings limit for National Insurance contributions (currently £109 per week) are entitled to receive SSP for days on which they are unable to work due to sickness. The current maximum weekly rate of SSP is £86.70 (rates are increased annually in April). The rules governing payment of SSP are complex but the main ones are that:

(a) there is a maximum entitlement of 28 weeks of SSP in any period of incapacity for work (“PIW”) or any linked series of PIWs spanning a maximum of three years;

(b) an employee is not entitled to be paid SSP for the first three days of any period of absence (unless it is a case of a recurring absence within a specified timescale); and

(c) the employee must provide the employer with evidence of incapacity for work for the first four to seven days’ absence in a self-certificate form and for periods after the first seven days in a doctor’s certificate.

6.2 Contractual sick pay

In view of the fact that the rate of SSP is usually much lower than most employees’ weekly salary, many employers operate contractual sick pay arrangements whereby employees are paid their full salary for a specified number of days’ sickness absence per year. Any contractual sick pay paid to an employee is set off against any SSP due for the same day. Therefore, where an employee is entitled to both SSP and contractual sick pay for the same day of absence, they will receive the higher of the two sums, but not both.

7 Maternity leave

7.1 Time off for ante-natal care

All pregnant employees are entitled to paid time off to keep appointments for ante-natal care made on medical advice. Except in the case of the first appointment, the employer can require the employee to produce a medical certificate confirming that she is pregnant together with a document showing that the appointment has been made.
7.2 Maternity leave

All pregnant employees (regardless of length of service) must take two weeks’ maternity leave starting on the day childbirth occurs. Employees are however entitled to 26 weeks’ Ordinary Maternity Leave (“OML”) which can be taken at any time from the 11th week before the expected week of childbirth (“EWC”), followed by a further 26 weeks’ Additional Maternity Leave (“AML”), which must start immediately after the end of the OML. All contractual benefits and non-contractual benefits connected with employment except wages or salary continue to be payable throughout OML and AML. For special rules relating to bonuses, see 7.6 below.

In order to qualify for maternity leave, an employee must notify her employer by the end of the 15th week before her EWC, unless this is not reasonably practicable. If the employee wishes to change her mind about when she wants to take her maternity leave, she must give her employer at least 28 days’ notice. Maternity leave is automatically triggered if an employee is absent from work for a pregnancy-related illness during the four weeks immediately before her EWC or, if the employee gives birth before her OML has started, maternity leave starts automatically on the day after the date of the birth.

7.3 Maternity pay

Employees who have at least 26 weeks’ continuous service up to the “qualifying week” (which is the 15th week before the EWC) are entitled to up to a total of 39 weeks’ Statutory Maternity Pay (“SMP”). SMP for the first six weeks is paid at 90% of the employee’s normal weekly earnings (calculated as an average of her actual earnings over the eight week period prior to that period). The remaining 33 weeks are paid at a flat rate which is set by the Government. That rate is £136.78 from 1 April 2013 (or 90% of the employee’s normal weekly earnings if lower), with any rate increases taking place annually in April. An employer can recover from the Government either 92% or 103% (depending on the amount of National Insurance Contributions paid during the relevant tax year) of SMP paid by setting it off against the PAYE tax, National Insurance Contributions and student loans payments which it sends to HMRC each month.

7.4 Rights on returning to work

If an employee intends to return to work at the expiry of her full maternity leave entitlement, no notice is required to be given. In contrast, an employee must give at least eight weeks’ notice to her employer if she intends to return to work before the end of her full entitlement. An employee returning from OML is entitled to return to the same job that she had before taking maternity leave. An employee returning from AML is entitled to return to the same job unless it is not reasonably practicable for her to do so,
in which case she must be offered suitable alternative employment. If a redundancy situation arises during an employee’s maternity leave, the employer must offer her a suitable alternative position if one is available (and she takes priority over any colleagues not on maternity leave) or the redundancy will be regarded as automatically unfair. However, guidance from the courts suggests that an employee on maternity leave should not be automatically favoured during a redundancy selection process at the expense of other employees. The case law illustrates how important it is for employers to get the balancing act right and to assess the possible ways in which the disadvantages of a maternity absence can be mitigated, rather than automatically favouring the female employee on maternity leave above others.

7.5 Contractual maternity rights

Many employers operate contractual maternity schemes which offer benefits over and above the statutory scheme. For example, employers may agree to continue to pay full salary for all or part of the maternity leave period. Some employers provide that any such enhanced contractual payments are repayable in the event that the employee does not return to work for a minimum period of time after the end of her maternity leave.

7.6 Bonuses during maternity leave

This is a complicated area. The general rule is that contractual bonuses can be pro-rated to exclude any entitlement while the employee is on maternity leave (other than the two week compulsory maternity leave period). The mechanics surrounding payments of any form of discretionary bonuses are very complex and legal advice should be sought.

8 Paternity leave

8.1 Paternity leave

Employees who:

(i) expect to have responsibility for the child’s upbringing;

(ii) are the biological father or the mother’s husband or partner or (in the case of adoption) the spouse or partner of the adopter; and

(iii) have completed 26 weeks’ service by the 15th week before the baby is due or by the week in which they receive notification of adoption (in the case of adoption), are entitled to two weeks’ paternity leave (known as “Ordinary Paternity Leave”).

Leave must be completed within 56 days of the date of childbirth (or, if the child is born early, within 56 days of the EWC) or the date the child is placed with the adopter (in the case of
adoption). Employees earning over the weekly lower earnings limit for National Insurance Contributions (currently £109 per week) are entitled to Statutory Paternity Pay (SPP), which will be at the same rate as flat rate Statutory Maternity Pay, which is £136.78 from 1 April 2013 (or 90% of the employee's normal weekly earnings if lower) (see 7.3). Employers can recover either 92% or 103%, plus compensation, of SPP paid (depending on the size of National Insurance Contributions paid during the relevant tax year). All contractual benefits except wages or salary continue throughout the paternity leave.

8.2 Procedure for taking paternity leave

Notice of the intention to take leave must be given to the employer by the 15th week before the EWC, or within seven days of the notification of adoption (in the case of adoption).

8.3 Rights on returning to work

Employees are entitled to return to the same job following paternity leave provided it is an isolated period of leave, or the last of consecutive periods of leave which were not AML, AAL or more than 4 weeks of parental leave.

8.4 Additional paternity leave

Parents who meet the eligibility conditions are also entitled to take up to 26 weeks of additional paternity leave. The eligibility conditions for additional paternity leave mirror the conditions for Ordinary Paternity Leave) and additionally provide that the mother or adopter must have returned to work without exhausting their entitlement to maternity or adoption leave.

Additional paternity leave can be taken at any time from 20 weeks from the date of birth of the child or the date of placement (in the case of adoption) up until the child’s first birthday. Eight weeks’ notice must be given by the employee of their intention to take additional paternity leave; the employer must then notify the employee of their right to take such leave within 28 days of receiving the request. The Additional Paternity Leave Regulations provide for a self-certification process, whereby both parents must provide certain information to the employer. The employer can then seek further information if it deems this necessary.

The provisions on terms and conditions of employment during additional paternity leave mirror those which apply to an employee on additional maternity leave. An employee returning from APL is entitled to the job in which they were employed prior to the leave, provided the leave lasted no longer than 26 weeks and was an isolated period of leave or the last of consecutive periods of leave which were not AML, AAL or more than 4 weeks of parental leave. If that is not the case they have the right to return to the same job, unless it is not reasonably practicable. While on additional paternity leave employees will be entitled to
statutory maternity pay period, or the adopter’s statutory adoption pay period (in the case of adoption).

9 Adoption leave

9.1 Adoption leave

To qualify for adoption leave, an employee must:
(i) be newly matched with a child for adoption; and
(ii) have completed 26 weeks’ service by the week in which they are notified of the adoption.

Employees earning over the weekly lower earnings limit for National Insurance Contributions are entitled to 26 weeks’ Ordinary Adoption Leave (“OAL”), plus a further 26 weeks’ Additional Adoption Leave (“AAL”). Statutory Adoption Pay (“SAP”) is payable for up to 39 weeks and is paid at the same rate as the last 33 weeks of Statutory Maternity Pay (see 7.3). Employers can recover either 92% or 103% of SAP paid (depending on the size of national insurance contributions paid during the relevant tax year).

9.2 Procedure for taking adoption leave

Employees must inform their employer of their intention to take adoption leave within seven days of being notified that they have been matched for adoption, unless this is not reasonably practicable. If an employee changes their mind about when they wish to start adoption leave, they must give at least 28 days’ notice to their employer.

Employees may start their leave either from the date of the child’s placement or up to 14 days before the expected date of the placement. During OAL and AAL, all contractual benefits except wages or salary continue to be payable.

9.3 Rights on returning to work

Employees wishing to return to work before the end of their full adoption leave must give their employer at least eight weeks’ notice. No notice is required if an employee wishes to return at the end of their full adoption leave entitlement. An employee returning from OAL is entitled to return to the same job that they had before taking leave, provided it is an isolated period of leave or the last of consecutive periods of leave which were not AML, AAL or more than 4 weeks of parental leave. If that is not the case an employee returning from OAL and an employee returning from AAL is entitled to return to the same job unless it is not reasonably practicable to do so, in which case they must be offered suitable alternative employment.
9.4 Interrelation with paternity leave

Only one member of a couple who adopt jointly may take adoption leave. The equivalent of paternity leave may be available to the other, and paternity leave may also be available to the partner of an individual who adopts a child but who does not, themselves, adopt the child. There is no requirement for an employee taking paternity leave to be the biological or adoptive father of the child so long as they are the partner, male or female, of the mother or adoptive parent and expect to have responsibility for bringing up the child. For further details, see section 8 above.

10 Expected changes in 2015

10.1 The government changes to family leave and pay

The Government has proposed various changes to family leave and pay, a number of which are to be introduced in 2015 and will have significant impact on maternity leave, paternity leave and adoption leave arrangements. Some of the more significant changes include a new system of shared parental leave, changes to adoption pay and changes to time off for antenatal and adoption appointments.

Look out for our updates on these areas as we get closer to implementation.

10.2 Shared parental leave and pay

A lot of the detail on the new system of shared parental leave will be contained in regulations which have not yet been published. Key features of the proposed arrangements include:

(i) Qualifying employees will be able to share up to 50 weeks’ of leave and 37 weeks’ of pay – the mother must take the two weeks’ of compulsory maternity leave.

(ii) Both parents to give employers’ eight weeks’ notice to begin shared parental leave and shared parental pay.

(iii) The leave can be taken in one continuous period or in several blocks of leave.

(iv) Parents can take the leave at separate times or at the same time.

(v) Employers are not required to accept the pattern of leave.

(vi) In addition to the mother’s ten KIT days, each parent taking shared parental leave will have 20 KIT days.

(vii) Employees will be entitled to return to the same job, provided that they have taken 26 or fewer weeks’ leave in total.

The leave will also be available to qualifying adopters and parents in a surrogacy situation.
10.3 Adoption pay

Statutory Adoption Pay will be paid at 90% of normal earnings for the first six weeks’ of leave, as is already the case with maternity leave.

10.4 Appointments

The intended parent in a surrogacy situation and the partner of a pregnant woman or adopter will be able to take unpaid time off to attend two ante-natal appointments.

Single adopters (or one of the adopters) will be able to take paid time off to attend up to five adoption appointments.

11 Parental leave

11.1 Entitlement to parental leave

Under the Maternity and Parental Leave Regulations 1999, parents of either sex who fulfil certain qualifying conditions are entitled to take up to 18 weeks’ unpaid parental leave per child for whom they have responsibility. The right is available to employees with over one year’s service and who have, or expect to have, parental responsibility for a child. The right to take parental leave normally ends when the child is five, although special rules apply to disabled or adopted children. Under the Regulations, the leave has to be taken for the purposes of caring for a child.

11.2 Procedure for taking parental leave

The Regulations allow employers to agree with employees how and when parental leave can be taken. In the absence of agreement, the Regulations provide that employees must give at least 21 days’ notice of their intention to take parental leave and that the leave can only be taken in blocks or multiples of one week (unless the child is disabled). Unless otherwise agreed, an employee cannot take more than four weeks’ leave in respect of an individual child in any one year. The Regulations also allow employers to require an employee to postpone taking leave by up to six months if the proposed timing of their leave would cause undue disruption to the business.

