# International Developments: The Situation in the United Kingdom

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*Employers take note: Changes have been made to employment laws in the U.K.*

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Employment law in England and Wales is constantly evolving. Employers in the U.K. and their human resources professionals face a constant challenge in trying to avoid the potential pitfalls the latest legislative and case law developments pose. This chapter summarizes the most important recent and forthcoming employment protection legislation in the U.K. for 2008 that are crucial for U.S. employers with U.K. operations or those planning expansion into the U.K. The chapter covers how the new developments affect employers and also includes practical implications.

All US$ sums in this chapter are calculated by reference to the exchange rate GB£1 = US$2 applicable on April 28, 2008.

## Unfair Dismissal Claims

2008 brought changes in calculation of compensation for unfair dismissal claims and for statutory redundancy payments.

### *What Is Unfair Dismissal?*

Unlike in the United States, under U.K. employment protection law, employees with more than one year's service have a statutory right not to be unfairly dismissed. The Employment Rights Act of 1996 sets out the legislative framework of the unfair dismissal regime. An employee with less than one year's service can bring an unfair dismissal claim in limited circumstances (including when an employee is dismissed because he or she has raised health and safety concerns to the employer or due to whistleblowing).

Under the unfair dismissal regime, a dismissed employee may issue a claim against a former employer for compensation, reinstatement or reengagement. To succeed in an unfair dismissal claim, the employee must show that the ground for the dismissal was not one of the potentially fair reasons in the law and/or the dismissal procedure the employer followed was unfair. A dismissal will be automatically unfair (and compensation can be increased by between 10 percent and 50 percent subject always to the applicable statutory cap) if the employer did not follow the minimum statutory dismissal procedure.

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The potentially "fair reasons" for which an employer may fairly dismiss an employee are on the grounds of: (1) redundancy; (2) conduct; (3) the employee's capability; (4) retirement at age 65 or; (5) when the employee could not continue to work in the position held without contravention of a legislatively imposed duty or restriction.

An employer may also dismiss an employee for some other substantial reason of a kind considered to be fair. Even if a fair reason for dismissal can be shown, the dismissal must be substantively fair by being within the "range of reasonable responses" and the employer must have followed a fair procedure.

### *What Is a Compensatory Award?*

Compensation under the statutory unfair dismissal regime in England and Wales consists of two awards: (1) the basic award; and (2) the compensatory award.

When an employee successfully brings a claim for unfair dismissal (whether on the grounds of the employer's basis for dismissal or the dismissal procedure the employer followed), he or she will usually be entitled to a basic award and a compensatory award.

The compensatory award is intended to compensate an employee for financial loss suffered as a consequence of unfair dismissal. Since Feb. 1, 2008, the maximum level of the compensatory award is £63,000 (approximately $126,000). Factors that a tribunal will take into account when determining the level of a compensatory award include:

- loss of pay and benefits (including pension);
- expenses the employee reasonably incurred as a result of the dismissal; and
- loss of statutory rights.

The employment tribunal does not compensate an employee for the manner of dismissal or injury to feelings under the unfair dismissal regime.

The compensatory award may be reduced to reflect:

- contributory fault on the employee's part;
- prior compensatory payments from the employer to the employee;
- sums the employee earned from new employment;
- state benefits the employee claimed; or
- a failure on the part of the employee reasonably to minimize income losses by searching for alternative employment.

When an employer fails to adhere to the statutory minimum dismissal procedure, the compensatory award from the tribunal may be increased 10 percent to 50 percent, subject always to the statutory cap of £63,000 (approximately $126,000).

### *What Is a Basic Award?*

The employment tribunal orders the employer to pay a basic award in most cases where an employee successfully brings an unfair dismissal claim. The basic award is calculated by reference to the claimant's age, former gross weekly salary and length of continuous service. It may be reduced to reflect contributory fault on the employee's part (but will not be reduced to reflect the employee's failure to minimize loss).

### *What Is a Redundancy Payment?*

A redundancy payment is calculated in the same way as a basic award.

An employee who is dismissed due to redundancy will be entitled to a statutory redundancy payment provided that he or she had over two years' service. An employee who has received a redundancy payment will not also be entitled to a basic award in the event he or she brings a successful unfair dismissal claim.

### *How Are Basic Awards/Redundancy Payments Calculated?*

The basic award and statutory redundancy payment are calculated as follows:

- one and a half week's pay for each year of employment in which the employee was aged 41 or older;
- one week's pay for each year of employment in which the employee was aged 22 or older; and
- half a week's pay for each year of employment in which the employee was younger than 22.

Since Feb. 1, 2008, the statutory cap on one week's gross pay is £330 (approximately $660). In calculating length of service, no more than 20 years' service may be taken into account. Accordingly, the maximum basic award (or redundancy payment) to which an employee may be entitled is currently £9,900 (approximately $19,800) (assuming 20 years' service during which an employee was aged 41 or older).

### *Unfair Dismissal Claims: Practical Considerations*

Employers therefore need to be aware of the increased compensation that can be recovered in unfair dismissal claims (in addition to compensation regarding the applicable notice period) and the need to calculate correctly statutory redundancy payments. The fact that unfair dismissal can arise from procedural – as much as substantive – failings in dismissal processes only reinforces the need for employers to carefully consider how they manage dismissals and downsizing situations.

## Immigration and Illegal Employment

Recent changes to the U.K.'s immigration law put employers at risk of criminal liability for hiring illegal workers. Specifically, an employer is guilty of a criminal offense if it knowingly employs an individual who is not entitled to work in the U.K. Illegal employment can give rise to an unlimited fine or up to two years imprisonment. In addition, an employer is liable of the civil offense if it negligently employs an individual who is not entitled to work in the U.K. Liability can give rise to a civil penalty of up to £10,000 (approximately $20,000) per illegal worker employed.

### *Background*

The Immigration, Asylum and Nationality Act 2006 (IANA) came into force on Feb. 29, 2008 in response to the influx of significant numbers of illegal migrants into the U.K. As a result of the IANA's introduction, an employer that knowingly employs a person who is not entitled to work in the U.K. will now face criminal liability.

### *What Steps Can an Employer Take to Avoid Liability?*

IANA does not provide for any statutory defense to the criminal offense of knowingly employing an illegal worker. However, it provides a statutory defense to the civil offense of negligently employing an illegal immigrant when an employer has checked certain prescribed identification and immigration documentation relating to the relevant employee.

To use the statutory defense, an employer can take several straightforward steps as part of its normal recruitment processes by checking the prescribed documentation relating to the prospective employee before making an employment offer.

*Which Documents Must an Employer Check?*

In terms of the documentation that an employer must check, IANA differentiates between employees entitled to stay in the U.K. indefinitely and those subject to immigration controls.

When a prospective employee is entitled to stay in the U.K. indefinitely, an employer is required to check his or her:

- passport (identifying that the individual is a U.K. citizen, European Economic Area or Swiss national);
- permanent residence card;
- biometric immigration documentation evidencing the individual's right to remain indefinitely in the U.K.; or
- U.K. birth certificate/adoption certificate (when produced in combination with an official government-issued document issued showing the individual's name).

When an individual's entitlement to remain in the U.K. is limited, the range of documents that a prospective employer must inspect is as follows:

- a passport endorsed to show the individual's right to stay and work in the U.K.;
- a biometric immigration document declaring that the individual is entitled to remain in the U.K. and is entitled to work; or
- a work permit (when produced in combination with a passport that shows the individual's right to stay in the