11.3 Rights on returning to work

An employee who takes parental leave of four weeks or less is entitled to return to work to the same job on the same terms and conditions.

If more than four weeks’ leave is taken or if leave is taken immediately after Additional Maternity Leave or Additional Adoption leave, the employee must be permitted to return to the same job unless it is not reasonably practicable to do so, in which case they must be offered suitable alternative employment.
12 Time off for dependants

12.1 Entitlement to time off

All employees (regardless of length of service) are entitled to take “reasonable” unpaid time off work to deal with an emergency involving a dependant. The guidance issued by the Government suggests that, in most cases, one or two days will be sufficient to deal with a particular incident. The employee must tell the employer the reason for the absence and how long they expect to be absent “as soon as reasonably practicable”.

The right to take time off is limited to the following situations:

(a) to provide assistance when a dependant falls ill, gives birth or is injured or assaulted, or to make arrangements for the care of a dependant who falls ill or is injured;

(b) following the death of a dependant;

(c) because of the unexpected disruption or termination of care arrangements for a dependant;

(d) to deal with an unexpected incident involving a child of the employee that occurs while the child is at school.

12.2 Definition of dependant

For the purposes of situations (b) and (d) above, a dependant is defined as a spouse, civil partner, child or parent of the employee or someone else living in the same house as part of the family (e.g. unmarried partners or step-children but excluding tenants, lodgers, boarders and employees). For situation (a) the definition is widened to include anyone who reasonably relies on the employee for assistance or to arrange care if they are ill or injured. For situation (c) a dependant will also include anyone who reasonably relies on the employee to make arrangements for their care.

13 Flexible working

13.1 Rights to request flexible working

Those caring for (a) children aged sixteen and under, or disabled children under the age of 18, or (b) adults who need care and fall within the statutory definition (see 13.3 below) may request flexible working. The right is available to individuals who have been continuously employed for 26 weeks and who have responsibility for the child’s or adult’s care. Employees are able to request a change to the hours they work or the times they are required to work may also request that they work from home.
13.2 Procedure for requesting flexible working

An application must be made for the purpose of enabling the employee to care for the child/adult. An employee can only make one application a year. However, there is nothing preventing an employee making additional informal requests. While the employer will not be obliged to follow the statutory procedure in response to an informal request, a refusal without appropriate consideration could amount to (indirect) sex discrimination. The employee must first make a written application to the employer, who must then arrange a meeting within 28 days. The employer must then write to the employee within 14 days of the meeting either agreeing to the new working arrangements or setting out clear business grounds as to why the application cannot be accepted. Arrangements can be agreed on a trial period basis. The business grounds listed in the legislation include the burden of additional costs and any detrimental effect on the employer’s ability to meet customer demand. It is important for the employer to have an audit trail supporting their given reasons. The employee may appeal against a decision within 14 days of being notified of it.

13.3 Adult carer

As mentioned in 13.1 above, the right to request flexible working covers caring for ‘qualifying adults’. Qualifying adults means: (a) the spouse, civil partner or partner of the employee; (b) a relative of the employee, for example parents (including adoptive, step parents and in-laws), guardians, siblings and children (including adoptive, full blood and half-blood relations), grandparents, aunts and uncles; and (c) adults not falling within the previous categories but who are living at the same address as the employee.

14 Union membership

All employees have the right to join, or to refuse to join, a trade union. A decision of the European Court of Human Rights also confirmed that offering employees financial inducements to relinquish their trade union rights is contrary to the European Convention on Human Rights. If the trade union is recognised by the employer, and in some circumstances an employer is obliged to recognise a trade union (see “Collective Rights”), then the employee will have certain rights to take part in trade union activities. Employees are also protected from dismissal and action short of dismissal on the grounds of their membership, or non-membership, of a trade union (see “Collective Rights” for more details).

15 Data protection rights

15.1 Recent developments

In January 2012, the European Commission published proposals for the reform of data protection laws within the EU. The proposals would, if enacted in their current form, result in
significant changes to data protection rules. Amongst other things, the rules relating to transferring personal data outside the EU, obtaining consent from data subjects (such as employees) and the penalties for non-compliance would all change. However, the proposals are subject to an extensive consultation process and are unlikely to come into force for 3-4 years.

15.2 Processing of personal data

The Data Protection Act 1998 requires that all employers must comply with certain data protection principles when “processing” (e.g. recording, holding, using) personal data relating to their employees. Personal data is broadly defined to include any data from which a living individual can be identified. Under the legislation, an employer is generally prohibited from processing an employee’s personal data unless the employee has consented or the employer needs to process the data either to perform its obligations under the contract of employment or to comply with any other legal obligation. In addition, when processing any personal data, an employer must comply with the other data protection principles contained within the legislation. These require employers to ensure that the personal data which they hold is accurate, kept secure, not kept for longer than is necessary, not excessive, only processed for certain specified purposes and not transferred to countries outside the EEA without adequate data protection safeguards.

15.3 Sensitive personal data

Stricter pre-conditions need to be satisfied before an employer can process “sensitive personal data” (i.e. information relating to an employee’s racial or ethnic origin, political opinions, religious beliefs or beliefs of a similar nature, trade union membership, physical/mental health or condition, sex life or criminal offences/proceedings/sentencing involving the employee). Unless the employee has made the information public themselves or the employer needs to process sensitive personal data to comply with UK employment law, an employer will generally need to obtain the employee’s explicit consent to the processing. Since an employer is likely to need to process an employee’s sickness records (which will qualify as sensitive personal data) it is advisable to include a clause in the employment contract whereby the employee gives their express consent to such processing.

15.4 Employees’ right of access

On making a written request, an employee is entitled to be provided with a copy of the personal information which their employer holds about them (unless this would involve a disproportionate effort or is not possible). The employer can charge the employee a fee of not more than £10 and must respond to the request within 40 days. There are a number of exemptions from the duty to make information available.
The exemptions most likely to be applicable in relation to access requests by employees are:

(a) references – an employee is not entitled to have access to any reference given in confidence by a current employer. However, they will be able to gain access to references received by that employer from a third party;

(b) information identifying another individual – an employer need not provide information which would identify another individual unless that individual has consented or it is reasonable to dispense with their consent;

(c) management forecasting information – personal data which is processed for the purposes of management forecasting or management planning cannot be accessed by employees if this would prejudice the conduct of the business (e.g. data relating to proposed pay reviews, redundancies or a possible take-over); or

(d) information which may prejudice negotiations between the employer and employee – this would cover matters such as details relating to intended salary rises.

15.5 International transfer of data

The legislation prohibits an employer from transferring employees’ personal data to any country outside the EEA unless it has adequate data protection laws. Although the US does not have generally applicable federal laws on data protection for the private sector, it is permissible for data to be transferred to companies in the US which have adopted the “safe harbour” principles (which have been recognised by the European Commission as providing adequate protection). If an employer wishes to transfer data to a non-safe harbour US company or anywhere else outside the EEA (save for Andorra, Argentina, Australia, Guernsey, the Isle of Man, Jersey, Switzerland, New Zealand, Uruguay and (with limitations) the Faroe Islands and Israel, which have been approved as having adequate data protection laws, and to Canadian recipients subject to the Personal Information Protection and Electronic Documentation Act), it must either require the organisation receiving the data to sign appropriate contractual undertakings or rely on one of the derogations in the legislation. The derogations most likely to be relevant to employment-related information are:

(a) the employee has given consent to the transfer;

(b) the transfer is necessary for the performance of the employment contract or for processing a job application from a prospective employee; or

(c) the transfer is necessary for the conclusion or performance of a contract between the employer and a third party which is entered into at the request of the employee or it is in the interests of the employee (e.g. for a contract between the employer and a company that provides certain employee benefits).

In view of the difficulties of establishing whether a particular country provides adequate protection or showing that the data transfer is necessary for the purposes listed in (b) and (c) above,
it is advisable for any company which may wish to transfer employee data outside the EEA either to obtain its employees’ consent by including an appropriate clause to that effect in the employment contract or to obtain appropriate contractual undertakings from the recipient of the data. The Commission has approved standard contractual clauses which will be regarded as providing adequate protection.

15.6 Code of practice

A code of practice for employers has been published by the Information Commissioner’s Office and is available on its website (www.ico.gov.uk). Although the Code is not legally binding, it represents the views of the Information Commissioner on what organisations must do to ensure compliance with the Data Protection Act 1998. Part 1 deals with Recruitment and Selection, Part 2 deals with Employment Records, Part 3 deals with Monitoring at Work and Part 4 deals with Information About Workers’ Health.

16 Disciplinary and grievance procedures

16.1 ACAS code of practice

When conducting disciplinaries and individual grievances employers and employees must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. Whilst the Code is not legally binding, if an employer unreasonably fails to comply with the Code, a Tribunal will have the power to increase any award that it makes by up to 25%, and if the employee has unreasonably failed to comply with the Code the Tribunal has the power to reduce any award by up to 25%. The Code does not apply to redundancy dismissals, the non-renewal of a fixed term contract or collective grievances.

The Code recommends that all employers should draw up disciplinary rules together with a procedure for dealing with disciplinary issues.

It indicates that the employee should be provided with details of the allegations that have been made against them in advance of any disciplinary hearing and should be given the opportunity of challenging the allegations and evidence before a decision is taken. The Code also recommends that employees should be given a right of appeal against any decisions taken.

16.2 The right to be accompanied

All workers have the right to be accompanied by a colleague of their choice or by a suitably qualified trade union official when required or invited to attend certain disciplinary or grievance hearings. However, the right does not apply to meetings that are purely investigation meetings. The employee may be accompanied by a trade union official even if the employer does not recognise a
17 Monitoring/surveillance

There is no general right to privacy under UK common law. However, in recent years legislation has been introduced which has given employees some protection against unwarranted infringements into their private lives. In particular, the legislation introduces limitations on an employer's ability to carry out monitoring of its employees' email, internet and telephone use.

17.1 Privacy rights

The Human Rights Act 1998 ("HRA") is designed to give effect to the rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The HRA makes it unlawful for public authorities in the UK to act in a way which is incompatible with the Convention rights unless they are required to do so under primary legislation. Although the HRA is not directly enforceable against private sector employers, it will have an indirect effect on employers in the private sector because the courts and Employment Tribunals (being public bodies) will have to take the provisions of the HRA into account when reaching their decisions. In addition, the HRA requires the courts to interpret all legislation so as to be compatible with the Convention so far as it is possible to do so. Among the rights protected by the HRA is the right to respect for private and family life, home and correspondence. This right could be infringed if an employer carries out monitoring or surveillance of its employees without giving prior warning that this may take place. Therefore, if an employee is dismissed as a result of evidence obtained through covert monitoring or surveillance, they may be able to argue that the Employment Tribunal should uphold their claim for unfair dismissal, and/or that this evidence should be inadmissible, on the grounds that rights under the HRA were infringed.

17.2 Interception of communications

The Regulation of Investigatory Powers Act 2000 ("RIPA") introduced both criminal and civil liability for "unlawful interception" of a communication on a telecommunications system (which may include a communication by telephone, fax, email or the internet). However, RIPA provides that employers will be able lawfully to intercept and monitor communications if there are reasonable grounds for believing that both the sender and the intended recipient consent to it or if the interception is authorised by the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. These Regulations allow an employer to intercept, monitor and (in
limited situations) record communications relevant to the employer’s business for certain specified purposes such as to investigate or detect unauthorised use of the system by employees. However, to take advantage of this exemption, the employer must make “all reasonable efforts” to inform potential users of the system that interceptions may be made. Therefore, any employer who is likely to carry out any form of email, internet or telephone monitoring should warn its employees that this may take place. Such a warning is commonly included in a document setting out the employer’s policy on email, internet and telephone use.

17.3 Data Protection Act 1998

Although monitoring may be lawful under the legislation referred to above, employers will still need to comply with the provisions of the Data Protection Act 1998 when carrying out any monitoring. The Information Commissioner has published a Code of Practice setting out guidelines on the standards which employers should adopt to avoid breaching any of the principles set out in the Data Protection Act. The Code is available on the website of the Information Commissioner’s Office (www.ico.gov.uk). The Code recommends that employers refrain from carrying out monitoring or surveillance unless it is necessary to achieve a specific business purpose and that, in making this assessment, they should consult with employee representatives. Personal information should only be used for the purposes for which it was collected unless it would be in the employee’s interests to use it otherwise, or if it reveals information that no reasonable employer could be expected to ignore. The Code also recommends telling workers what monitoring is taking place and why (and reminding them of this periodically) unless covert monitoring is justified. It is recommended that covert monitoring should be limited to situations where criminal activity is suspected and the employer concludes that overt monitoring would prejudice the investigation.

18 Health and safety

18.1 Duty to take care for safety of employees

An employer is under a duty to take reasonable care for the safety of its employees. This duty arises at common law and under the Health and Safety at Work Act 1974. Employers are also liable for health and safety breaches by their employees if these are committed in the course of their employment.

The employer’s duty is usually expressed as the obligation to:

(a) provide a safe place of work;
(b) provide a safe means of access to the place of work;
(c) provide a safe system of work;
(d) provide adequate equipment and materials;
(e) employ competent fellow employees; and
(f) protect employees from unnecessary risk of injury.
The application of the general duty to a wide range of specific situations (covering, for example, electricity at work, computer screens and use of alcohol and drugs) is set out in an extensive body of regulations.

18.2 Stress claims

An employer’s duty to take reasonable care for the safety of its employees extends to preventing psychological, as well as physical, harm. However, the case law suggests that an employer will not be liable to a particular employee unless there are warning signs, such as the fact that:

(i) the employee is being overworked or is showing signs of stress in comparison to other employees in a similar position;

(ii) the employee has previously suffered psychological injury, such as a breakdown, as a result of overwork;

(iii) the employee has previously complained about the stress of their job; or

(iv) the employee has uncharacteristically been absent from work for prolonged periods.

If these warning signs do exist, employers should consider:

(a) giving the employee a sabbatical or transferring them to other work;

(b) redistributing the work or providing extra help; and/or

(c) providing confidential counselling or buddying or mentoring services.

18.3 Health and Safety Policy Statement

Employers employing five or more employees must prepare (and revise where necessary) a written statement detailing their policy on health and safety at work and the arrangements for giving effect to it. The policy must be brought to the notice of all employees, for example by displaying it on an accessible notice board. Employees should also be given information on health, safety and welfare in the form of posters and leaflets published by the Health and Safety Executive.

18.4 Consultations with employees

Employers are obliged to consult with employees on health and safety matters. This consultation should be with union representatives or, in the case of non-unionised workers, with employees directly or with their elected representatives. This is dealt with in more detail in “Collective Rights”.

19 Whistleblowing

19.1 Right not to suffer detriment or be unfairly dismissed

Under the Public Interest Disclosure Act 1998 ("PIDA"), employees (and certain other workers) have the right to disclose information about alleged wrongdoings. Provided the disclosure qualifies as a “protected disclosure”, then the employee has the right not to suffer any detriment as a result of making the disclosure. If the employee were dismissed, the dismissal would be automatically unfair.

19.2 Qualifying disclosures

To qualify as a “protected disclosure”, the information disclosed must, in the reasonable belief of the worker making the disclosure, fall within one of a number of categories of wrongdoing listed in PIDA. Disclosures made after 25 June 2013 must also, in the reasonable belief of the worker making the disclosure be in the public interest. The disclosure must be made to the employer or a specified authority in the first instance in order to be “protected”, although in some circumstances this may not be necessary.

Information that can be disclosed. The information to which PIDA applies includes the fact that: (i) a criminal offence has been, is being or is likely to be committed; (ii) a person has failed, is failing or is likely to fail to comply with a legal obligation to which they are subject; (iii) the health and safety of any individual has been or is likely to be endangered; (iv) a miscarriage of justice has occurred, is occurring or is likely to occur; (v) damage to the environment has occurred, is occurring or is likely to occur; or (vi) information indicative of any of the listed wrongdoings has been, is being or is likely to be concealed. Previously the Employment Appeal Tribunal had interpreted “failings to comply with a legal obligation” widely, so as to include breaches of an employee’s employment contract. However, the government has recently amended PIDA so that disclosures must be made in the public interest. It is arguable that this would no longer cover a breach of an individual’s contract of employment.

Person to whom the information must be disclosed. The categories listed in PIDA include (i) the individual’s employer, or, where the conduct relates to another person or to matters for which a person other than the employer is responsible, that other person; (ii) the individual’s legal adviser in the course of obtaining legal advice; and (iii) a large number of public bodies listed in the Public Interest Disclosure (Prescribed Persons) Order 1999 (as amended), such as the Health and Safety Executive in relation to health and safety matters, HMRC in relation to tax and similar matters, and the Pensions Regulator in relation to pension scheme matters. The disclosure can also be made to other individuals if: (a) the worker believes they will be subjected to a detriment if they make a disclosure to their employer or to one of the bodies listed in the Order;
(b) there is no applicable public body listed in the Order to whom the worker can make the disclosure and they believe that the wrongdoing will be concealed if the disclosure is made to the employer; or (c) the worker has previously made the same disclosure to their employer or to one of the bodies listed in the Order. Where a worker made a disclosure on this basis prior to 25 June 2013, it must be made in good faith and not for the purposes of personal gain, they must reasonably believe that the information and the allegations are correct and it must be reasonable for the disclosure to be made. Disclosures made after 25 June 2013 no longer need to be made in ‘good faith’ but compensation may be reduced. Finally, where the wrongdoing is of an “exceptionally serious nature”, the worker can also make a disclosure to other individuals, provided that the disclosure is made in good faith and not for the purposes of personal gain, the worker reasonably believes that the information and the allegations are correct, and that it is reasonable for the disclosure to be made. Again, the good faith requirement only applies to disclosures made prior to 25 June 2013.

Regulations brought into force on 6 April 2010 give Employment Tribunals the power to forward a Tribunal claim form, or extracts from it, to an appropriate regulator where the claimant has consented and alleged in the claim that they have made a protected disclosure. The regulator will then be able to investigate the alleged malpractice. The claimant must give express consent by ticking a box on the ET1 (claim) form, which has been amended for this purpose.

20 The Protection From Harassment Act 1997

The Protection From Harassment Act 1997 was originally introduced to deal with stalkers but employees have subsequently tried to apply the legislation to wider harassment in the employment context. Under the Act, it is an offence for anyone to pursue a “course of conduct” which causes another person harassment, alarm or distress in circumstances where a reasonable person would feel harassed. A “course of conduct” excludes one-off incidents, so in order for the Act to apply there must be two or more incidents (but note that they do not have to amount to unlawful discrimination or be by the same harasser, so for example if an employee working in a shop is subjected to two separate incidents by two separate customers, this may amount to a course of conduct).

20.1 Liability

If convicted in the criminal courts of an offence under the Act, a harasser could face imprisonment, a fine and/or a restraining order. A person subject to harassment can also bring a claim in the civil courts for economic losses resulting from the harassment and money to compensate for anxiety caused by the harassment. They can also apply for an injunction to restrain the harasser from pursuing any conduct which amounts to harassment. Civil proceedings can be issued at any time up to six years from when the harassment occurred.
20.2 Vicarious liability

Employers can be held vicariously liable for acts committed by employees in the course of their employment, including harassment. An employer will only be liable for civil acts and not criminal acts.

20.3 Impact of the Act on the workplace

The Supreme Court has confirmed that where one employee is harassing or bullying another, and those acts are closely connected with the harasser's ordinary work duties (e.g. a manager bullying a member of their team when issuing instructions or reviewing work), the employer could be held vicariously liable for those acts and be liable to pay compensation. Unlike discriminatory harassment claims, it will not be open to the employer to argue that they took all reasonable steps to prevent the harassment from happening.
## E Termination of Employment

### 1 Overview  49

### 2 Wrongful dismissal  49
  2.1 Nature of claim  49  
  2.2 Defences  49  
  2.3 Compensation  50  
  2.4 Damages for failure to follow disciplinary procedure  50  
  2.5 Damages for failure to follow the ACAS Code of Practice  50  
  2.6 Garden leave  50

### 3 Unfair dismissal  51
  3.1 Entitlement to claim  51  
  3.2 Constructive dismissal  51  
  3.3 Potentially fair reasons for dismissal  51  
  3.4 Remedies  52

### 4 Dismissal procedures  53
  4.1 Misconduct  53  
  4.2 Poor performance  54  
  4.3 Sickness  54  
  4.4 Redundancy  55

### 5 Redundancy payments  56
  5.1 Redundancy situation  56  
  5.2 Statutory redundancy payment  56  
  5.3 Enhanced redundancy payments  57

### 6 Written reasons for dismissal  57

### 7 Settling employees’ claims on termination  58
  7.1 Settlement agreements  58  
  7.2 ACAS agreements  58

### 8 Enforcing post-termination restrictions  59
Termination of Employment

1 Overview

Dismissal can give rise to a number of different claims under UK law. The principal claims that may arise on termination of employment are:

(i) wrongful dismissal;
(ii) unfair dismissal;
(iii) a claim for a redundancy payment;
(iv) a claim arising out of a failure to give written reasons for dismissal; and
(v) a claim for discrimination on the grounds of sex, race, disability, sexual orientation, religion or belief, pregnancy or maternity, marriage or civil partnership, gender reassignment or age (see "Rights During Employment").

2 Wrongful dismissal

2.1 Nature of claim

An employee will be able to bring a claim for breach of contract (commonly known as “wrongful dismissal”) if their employer terminates their employment without either giving the appropriate period of notice specified in their contract of employment or making a payment in lieu of notice. Alternatively, a claim for wrongful dismissal may be brought if the employee is employed under a fixed term contract which is terminated prior to the expiry of the fixed term. This type of claim may be brought in either the High Court/County Court or the Employment Tribunal. The Employment Tribunal can only make awards of compensation for breach of contract of up to £25,000. There is no limit in the High Court/County Court.

2.2 Defences

The only defences available to the employer are either:

(i) that proper notice of termination (or payment in lieu of notice) has been given; or
(ii) that the employer was entitled to dismiss the employee without any notice.

The circumstances in which the employer is entitled to terminate without giving notice are sometimes set out in the contract of employment. If they are not set out in the contract, the employer will need to show that the employee’s behaviour amounted to a fundamental breach of their obligations under the contract. Generally, it will be necessary to show that the employee was guilty of gross misconduct or gross negligence.
2.3 Compensation

If an employee is successful in bringing a wrongful dismissal claim, they will generally be entitled to compensation equal to the net value of the salary and benefits which they would have received had they been given their full period of notice. However, the employee will be under a duty to "mitigate their loss". This means that they must take reasonable steps to look for alternative employment. If they are successful in finding other work during the period which would have represented their notice period (or the unexpired portion of their fixed term contract), then they may be required to deduct such earnings from the losses claimed as compensation. If the employee fails to take reasonable steps to mitigate their loss, the Court may reduce their compensation accordingly. An employee may not be obliged to mitigate his or her loss for wrongful dismissal purposes where the contract includes an express right to payment in lieu of notice.

2.4 Damages for failure to follow disciplinary procedure

An employee may be entitled to claim additional compensation if the employer fails to follow a contractual disciplinary procedure before dismissing for misconduct or poor performance. If the employer dismisses the employee without following the disciplinary procedure, the employee may claim additional compensation equal to the value of their salary and benefits during the period which would have elapsed had the procedure been followed. To succeed with such a claim, the employee will need to establish that the disciplinary procedure forms part of their contractual terms. Therefore, it is currently possible to avoid liability for claims of this type by including a statement in the disciplinary procedure to the effect that it is not contractually binding.

2.5 Damages for failure to follow the ACAS Code of Practice

The employee may decide to bring a wrongful dismissal claim in the Employment Tribunal instead of the common law courts. Consequently, the Employment Tribunal will have a discretion to increase awards by up to 25% if an employer unreasonably fails to comply with the ACAS Code of Practice, or reduce awards by up to 25% if an employee unreasonably fails to comply with the ACAS Code of Practice.

2.6 Garden leave

As an alternative to dismissing an employee without notice, an employer may want to put the employee on garden leave. In this situation, the employer requires the employee not to attend work and/or not to contact other employees or clients/customers during their notice period, but to remain “on call”. However, unless there is an express clause in the employee's contract, an employer may not be able to force the employee to go on garden leave. Case law has indicated that, in the absence of an express general power to suspend the employee, an employer may be under an implied duty to provide an employee with work...
if there is work to do and the employee is willing to do it, and if other factors (such as the need for the employee to continue to practise their skills in order to maintain them) point towards this.

3 Unfair dismissal

3.1 Entitlement to claim

Employees who commenced their employment before 6 April 2012 and who have at least 51 weeks’ continuous employment with the same or an associated employer are entitled to bring claims for unfair dismissal. Those whose employment commenced on or after 6 April 2012 will need at least 103 weeks of continuous service. However, there are exceptions to this requirement. For example, an employee without the requisite length of service will be able to bring an unfair dismissal claim if the dismissal is for a reason related to the employee’s trade union membership/activities, is connected with pregnancy or maternity leave, is for reasons connected with designated health and safety activities, is because the employee has brought a statutory claim against the employer (such as a claim for unlawful deduction of wages) or has made a protected disclosure.

3.2 Constructive dismissal

Only employees who have been dismissed are entitled to bring a claim for unfair dismissal. However, if an employee resigns in response to a fundamental breach of their contract of employment by their employer, they will still be treated as having been dismissed. This is known as constructive dismissal. To establish a constructive dismissal, the employee will need to show that the employer has committed a serious breach of contract, that they resigned in response to that breach and that they did not waive the breach by delaying too long before resigning. Common examples of situations which could give rise to a claim for constructive dismissal are where an employer unilaterally reduces an employee’s remuneration package or changes their status.

3.3 Potentially fair reasons for dismissal

To defend a claim for unfair dismissal successfully, the employer will need to show not only that it had a fair reason for the dismissal but also that it followed a fair procedure before carrying it out. Dismissal procedures are examined at 4, below.

As to the reason for dismissal, the legislation provides that there are only five potentially fair reasons, as follows:

(a) misconduct;
(b) poor performance/ill health;
Employment Team

Contents

Introduction

Business

Immigration

Contractual Terms

Rights During Employment

Termination of Employment

Discrimination

Business Transfers

Collective Rights

(c) redundancy;

(d) because it would be illegal to continue to employ the individual in his current capacity (e.g. if a driver is disqualified from driving); or

(e) some other substantial reason justifying dismissal (e.g. if an employee refuses to accept a necessary change to their terms and conditions of employment).

3.4 Remedies

If an unfair dismissal claim succeeds, the Tribunal has a choice of remedies. First, it can order the employer to reinstate the employee to their old position or re-engage them in a comparable position. Such an order will also require the employer to pay the employee's lost earnings between the date of dismissal and the date when the order is complied with. However, in practice, reinstatement/re-engagement orders are rarely made and will only be made where the employee wants it, compliance with the order by the employer is practicable and there was no substantive contributory fault by the employee.

Where no re-engagement/reinstatement order is made then a Tribunal will award compensation as follows:

(a) Basic Award – this is calculated in the same way as a statutory redundancy payment and is based on the employee’s age, salary and length of service. It is currently subject to a maximum of £13,500 (this will increase to £13,920 as of 6 April 2014). In some circumstances there is a minimum amount that is awarded as a basic award; for example, where the main reason for dismissal is because of the employee’s trade union membership, the basic award shall not be less than £5,500 (this will increase to £5,676 as of 6 April 2014);

(b) Compensatory Award – this will be such amount as the Tribunal considers “just and equitable” having regard to the loss suffered by the employee as a consequence of the dismissal. In practice, it is calculated based on the employee’s loss of earnings arising out of the dismissal (including the value of any loss of benefits). If the employee has not found another job by the time of the Tribunal hearing, the Tribunal will calculate the compensatory award by estimating how long it will take the employee to find another job at a similar salary. The current maximum compensatory award that can be made for most unfair dismissal cases is the lower of £74,200 (increasing to £76,574 as of 6 April 2014) or 52 weeks gross pay (for dismissals that take effect after 29 July 2013) and may include a sum in respect of loss of statutory rights, generally £250. This maximum amount for the basic and compensatory awards is reviewed each year by the Government with reference to the Retail Prices Index;

(c) Additional Award – in the rare cases where a reinstatement/re-engagement order is made and the employer unreasonably fails to comply with it, the Tribunal can award additional compensation of between 26 and 52 weeks’ pay. For these purposes, a “week’s pay” is currently capped at £450 (increasing to £464 as of 6 April 2014); or
(d) Deductions from Compensation – there are a number of grounds on which the Tribunal may reduce the amount of compensation awarded for unfair dismissal. For example, if the Tribunal considers that the employee was partly to blame for their dismissal, it may reduce the basic and compensatory awards by such proportion as it considers “just and equitable”. In appropriate circumstances (such as where the Tribunal is satisfied that the employee was guilty of gross misconduct but the employer failed to follow a fair dismissal procedure) the reduction may be as much as 100%. In addition, if the dismissal is found to be unfair only on procedural grounds, and the Tribunal concludes that there was a chance that the dismissal would have taken place even if a fair procedure had been followed, it may reduce the compensatory award to reflect this. For example, if it considers that there was a 50% chance that the employee would have been dismissed in any event, the compensatory award may be reduced by a similar percentage. A failure to follow the ACAS code of practice on disciplinaries and grievances could also result in compensation being increased or reduced by up to 25%.

4 Dismissal procedures

A dismissal can be found to have been unfair purely on the grounds that it was handled unfairly (e.g. because the employer’s dismissal procedures were not implemented correctly). Therefore, before dismissing an employee who is eligible to bring a claim for unfair dismissal, it is important that an appropriate dismissal procedure is followed – simply following the ACAS code of practice does not necessarily make a dismissal fair. The appropriate procedure will depend on the reason for dismissal. However, it is important to bear in mind that an employee who is unable to bring a claim for unfair dismissal (for example, because they have less than the required length of service) may still bring a claim for damages for breach of contract if the employer fails to follow a contractual disciplinary procedure before dismissing.

4.1 Misconduct

If an employer is to dismiss an employee fairly on grounds of misconduct, it must operate a fair disciplinary procedure. This will always involve inviting the employee to a disciplinary investigation and giving them an opportunity of answering the allegations made against them. The employee should be given advance notice of any subsequent disciplinary hearing and full details of the allegations against them as well as the opportunity of being accompanied by either a fellow employee of his choice or a trade union representative. In some circumstances, it may be appropriate to suspend the employee from work prior to the disciplinary hearing while an investigation into the allegations against them is carried out. Any such suspension should normally be paid. It will be unfair to dismiss an employee for a first offence, unless the incident is serious enough to constitute gross misconduct. In all other cases employees should normally be given warnings before dismissal. There is no specific legal
A Guide to UK Employment Law

Employment Team

Contents

Introduction

Business Immigration

Contractual Terms

Rights During Employment

Termination of Employment

Discrimination

Business Transfers

Collective Rights

employment requirement that a certain number of warnings must be given prior to dismissal, but it is common in the UK for employers to have the following stages to a disciplinary procedure:

(i) oral warning;
(ii) first written warning;
(iii) final written warning; and
(iv) dismissal.

Finally, all employees should be given the right to appeal against any disciplinary sanction.

4.2 Poor performance

The ACAS Code of Practice recommends that an employee should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been given. An exception to this is where the employee has been guilty of gross negligence (in which case it may be fair to dismiss without any prior warnings), although the employer should generally follow the relevant code of practice.

In cases of poor performance, the employer will be expected to follow a procedure similar to the one described in 4.1 above whereby the employee is given a series of warnings explaining the respects in which their performance is unsatisfactory, the improvement required and the time within which the improvement must be made. The consequences of failing to achieve the required standards within that timeframe should also be made clear. If appropriate, the employee should be given reasonable assistance (such as additional training) to help them achieve the required improvements. Consideration should also be given to whether the employee should be transferred to an alternative position.

The employee should be given the opportunity of being accompanied by a fellow employee of their choice or a trade union representative at any meeting which could result in disciplinary action being taken, and be given the opportunity to appeal against any formal decisions taken.

4.3 Sickness

Before dismissing an employee for long-term sickness absence, the employer should investigate the current medical position by either sending the employee to a company nominated doctor or by obtaining a report from the employee’s own doctor. However, the employee’s consent to this will be required. If the medical evidence reveals that the employee will be unable to return to work within a reasonable period of time, it may be fair for the employer to dismiss.

What is “reasonable” in this context will depend on the nature of the business and the employee’s position. For example, a small business will generally not be expected to tolerate as much sickness absence as a larger organisation might. However,
before carrying out the dismissal, the employer should consult with the employee regarding the likelihood of the employee returning to work, the employer’s intention to dismiss and any alternatives to dismissal (e.g. it may be possible for the employee to return on a part-time basis or carry out different duties). Particular care should be taken if the employee’s condition is sufficiently serious to bring them within the definition of a person with a “disability” under the Equality Act 2010. In these circumstances, the employer will be under an obligation to make “reasonable adjustments” to accommodate the employee’s disability.

4.4 Redundancy

A dismissal on the grounds of redundancy may be found to be unfair either as a result of the manner in which employees were selected for redundancy or as a result of the procedure by which the redundancies were put into effect. Dealing with each of these in turn:

(a) selection – redundancy selection will be automatically unfair if it is related to certain specified impermissible reasons (e.g. trade union activity, health and safety reasons, maternity-related reasons or reasons related to the employee’s activities as an employee representative). In any event, to avoid unfair dismissal liability, the employer will need to show that its selection criteria were fair and were reasonably applied in the particular circumstances. Selection based purely on the subjective judgment of a manager about who should be made redundant is unlikely to be considered a fair method of selection. Although it is permissible to take performance into account, it is important that this is used in conjunction with other objective criteria (such as attendance record, disciplinary record and qualifications). It is also important that the criteria used do not operate in a way which is directly or indirectly discriminatory against employees on grounds of a protected characteristic. For example, in some circumstances, the selection of part-time employees ahead of full-time employees for redundancy may constitute indirect sex discrimination. By the same token, practices such as ‘last in first out’ may fall foul of the age discrimination regime. Ideally, the selection criteria to be used should be agreed with the employees affected or their representatives before the selection process is carried out; and

(b) procedure – the employer should give as much advance warning of the impending redundancies as is reasonable in the circumstances, and then consult with the individual employees and their representatives (if appropriate). Consideration should be given as to whether employees should be allowed the opportunity of volunteering for redundancy. It is important that no redundancies are confirmed until the period of consultation has been completed. During the period of consultation, the employer should hold meetings with the individuals affected to explain the basis for their selection, to allow the employees to challenge their selection and to investigate the possibility of offering the otherwise redundant employees any suitable
available vacancies either within the company or within other group companies. The length of the consultation period will depend on the nature of the redundancy exercise and the number of employees affected. As a general rule of thumb, the period of consultation should last between two and four weeks, with at least two meetings taking place with each individual during that period.

In the event that the employer proposes to make 20 or more employees redundant at the same establishment within a period of 90 days or less, there are statutory obligations to collectively consult with representatives of the employees affected and minimum timescales that must be observed.

5 Redundancy payments

5.1 Redundancy situation

An employee will be deemed to be dismissed due to redundancy if the dismissal is because the employer closes the business at the location where the employee is employed (known as a "place of work redundancy") or if it is because the employer needs fewer employees to carry out work of a particular kind (known as a "type of work redundancy").

5.2 Statutory redundancy payment

An employee who is dismissed because of redundancy is entitled to receive either the period of notice of termination set out in their contract of employment or a payment in lieu of notice. In addition, if they have two or more complete years’ of service at the date of dismissal, they will also be entitled to a statutory redundancy payment. Statutory redundancy payments are calculated on a sliding scale based on the employee’s age, length of continuous service and salary.

The payment is worked out as a specified multiple of a week’s gross pay for each complete year of service, as follows:

<table>
<thead>
<tr>
<th>For each complete year of service when an employee is aged</th>
<th>Multiplier of a week’s pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 or under</td>
<td>½</td>
</tr>
<tr>
<td>22–40</td>
<td>1</td>
</tr>
<tr>
<td>41 or above</td>
<td>1½</td>
</tr>
</tbody>
</table>

For the purposes of calculating statutory redundancy payments the amount of a week’s pay is currently capped at £450 (£464 from 6 April 2014). In addition, only a maximum of 20 years’ service can be taken into account. Therefore, the maximum payment is currently £13,500 (£13,920 from 6 April 2014). Statutory redundancy payments may be paid without
deducting tax provided that, taken together with other compensation paid in respect of the termination, the total payments to any one employee do not exceed £30,000.

5.3 **Enhanced redundancy payments**

Some employers operate enhanced redundancy payment schemes under which redundant employees receive payments in excess of the normal statutory redundancy payments. The calculation of such enhanced redundancy payments will vary from employer to employer. However, care must be taken to ensure that the arrangement does not fall foul of the age discrimination regime. This will not occur if the scheme involves: (i) making the payment available to all employees, including those with less than two years’ service; (ii) disregarding or increasing the statutory cap on a week's pay; (iii) enhancing the statutory multipliers or the total statutory redundancy payment by a factor greater than one; or (iv) a combination of these approaches.

Genuine non-contractual payments can be made tax-free subject to the £30,000 threshold.

6 **Written reasons for dismissal**

An employee with 103 weeks or more continuous employment with the same or an associated employer is entitled to ask their employer to provide written reasons for dismissal. These written reasons have to be delivered within 14 days of the request and must be both adequate and accurate. A female employee (regardless of length of service) who is dismissed at any time whilst she is pregnant or on statutory maternity leave should be given written reasons for her dismissal automatically even though she may not have asked for them. The same right is held by any employee dismissed during statutory adoption leave. Failure to comply with this requirement renders the employer liable to pay compensation of two weeks’ pay.
7 Settling employees’ claims on termination

If an employee is offered a payment which is more than their statutory and contractual entitlement on the termination of their employment, it is often advisable for the employer to make the offer conditional on the employee waiving all claims that they may have against the employer. Although it is possible for an employee to waive any contractual claims by simply signing an acknowledgment confirming that they are accepting the termination payment in full and final settlement of any such claims, the legislation provides that it is not possible to waive statutory claims (such as a claim for unfair dismissal) in this way. Instead, the only way in which statutory claims may be waived is if the waiver is contained in one of the following types of agreement:

7.1 Settlement agreements

This is the most common type of agreement entered into when an employee is offered an ex gratia payment on the termination of employment. Employers must take care when introducing the possibility of a settlement agreement. Case law suggests that an offer of a settlement agreement will not be treated as “off the record” (i.e. without prejudice) unless either: (a) there was a pre-existing dispute between the parties; or (b) it was put forward as part of a “protected conversation”, the concept of which was introduced by the Government on 29 July 2013. The rules around protected conversations are fairly complicated and they are not protected from disclosure in cases off automatically unfair dismissal, discrimination or where the employer has acted improperly. In order to be effective in settling statutory complaints, the settlement agreement should contain a brief factual description as to the circumstances leading up to the settlement agreement and also refer to the specific claims being compromised. Further, the waiver in this type of agreement will only be valid if the agreement complies with certain statutory requirements. The most important requirement is that the employee must take advice on the terms and effect of the agreement from an independent legal adviser (who must be identified in the agreement). In addition to the waiver of claims, it is possible to include a variety of other provisions such as a term requiring the employee to maintain confidentiality about the severance terms; a term prohibiting the employee from making critical or derogatory statements about the employer; a term requiring the employer to provide a reference in respect of the employee; and terms imposing restrictions on the activities which the employee can pursue after the termination of employment.

7.2 ACAS agreements

As an alternative to entering into a settlement agreement, it is possible to negotiate a settlement with the employee using a conciliation officer employed by the Advisory Conciliation and Arbitration Service (“ACAS”) who may then record the settlement in an agreement known as a “COT3 Agreement”. In practice, it is unusual for an ACAS conciliation officer to get involved in settlement negotiations unless the employee actually commences
Employment Tribunal proceedings. Therefore, these types of agreement are generally only used if a settlement is achieved after an employee has brought legal proceedings.

8 Enforcing post-termination restrictions

Following the termination of employment, there may be circumstances where an employer wants to enforce an ex-employee’s post-termination restrictions. In order for this to be possible, the obligations must be enforceable in principle and the employer must not have committed any serious breaches of the employee’s contract. If the employer has committed a serious breach of the employee’s contract, then the employee may no longer be bound by their obligations under the contract. Often the most effective way of enforcing post-termination restrictions will be for the employer to seek an injunction restraining the employee from breaching the restrictions. In deciding whether to grant an injunction, the court will consider: (i) whether there is a triable issue (i.e. are the restrictions, in principle, enforceable and does the employee appear to be breaching them); and (ii) whether the balance of convenience is in favour of granting an injunction (i.e. will the employer suffer more harm if the injunction is not granted than the employee will if it is granted).
# Discrimination

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Overview</td>
<td>62</td>
</tr>
<tr>
<td>2 The Equality Act 2010</td>
<td>62</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>62</td>
</tr>
<tr>
<td>2.2 Key changes introduced by the Equality Act 2010</td>
<td>62</td>
</tr>
<tr>
<td>3 Sex discrimination</td>
<td>63</td>
</tr>
<tr>
<td>3.1 Direct discrimination</td>
<td>63</td>
</tr>
<tr>
<td>3.2 Indirect discrimination</td>
<td>64</td>
</tr>
<tr>
<td>3.3 Victimisation</td>
<td>64</td>
</tr>
<tr>
<td>3.4 Positive discrimination</td>
<td>65</td>
</tr>
<tr>
<td>3.5 Remedies</td>
<td>65</td>
</tr>
<tr>
<td>4 Equal pay</td>
<td>66</td>
</tr>
<tr>
<td>4.1 Equal pay claims</td>
<td>66</td>
</tr>
<tr>
<td>4.2 Remedies</td>
<td>66</td>
</tr>
<tr>
<td>4.3 Equal pay and the Equality Act 2010</td>
<td>66</td>
</tr>
<tr>
<td>5 Race discrimination</td>
<td>67</td>
</tr>
<tr>
<td>5.1 Direct discrimination</td>
<td>67</td>
</tr>
<tr>
<td>5.2 Indirect discrimination</td>
<td>67</td>
</tr>
<tr>
<td>5.3 Remedies</td>
<td>68</td>
</tr>
<tr>
<td>6 Disability discrimination</td>
<td>68</td>
</tr>
<tr>
<td>6.1 Definition of disability</td>
<td>68</td>
</tr>
<tr>
<td>6.2 Employers’ duties</td>
<td>68</td>
</tr>
<tr>
<td>6.3 Remedies</td>
<td>69</td>
</tr>
<tr>
<td>6.4 Disability discrimination and the Equality Act 2010</td>
<td>69</td>
</tr>
<tr>
<td>7 Sexual orientation discrimination</td>
<td>70</td>
</tr>
<tr>
<td>7.1 Employers’ duties</td>
<td>70</td>
</tr>
<tr>
<td>7.2 Gender reassignment</td>
<td>70</td>
</tr>
<tr>
<td>7.3 Remedies</td>
<td>70</td>
</tr>
<tr>
<td>7.4 Civil Partnership Act 2004</td>
<td>70</td>
</tr>
<tr>
<td>8 Discrimination on the grounds of religion or belief</td>
<td>71</td>
</tr>
<tr>
<td>8.1 Definition of religion or belief</td>
<td>71</td>
</tr>
<tr>
<td>8.2 Remedies</td>
<td>71</td>
</tr>
<tr>
<td>9 Part-time workers</td>
<td>71</td>
</tr>
<tr>
<td>9.1 Employers’ duties</td>
<td>71</td>
</tr>
<tr>
<td>9.2 What is part-time?</td>
<td>72</td>
</tr>
<tr>
<td>9.3 Remedies</td>
<td>72</td>
</tr>
</tbody>
</table>
10 **Fixed-term employees**

10.1 Employers’ duties

10.2 What is a fixed-term employee?

10.3 Who is a comparable permanent employee?

10.4 Remedies

---

11 **Age discrimination**

11.1 General principle

11.2 Definition of ‘age’

11.3 Justification of age discrimination

11.4 Key provisions

11.5 Pensions

11.6 Redundancy payments

11.7 Insured benefits

11.8 Where can I get more information?
1 Overview

Until October 2010, discrimination in the UK was dealt with by numerous pieces of anti-discrimination legislation. The Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Acts 1995 and 2005 and the Employment Equality (Age) Regulations 2006 prohibited discrimination on the grounds of sex, race, disability and age respectively. In addition, the Equal Pay Act 1970 (as amended) enabled an employee to claim equal pay with a comparable employee of the opposite sex. Further regulations introduced in 2003 prevented discrimination on the grounds of both religion or belief and sexual orientation.

This legislation, which has governed so much in the workplace and beyond, has often been inconsistent and difficult to interpret. As of October 2010, all of this legislation was replaced by the Equality Act 2010.

In addition to the above, regulations were also introduced in 2000 prohibiting discrimination against part-time workers and in October 2002 prohibiting discrimination against employees employed on fixed term contracts. These regulations are unaffected by the Equality Act 2010.

In October 2007, the Commission for Equality and Human Rights came into existence. This is a public body which replaces the previous commissions for equality opportunities and aims to promote equality.

2 The Equality Act 2010

2.1 Introduction

The Equality Act 2010 aims to harmonise and strengthen existing discrimination law. It brings together and re-states the various different pieces of existing discrimination legislation concerning sex, race, disability, marriage and civil partnership, sexual orientation, gender reassignment, pregnancy and maternity, religion or belief and age (each is referred to as “protected characteristics”), adopting a unified approach where appropriate.

2.2 Key changes introduced by the Equality Act 2010

As well as the changes to specific categories of discrimination, which we have summarised under the appropriate “protected characteristic” categories below, the Act introduced more general changes to discrimination law. The key changes of significance from an employment law perspective are:

2.2.1 Direct discrimination

The Act harmonised the definition of direct discrimination to cover “associative” and “perceptive” cases, using the phrase “because of”. This makes the definition of direct discrimination wide enough to cover, for example, if an employee was refused a job because he or she had a disabled child; this would be direct discrimination. The employer’s treatment of the claimant
would be "because of" the protected characteristic of disability, albeit the child's disability rather than the claimant's.

2.2.2 Indirect discrimination

The Act also harmonised the definition of indirect discrimination across all of the protected characteristics. The Act provides that an employer indirectly discriminates against an employee if it applies an unjustified provision, criterion or practice which has a disproportionate impact on persons with a particular protected characteristic.

2.2.3 Objective justification test

As the test of "objective justification" was, historically, worded differently in the various discrimination legislation, leading to inconsistencies in application, the Act now harmonised the concept of justification in discrimination cases, where the behaviour in question must now be a "proportionate means of achieving a legitimate aim".

2.2.4 Discriminating lawfully

The Act contains an "occupational requirement" ("OR") defence (formerly known as "genuine occupational requirement" ("GOR")) across all protected characteristics, and removed the job-specific "genuine occupational qualifications" ("GOQs") in sex, gender reassignment and race cases. It also includes an extended concept of positive action to allow employers to recruit or promote someone from an under-represented group, but only where they have a choice between two or more equally suitable candidates.

2.2.5 Enforcement

The Act enables Employment Tribunals to make recommendations to organisations they determine have broken the law, that benefit the wider workforce, rather than just the claimant. This is potentially a significant change although in reality the Employment Tribunal has no power to follow up whether any action has been taken in light of its recommendations. However, if that organisation comes before the Employment Tribunal again, any failure to implement recommendations will no doubt be taken into account.

3 Sex discrimination

3.1 Direct discrimination

The Equality Act 2010 prohibits discrimination on the grounds of sex, marital status, pregnancy and maternity, marriage or civil partnership and the fact that someone has undergone or is intending to undergo gender reassignment. The legislation applies to employees, agency workers and independent contractors (as long as they contract personally to carry out the work) and it prohibits discrimination at every stage of the relationship, from the very beginning when vacancies are first advertised, through to dismissal. These obligations may also
apply to certain acts occurring after the employment relationship comes to an end (for example the provision of references).

Sexual harassment is also prohibited in the legislation. It is defined as unwanted conduct which is related to the sex of the complainant or of another person and which violates dignity or creates a hostile or offensive environment, regardless of whether the conduct itself is of a sexual nature. The motive and intention of the discriminator is irrelevant.

However, the legislation does not prohibit certain forms of discrimination where being a man or woman is an "occupational requirement" for the job in question. For example, discrimination will be permitted if the job needs to be carried out by a person of a particular sex to preserve decency or privacy or because the job requires a person of a particular sex to give it authenticity (e.g. an actress or model).

An employer is liable for acts of sex discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring.

The Equality Act 2010 harmonises the definition of harassment to cover "associative" and "perceptive" cases.

3.2 Indirect discrimination

It is also unlawful for employers to indirectly discriminate on the grounds of sex by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular sex or marital status. This prohibition extends beyond written rules and regulations to unjustified "practices". A common example of indirect sex discrimination is where an employer refuses to allow a working mother to work on a part-time basis (on the basis that a considerably smaller proportion of women are able to work full time as a result of child care commitments). Unless the employer is able to show objective justification for the requirement or condition (in this example, the requirement for the employee to work full-time), it may be found liable for indirect discrimination. This is in addition to any liability under the Flexible Working Regulations and may be so even if any of the business reasons in those regulations apply.

3.3 Victimisation

The legislation also prohibits an employer from treating any person less favourably because that person has raised a discrimination complaint in good faith or has assisted another in doing so. For example, dismissing an employee who has brought a discrimination claim or who gives evidence at an Employment Tribunal in support of a discrimination claim brought by a colleague will amount to unlawful victimisation. There is no longer a requirement for a comparator in victimisation cases.
3.4 Positive discrimination

In general, acts of positive sex discrimination are unlawful under UK law. However, positive discrimination by an employer in favour of men or women in affording access to training or in giving encouragement to apply for particular work is permitted if, at any time within the preceding 12 months, there were either no persons of the sex in question doing that work or the number of persons of that sex doing the work was comparatively small.

3.5 Remedies

Claims for sex discrimination may be made to an Employment Tribunal up to three months after the date of the alleged discriminatory act. Unlike claims for unfair dismissal, an individual does not need to have a minimum period of qualifying service to be eligible to bring a claim and if the complaint relates to the recruitment process it can be made by someone who has never actually been employed. In deciding whether to bring a claim, an individual may currently issue a questionnaire in the prescribed form. Provided certain time limits are complied with, the questionnaire and the employer’s responses to it may be admissible in evidence before an Employment Tribunal. However, discrimination questionnaires will be repealed as of 6 April 2014 and will be replaced with an informal approach to be set out in ACAS guidance.

Once an individual has shown that apparently discriminatory conduct has taken place, the employer must provide an adequate explanation for it. If it does not do so, the Employment Tribunal must uphold the claim of discrimination (unless, in the case of indirect discrimination, the employer can justify the conduct).

If a claim is upheld, the Employment Tribunal may make an award of compensation, a declaration of the claimant's rights and/or make a recommendation that the employer takes action to eliminate the discriminatory practice in question. Any award of compensation will cover not only the financial losses caused by the discrimination but also an award for “injury to feelings” which, in exceptional cases, may include aggravated damages. There is no upper limit on the amount of damages that can be awarded, although the Court of Appeal has in the past issued guidelines on the amount which should be awarded for injury to feelings, which should not normally exceed £30,000.

The Commission for Equality and Human Rights also has powers to carry out formal investigations into allegations of discriminatory practices and may issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period.
4 Equal pay

4.1 Equal pay claims

The Equality Act 2010 provides for equal pay between men and women in the same employment by giving the woman (or man) the right to equality in the terms of their contract of employment where they are employed on like work to that of an employee of the opposite sex, or work rated as equivalent to them or work of equal value to them. The employer can defeat a claim for equal pay by proving that the difference between the contractual terms is genuinely due to a material factor other than sex. The arguments adopted in such claims can be complex and detailed information on equal pay is available from the Commission for Equality and Human Rights.

4.2 Remedies

An individual is able to bring an equal pay claim to an Employment Tribunal at any time up to six months after leaving the employment to which the claim relates. Following a recent Supreme Court ruling, an employee may also be able to bring an equal pay claim in the High Court up to six years after leaving the employment to which the claim relates. If the claim is successful, equal pay is achieved by raising the pay of the claimant to that of the relevant comparator. This means that any beneficial term which is in the comparator’s contract but is missing from the claimant’s contract is to be treated as if it is in their contract and/or any term in the claimant’s contract which is less favourable than the same term in the comparator’s contract is improved so that it is as good.

The Employment Tribunal also has the power to award compensation for the financial losses suffered by a claimant in the six years prior to the date on which the claim is lodged. Employees can still currently submit a questionnaire to assist them in deciding whether or not they have a valid claim – although this process will be repealed as of 6 April 2014.

4.3 Equal pay and the Equality Act 2010

Several key changes to the rules regarding equal pay have been introduced by the Equality Act 2010. The Act:

(i) introduces explicit provisions on indirect discrimination in equal pay cases;
(ii) provides for the possibility of direct sex discrimination claims in respect of pay based on hypothetical comparators;
(iii) limits the enforceability of contractual "pay secrecy" clauses – the Act makes it unlawful for employers to prevent or restrict employees from having a discussion to establish if differences in pay exist that are related to protected characteristics. It also makes terms of the contract of employment that require pay secrecy unenforceable because
of these discussions. However, an employer can require their employees to keep pay rates confidential from some people outside the workplace, for example a competitor organisation; and

(iv) introduces a power to require large employers to report on their gender pay gap (although it is not clear when (if at all) this power will come into force).

5 Race discrimination

5.1 Direct discrimination

The Equality Act 2010 prohibits discrimination on the grounds of colour, race, nationality or ethnic or national origin. The Equality Act 2010 introduces a power for the Government to provide specifically that the definition of “race” includes “caste”.

The main provisions of the legislation mirror the corresponding provisions relating to sex discrimination. In particular, there are provisions prohibiting direct discrimination, indirect discrimination, discrimination by way of victimisation and positive discrimination. The “occupational requirement” defence is also available in prescribed circumstances such as where a person of a particular racial group is required to carry out a job for reasons of authenticity.

Racial harassment occurs where, on grounds of race or ethnic or national origin, a person engages in unwanted conduct which has the purpose or effect of violating another person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

An employer is liable for acts of race discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring. In practice this means equal opportunities/diversity training for all staff and a well-published and comprehensive policy.

5.2 Indirect discrimination

It is unlawful for an employer to discriminate indirectly by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular race or ethnic or national origin when compared to other persons. For example, it may be indirectly discriminatory to insist that a job applicant must be a fluent Japanese speaker unless it can be demonstrated that this is an important requirement of the job (on the basis that a considerably smaller proportion of non-Japanese people will be able to satisfy the requirement of being fluent in Japanese).
5.3 Remedies

The procedure for bringing a claim for race discrimination and the remedies that are available are very similar to those applicable to sex discrimination (i.e. a declaratory order, an award of compensation or a recommendation that remedial action is taken). In addition, the Commission for Equality and Human Rights has powers to carry out investigations into alleged discriminatory practices and to issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period. The most recent Code of Practice can be found on the Commission’s website.

6 Disability discrimination

6.1 Definition of disability

Under the Equality Act 2010 it is unlawful for any employer to discriminate against current or prospective workers for a reason arising from a past or present disability. A person will have a disability for the purposes of the legislation if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out day to day activities.

The effect of an impairment will generally be regarded as “long-term” if its effect has lasted or is likely to last for at least 12 months. People with mental impairments are not required to have an impairment which is “clinically well- recognised”, and people living with HIV, MS or cancer will automatically qualify as disabled without the need to show any adverse effect on their normal day-to-day activities.

Before the changes introduced by the Equality Act 2010, the impairment had to affect one or more of a number of specified physical or mental faculties (such as mobility, manual dexterity, co-ordination, etc). However, this list has been removed under the Equality Act 2010, leaving tribunals to make a common-sense decision about whether or not a particular impairment has a substantial effect on day-to-day activities. The intention of the change is to make it easier for someone to show that they have difficulty carrying out their day to day activities, and therefore that they come under the definition of ‘disabled person’.

6.2 Employers’ duties

The legislation imposes a duty on employers not to treat disabled workers or job applicants less favourably for a reason arising from their disability. In certain cases, the employer can defend the position if the less favourable treatment is justified. In addition, employers must make reasonable adjustments to their premises or employment arrangements if they substantially disadvantage a disabled worker or job applicant, unless the employer does not know, and cannot reasonably be expected to know, that the worker/applicant is disabled. The sort of adjustments that an employer may be expected to make include making alterations to premises, allocating certain duties to other
employees, altering working hours, allowing additional absence for treatment and acquiring or making changes to equipment to accommodate the specific needs of the disabled worker. To determine whether it is reasonable to make a particular adjustment, a number of factors can be taken into account, including how much the adjustment will cost, the financial resources of the employer, how easy it is to make the adjustment and how much it will improve the situation.

6.3 Remedies

The remedies available for disability discrimination are the same as those for sex and race discrimination (see 3.5 and 5.3 above). In addition, the Equality and Human Rights Commission has a variety of powers including the power to undertake formal investigations and issue non-discrimination notices. The most recent Codes of Practice, which reflect best practice, can be downloaded from its website at www.equalityhumanrights.com.

6.4 Disability discrimination and the Equality Act 2010

Some of the most significant changes introduced by the Equality Act 2010 affect disability discrimination. These can be summarised as:

(a) discrimination by association and perception: the Act extends the law on direct discrimination to include discrimination by association (e.g. workers who care for a family member who is disabled) and perception to disability;

(b) discrimination arising from a disability: the Act introduces a new form of disability discrimination – discrimination "arising from" a disability, which replaces disability-related discrimination. This sidesteps the effects of the House of Lords’ decision in the case of London Borough of Lewisham v Malcolm and dispenses with any need for a comparator. It simply requires that the claimant has been treated "unfavourably because of something arising in consequence" of their disability. For this type of discrimination to occur, the employer has to know, or reasonably be expected to know, that the employee has the disability in question;

(c) indirect discrimination: the Act aligns the concept of indirect discrimination relating to disability with that in other discrimination legislation; and

d) pre-employment health questionnaires: the Act outlaws employers’ pre-employment health enquiries other than in very limited circumstances, such as where the employer needs to check whether a candidate can perform an “intrinsic function” of the job, e.g. heavy lifting. Employers will now only be able to ask health questions upon making a job offer, and not before. Both written and oral questions are outlawed by the provision. The burden of proof in such cases will be reversed, meaning that the employer will be assumed to have discriminated, unless it can show there was another reason for non-recruitment. We therefore recommend employers urgently review any pre-employment questions
7 Sexual orientation discrimination

7.1 Employers’ duties

It is unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of their actual or perceived sexual orientation, that is, the fact that they are heterosexual, homosexual or bisexual (or are perceived to be). Direct and indirect discrimination are defined in similar terms as under the sex and race legislation considered above. It is now also unlawful to subject an individual to harassment or victimisation due to their sexual orientation, or perceived sexual orientation, and in certain circumstances these obligations continue once the employment relationship has ended. There are very limited exceptions contained in the legislation for cases where there is a genuine occupational requirement for the employee/worker to be of a particular sexual orientation in order to perform the work. ACAS has published useful guidance on the Regulations on its website at www.acas.gov.uk.

7.2 Gender reassignment

The Equality Act 2010 removes the requirement that individuals need to be under medical supervision to be protected by the gender reassignment provisions. The Act also extends protection afforded to transsexual people to those “proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex”.

7.3 Remedies

Claims for discrimination or harassment on the grounds of sexual orientation can be made to an Employment Tribunal up to three months from the date of the alleged discriminatory act. As with other anti-discrimination legislation, no minimum period of service is required before a claim can be made and remedies are very similar to those applicable for sex and race discrimination. The legislation currently also provides for a questionnaire procedure which may be used by an individual before deciding whether to bring a claim, although this is due to be abolished as of 6 April 2014.

7.4 Civil Partnership Act 2004

Since 5 December 2005, same sex couples have been able to register a civil partnership which gives them similar rights to married couples. Civil partners are entitled to have equal treatment to married couples in a wide range of legal matters. Employers need to watch out for this where, for example, any benefits are dependent on the individual being ‘married’. The Equality Act 2010 sets out the legislation prohibiting discrimination, harassment and victimisation concerning civil partnerships.
8 Discrimination on the grounds of religion or belief

8.1 Definition of religion or belief

It is unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of religion or belief. Religion or belief for the purposes of the legislation means any religion, religious belief or philosophical belief and a reference to belief includes a reference to a lack of belief. “Belief” does not currently include any philosophical or political belief (unless it is equivalent to religious belief). Case law has indicated that a belief must, amongst other things, be more than an opinion, must be worthy of respect in a democratic society and must have a similar status to a religious belief in order to be protected. Both a belief in man-made climate change and anti-fox hunting views have been found to be protectable beliefs. As with sexual orientation legislation, individuals are also protected from being subjected to harassment or victimisation, and continue to enjoy certain protection after the employment relationship ends. Discrimination may be permissible in certain limited circumstances, where there is an occupational requirement for the job to be performed by an individual with a particular religion or belief. ACAS has published useful guidance on religion or belief discrimination on its website.

8.2 Remedies

The procedure for bringing claims (including the ability to issue a questionnaire in deciding whether to bring proceedings) and the remedies available are similar to those available for all discrimination complaints. In a successful discrimination claim, an Employment Tribunal may make a declaration of the rights of the parties, an order that the respondent pay compensation to the claimant and/or a recommendation as to what steps the respondent should take to reduce the adverse effect of discrimination on the claimant or any other person.

9 Part-time workers

9.1 Employers’ duties

Part-time workers have a right not to be treated less favourably than comparable full-time workers unless the treatment can be justified on objective grounds.

In particular, part-timers should receive the same pay and benefits (such as pension, sick pay, maternity pay, parental leave, holidays and share options) as comparable full-timers, calculated on a pro-rata basis, unless there is objective justification for the different treatment. An individual who previously worked full-time who returns part-time after a period of absence (such as sickness or maternity leave) should not be treated less favourably (e.g. in terms of rate of pay and benefits).
than they were treated before the period of absence. These Regulations do not give an individual a right to demand part-time work, although an unjustified refusal to allow a woman to work part-time may amount to indirect sex discrimination (see 3.2). However, applications for part-time work can be made under the Flexible Working legislation.

9.2 What is part-time?

The legislation does not specify that an individual must work less than a certain number of hours per week to qualify for protection. Instead, the Regulations provide that a part-time worker is anyone who is not a full-time worker, having regard to the employer’s custom and practice in relation to workers engaged under the same type of contract.

9.3 Remedies

If a part-time worker considers that they may have been treated less favourably, they may request that the employer provides a written statement within 21 days giving reasons for the treatment. In addition, a part-timer who considers that their employer has acted in breach of the Regulations may present a claim to an Employment Tribunal. If an individual succeeds with a claim, the Employment Tribunal may make a declaration as to the rights of the individual and/or recommend that the employer take remedial action and/or make an award of compensation. Any award of compensation will be what the Employment Tribunal considers “just and equitable” having regard to the infringement and the loss suffered by the individual (such as expenses incurred in consequence of the infringement and the value of any benefit the individual has lost as a result of the infringement). There is no limit to the compensation that may be awarded.

10 Fixed-term employees

10.1 Employers’ duties

Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, fixed-term employees have a right not to be treated less favourably than comparable permanent employees unless the treatment can be justified on objective grounds. The Regulations closely follow those protecting part-time workers described above, and require employers to offer fixed-term employees (i) pay and pensions at least as favourable as that of permanent employees; (ii) equal training opportunities; and (iii) access to employment benefits after the same period of employment as permanent employees.

However, unlike the rules applicable to part-time workers, these Regulations specifically provide that a less favourable term in a fixed-term employee’s contract will be justified if the overall package is no less favourable. In addition, employers must inform fixed-term employees of any available vacancies to enable them to apply for permanent positions. The Regulations also prevent fixed-term employees (on contracts signed
extended or renewed after the Regulations came into force on 1 October 2002) from waiving their right to a redundancy payment.

10.2 What is a fixed-term employee?

Unlike the Regulations protecting part-time workers, these Regulations apply only to employees. Agency workers are specifically excluded. A fixed-term employee is an employee whose contract of employment is for a specific term or which terminates upon the completion of a specified task or upon the occurrence (or non-occurrence) of a specific event. The Regulations provide that an employee will normally be considered a permanent employee after they have been continuously employed on successive fixed-term contracts for four years unless the continued use of a fixed-term contract can be objectively justified.

10.3 Who is a comparable permanent employee?

A comparable permanent employee is an individual employed at the same establishment to do broadly similar work as the fixed-term employee. If there is no employee doing similar work at the same establishment, the fixed-term employee may compare themselves to such an employee at another of the employer’s establishments.

10.4 Remedies

As with the Part-Time Workers Regulations, if a fixed-term employee considers that they may have been treated less favourably than a permanent employee, they may request that their employer provide a written statement within 21 days giving reasons for the treatment. In addition, they may present a claim to an Employment Tribunal. If an individual succeeds with a claim, the Employment Tribunal may make a declaration as to the rights of the employee and/or recommend that the employer takes remedial action and/or make an award of compensation. Any award of compensation should be what the Employment Tribunal considers “just and equitable” having regard to the infringement and the loss suffered by the individual. There is no limit on the compensation that may be awarded.

11 Age discrimination

11.1 General principle

The Equality Act 2010 protects all employees, as well as contractors, directors, former employees and job applicants, from unlawful age discrimination.
11.2 Definition of ‘age’

Age means any age, so younger workers are protected as well as older workers, and discrimination on grounds of apparent age is also specifically covered.

11.3 Justification of age discrimination

Unlike other forms of discrimination, any age discrimination (including direct discrimination) may be objectively justified if the employer can show that it has a legitimate (non-discriminatory) aim and that what it is doing is a proportionate means of achieving that aim. Retirement is dealt with below.

11.4 Key provisions

The legislation provides specifically for the following:

(a) The default retirement age of 65 was removed on 6 April 2011.

(b) Service-related benefits may be applied for up to five years’ service, after which they will have to be justified;

(c) Removal of upper age limits on the right to claim redundancy pay and unfair dismissal, which means that anyone who is forced to retire will have a forum in which to bring a claim; and

(d) Age limits for claiming benefits such as SSP and SMP are abolished (although advances in reproductive medicine are required to make the latter useful!).

The Department for Business Innovation and Skills (“BIS”) has produced some guidance on legitimate aims which might justify age discrimination, depending on the circumstances. These include:

(i) health, welfare and safety (including protection of young or older people);

(ii) facilitation of employment planning;

(iii) particular training requirements;

(iv) encouraging and rewarding loyalty;

(v) the need for a reasonable period of employment before retirement; and

(vi) recruiting or retaining older people.

Case law has established that in general a wish to save money cannot on its own amount to a legitimate aim justifying discrimination, although cost considerations may be taken into account along with other factors. Although this rule (the “costs-plus” rule) has been stated to apply to age discrimination, in Woodcock v Primary Care Trust the Court of Appeal appeared to make an artificial distinction between cost and other factors. In this case, it has held that a redundant chief executive, dismissed without proper consultation so his notice expired before he qualified for enhanced pension payments, had not
suffered unlawful age discrimination because the treatment was justified. The Court of Appeal held that the Trust's actions were aimed not only at saving costs, but also to give effect to the decision to make his role redundant.

11.5 Pensions

The legislation contains detailed provisions explaining what is and what is not permitted in relation to the provision of pension benefits, the detail of which is outside the scope of this guide.

11.6 Redundancy payments

There is no longer a minimum or maximum age to qualify for a statutory redundancy payment, but the age-related multipliers will continue to apply. BIS has produced a ready reckoner which is available on its website. Enhanced contractual redundancy schemes which mirror the statutory scheme will be exempt from the legislation; others will have to be objectively justified.

11.7 Insured benefits

The Equality Act 2010 contains an exception designed to permit employers to withdraw insured benefits at age 65. However, the scope of this is limited, and care must be exercised when relying on it.

11.8 Where can I get more information?

More information about age-related discrimination is available on the following website: www.businesslink.gov.uk.
G Business Transfers

1 Overview

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") contain far-reaching rules for the protection of employees’ rights on the transfer of businesses.

The purpose of TUPE (which replaced the previous version of the regulations which were introduced in the 1980s) is to give effect to the UK’s obligations under EC law to implement EC Council Directive 77/187 (otherwise known as the “Acquired Rights Directive”) which is designed to provide protection to employees when the business in which they work is sold or transferred.

TUPE applies in the event that a business or undertaking is transferred from one party to another or in the event that there is a change in the party providing a service, provided that the applicable conditions and requirements are met.

Recent cases have limited the application of TUPE in certain circumstances.

If TUPE applies, the employees will transfer automatically together with associated liabilities. TUPE gives rise to certain obligations to inform and consult and to provide employment information, for which there are penalties for non-compliance.

Employees are also afforded enhanced protection in the event that they are dismissed or an attempt is made to vary their terms and conditions of employment in connection with a TUPE transfer.

Any agreement to exclude or limit the application of TUPE is invalid. TUPE applies by operation of law, notwithstanding any agreement to the contrary in any commercial arrangements.

That said, it is usually possible to deal with or avoid some of the implications of an application of TUPE, whether by procuring that employees object to a transfer or enter into compromise agreements, or otherwise by virtue of a commercial agreement between the parties which deals with the potential costs and expenses which arise.

Further explanation is set out in our separate guide “Employment implications of business transfers and service provision changes”.
## H Collective Rights

### 1 Overview

### 2 Trade union recognition

2.1 Compulsory recognition rights
2.2 Request for recognition
2.3 Applications to the CAC
2.4 Procedure for agreeing bargaining units
2.5 CAC declarations
2.6 Ballot in support of recognition
2.7 Negotiation of recognition agreement
2.8 Rights of trade union members

### 3 Consultation on collective redundancies 80

3.1 Consultative obligations
3.2 Representatives
3.3 Timescales for consultation
3.4 Information to be provided
3.5 Penalty for failure to inform and consult
3.6 Obligations to notify BIS
3.7 Failure to notify BIS

### 4 Consultation on business transfers 82

### 5 Consultation on health and safety issues 82

5.1 Health and safety representatives
5.2 Consultation with employee representatives

### 6 Works councils 82

6.1 European Works Councils
6.2 Procedure for establishment
6.3 Representatives
6.4 The default model
6.5 The Regulations and the Amendment Regulations

### 7 National works councils 83

7.1 Obligations on employers
7.2 Definition of “undertaking”
7.3 Information and Consultation Agreement
7.4 Effect of valid request
7.5 Duration of negotiations
7.6 Conditions for valid ICA
7.7 The default model
7.8 Requirements under the default model
7.9 Additional requirements
7.10 Complaints
Collective Rights

1 Overview

There is presently much legislation in place regarding collective rights of employees, including compulsory recognition rights for trade unions and various forms of collective consultation (even where a trade union is not recognised).

2 Trade union recognition

2.1 Compulsory recognition rights

A trade union wishing to be recognised for collective bargaining purposes would usually first seek voluntary recognition from the employer. If the employer refuses or agreement is not reached, the union may seek recognition under the statutory procedure set out in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992. The statutory procedure will only apply:

(a) to employers which (together with associated employers) employ 21 or more workers; and

(b) where:

(i) there is no collective agreement already in force under which the union is recognised to conduct collective bargaining; and

(ii) there are no competing applications for recognition by other union(s), unless the unions can show that they will co-operate and act together on behalf of all workers if granted recognition.

2.2 Request for recognition

A union seeking recognition must first make a written recognition request to the employer identifying the bargaining unit (i.e. the group of employees within the company for which the union is seeking recognition for collective bargaining purposes). If the parties reach agreement within ten working days then the union is deemed to be recognised. If the employer does not accept the request but agrees to negotiate then the parties have a further 20 day working period in which to reach agreement. However, if the employer either rejects or fails to respond to the recognition request (or if negotiations break down within the further 20 day period) then the union may make an application for recognition to a body called the Central Arbitration Committee (“CAC”) to decide on the appropriate bargaining unit and whether the union has the support of the majority of workers within that unit.

2.3 Applications to the CAC

If an application is made to the CAC, the union will have to demonstrate that its application is “admissible” by showing that at least 10% of the individuals in the proposed bargaining unit are union members and that at least 50% of the workers within that bargaining unit are likely to favour recognition of the union.
If the criteria are fulfilled and the CAC accepts the application, it must try to assist the parties to agree the appropriate bargaining unit within 20 days (although the CAC may extend this). In the absence of agreement, the CAC must decide on the appropriate bargaining unit. Paragraph 19B of Schedule A1 requires the CAC to take account of the need for the bargaining unit to be compatible with effective management, and other factors such as existing arrangements and the views of the employer.

2.4 Procedure for agreeing bargaining units

Exactly what happens next depends upon whether the recognised bargaining unit is the same as the bargaining unit that was proposed in the union’s initial application. However, ultimately the CAC will issue a declaration that the union is recognised if it is satisfied that at least 50% of the individuals in the bargaining unit are members of the union. If it believes that a ballot should be held in the interests of good industrial relations or has reason to believe that a significant number of union members do not want the union to conduct collective bargaining on their behalf the CAC will arrange a secret ballot in which the workers will be asked whether they want the union to conduct collective bargaining on their behalf.

2.5 CAC declarations

If a ballot is held and union recognition is supported by a majority of workers voting and at least 40% of the workers within the bargaining unit, then the CAC will issue a declaration that the union is recognised for collective bargaining purposes.

2.6 Ballot in support of recognition

Once a declaration of recognition has been made, the parties will have 30 days in which to negotiate a recognition agreement. If no agreement is reached the parties may apply to the CAC for assistance. If no agreement is reached after a further 20 days then the CAC must specify the method by which the parties will conduct collective bargaining.

2.7 Negotiation of recognition agreement

An employer must allow the trade union’s workplace representatives to take reasonable paid time off work to carry out their trade union duties (provided those duties are for certain specified purposes) and to undergo training in respect of those duties (provided that the training is approved by either the relevant trade union or the Trades Union Congress). If a trade union representative considers that they have been unreasonably refused paid time off, they may present a claim to an Employment Tribunal.
2.8 Rights of trade union members

Members of a trade union recognised by their employer are entitled to take unpaid time off work during working hours to take part in trade union activities (other than industrial action). In addition, the dismissal of an employee on the grounds of being a trade union member or for taking part in trade union activities is automatically unfair. Action short of dismissal on the grounds of either trade union membership or activity will enable the employee to bring a claim for compensation to an Employment Tribunal.

Employees are similarly protected from dismissal and action short of dismissal on the grounds that they are not a member of a trade union or are refusing (or proposing to refuse) to become or remain a member.

3 Consultation on collective redundancies

3.1 Consultative obligations

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or fewer, it must consult “appropriate representatives” of the employees concerned.

3.2 Representatives

Appropriate representatives will be either representatives of an independent trade union recognised by the employer or, if the employer does not recognise a trade union, representatives that have been elected by the affected employees.

3.3 Timescales for consultation

Where these obligations arise, employers are required to commence the consultation process “in good time” and, in any event, in accordance with the following timescales:

(a) where it is proposed that 100 or more employees are to be made redundant at a single establishment within 90 days or less – at least 45 days before the first dismissal takes effect; or

(b) where it is proposed that between 20 and 99 employees are to be made redundant at a single establishment within 90 days or less – at least 30 days before the first dismissal takes effect.

The purpose of consulting is to explore ways of (a) avoiding the redundancy dismissals; (b) reducing the numbers to be dismissed; and (c) mitigating the consequences of the dismissals. The consultation must be undertaken with a view to reaching agreement, although it is possible that agreement may not be reached on some issues. Notice of dismissal should not
be issued until the appropriate representatives have been properly consulted and the public authority has been notified (see 3.6 below for details).

3.4 Information to be provided

The legislation provides that, for the purposes of the consultation, the employer shall disclose in writing the following information to the appropriate representatives:

(a) the reasons for the proposed redundancies;
(b) the numbers and descriptions of employees whom it is proposed to make redundant, and the total number of such employees employed at the establishment in question;
(c) the proposed method of selecting employees for redundancy;
(d) the proposed method of putting the redundancies into effect, including the timescale and the proposed method of calculating the redundancy payments; and
(e) information on agency workers (number working for the employer; the parts of the undertaking they’re working; and the type of work they’re carrying out).

The obligations to inform and consult appropriate representatives arise in relation to each separate establishment at which redundancies are to be made. Therefore where a redundancy programme is likely to affect more than one establishment, the consultation and information obligations apply separately to each such establishment.

3.5 Penalty for failure to inform and consult

Where an employer has failed to comply with its obligations to inform and consult appropriate representatives, and cannot demonstrate that there were special circumstances justifying such non-compliance (such as an unforeseen collapse of the business), an Employment Tribunal may order the employer to pay a protective award in respect of every employee who has been affected by the failure. The protective award will be what the Employment Tribunal considers to be just and equitable (subject to a maximum of 90 days’ pay per employee affected). Although when determining the level of award to make the Employment Tribunal will often work from a starting point of the full 90 days’ pay, recent case law suggests that there is now more willingness to consider mitigating factors in carrying out this assessment.

3.6 Obligations to notify BIS

Employers also have an obligation to complete a Form HR1 and send it to BIS in advance of collective redundancies. The advance notification periods are the same as the minimum consultation periods referred to in section 3.3 above and notification should be received before redundancy notices are issued.
3.7 Failure to notify BIS

While BIS must be notified in advance about collective redundancies, there is no requirement to obtain the permission of BIS in order for the redundancies to be put into effect. However, failure to notify BIS is a criminal offence and may lead to a fine.

4 Consultation on business transfers

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006, an employer will be under an obligation to provide certain information to “appropriate representatives” prior to a business transfer and, in certain circumstances, will be obliged to enter into consultation with those representatives. These obligations are dealt with in more detail in our separate guide “Employment implications of business transfer and service provision changes.”

5 Consultation on health and safety issues

5.1 Health and safety representatives

Recognised trade unions have the right to appoint safety representatives from amongst the workforce at a particular establishment. These representatives have wide-ranging functions relating to all health and safety matters and will need to be consulted on health and safety issues. The representatives may also require the employer to establish a committee for the purposes of overseeing health and safety matters.

5.2 Consultation with employee representatives

If a trade union is not recognised, an employer is obliged to consult with employees directly or with their elected representatives on health and safety matters. Elected representatives are entitled to time off with pay for training and to carry out their duties and are protected against dismissal and victimisation.

6 Works councils

6.1 European Works Councils

The Transnational Information and Consultation of Employees Regulations 1999 implemented the European Works Council Directive in the UK. These Regulations were subsequently amended by the Transnational Information and Consultation of Employees (Amendment) Regulations in 2011. These provide that a multinational company which employs at least 1000 employees across the EEA member states and at least 150 employees in each of two member states may be required to establish a European Works Council (“EWC”) or other suitable procedures for informing and consulting its employees about matters of transnational concern.
6.2 Procedure for establishment

The process of establishing an EWC may be triggered by management on its own initiative or by a written request by at least 100 employees (or their representatives) from two or more member states.

6.3 Representatives

The employees are represented in the negotiations (to reach agreement on the terms of an EWC agreement) with management by a “special negotiating body” (“SNB”) which consists of representatives of employees from all the EEA member states in which the business has operations.

6.4 The default model

If management refuses to negotiate within six months of receiving a valid request to establish an EWC, or if the parties fail to conclude an agreement on transnational information and consultation procedures within three years of the request, an EWC must be set up in accordance with the statutory default model. This model sets out requirements concerning the size, establishment and operation of the EWC and lists topics on which the EWC has the right to be informed and consulted (which includes the economic and financial situation of the business, its likely development, probable employment trends, the introduction of new working methods and substantial organisational change).

6.5 The Regulations and the Amendment Regulations

The Regulations and the Amendment Regulations provide for slightly different arrangements. The extent to which the Amendment Regulations apply to an EWC depends on the date of establishment or certain revisions of the EWC.

7 National works councils

7.1 Obligations on employers

The Consultation of Employees Regulations 2006 imposes obligations on employers to inform and consult staff representatives on various aspects of their businesses and management, even where a trade union is not recognised by the employer. These obligations apply to all employers with 50 or more employees in their undertaking.
7.2 Definition of “undertaking”

For these purposes, an “undertaking” is “a private or public undertaking carrying on an economic activity in the UK, whether or not operating for gain”. This covers most employers.

7.3 Information and Consultation Agreement

The requirement to inform and consult will not apply automatically. Unless the employer agrees to enter into an information and consultation agreement (“ICA”) voluntarily, it will be triggered only if the employer receives a valid request made by at least 10% of the employees of the undertaking (subject to a minimum of 15 and a maximum of 2500 employees).

7.4 Effect of valid request

Once a valid request has been made, the employer must, as soon as reasonably practicable, initiate negotiations for an ICA (which includes making arrangements for its employees to appoint or elect negotiating representatives).

7.5 Duration of negotiations

Negotiations regarding the ICA must be completed within six months (or such longer period as may be agreed with the employee representatives).

7.6 Conditions for valid ICA

A negotiated ICA (or entered into on a voluntary basis by the employer) will not be valid unless it:

(a) Sets out the circumstances in which the employer must inform and consult its employees;

(b) Is in writing, dated and covers all the employees in the undertaking;

(c) Is approved on the employees’ behalf by:

   (i) Signature of all negotiating representatives; or

   (ii) Signature of the majority of the negotiating representatives and approval of 50% of the employees (in writing or by ballot);

(d) Is signed on behalf of the employer; and

(e) Either:

   (i) provides for the appointment or election of representatives to whom the undertaking must supply information and with whom the employer must consult; or
(ii) provides that the employer will provide information directly to its employees and consult with them directly. This criterion enables employers to avoid the appointment of representatives but instead to inform and consult employees directly via company networks, such as an intranet or email. If an ICA is not concluded by the end of the six month period, then the standard default model will apply (unless agreement is reached during the intervening period); and

7.7 The default model

The standard default model (which will usually form the basis of the negotiation with the employee representatives) automatically come into effect at a certain time where the employer has not initiated negotiations after a valid request or notification or where negotiations have commenced but agreement is not reached. The default model obliges the employer to put in place one elected representative for every 50 employees (provided that there are always at least two and not more than 25 representatives) and to provide the representatives with information on:

(a) Recent and probable developments in the employer's activities or economic situation. This could include takeovers and mergers, reorganisation, changes in senior management, launch of new products or services;

(b) Probable development of employment including threats to employment. This covers issues such as planned use of temporary workers, or agency workers consultants and the possibility of redundancies; and

(c) Decisions likely to lead to substantial changes in work organisation or contractual relations. This covers strategic and investment decisions that could have consequences in relation to work organisation or contractual relations e.g. outsourcing arrangements or the introduction of new technology on site.

7.8 Requirements under the default model

The information above must be given in such a time and manner that will, amongst other things, give the representative a fair opportunity to understand the matters about which they are being consulted on and to express their views.

7.9 Additional requirements

In addition to providing the representatives with information, the employer must consult with representatives about the matters referred to in paragraph (b) and (c). In the case of information referred to in paragraph (c), the consultation must be undertaken "with a view to reaching agreement on decisions within the scope of the employer's powers".
7.10 Complaints

The CAC will deal with any complaints concerning a failure to comply with a negotiated agreement or the default model. If such a complaint is well founded, the CAC may make a declaration to that effect, and an order requiring the defaulting party to take appropriate action. Where the failure is by the employer, an application may be made to the Employment Appeal Tribunal ("EAT") for a penalty notice to be issued. There is a maximum penalty of £75,000. The EAT does not, however, have the power to order any form of injunctive relief to prevent an employer from taking a certain course of action.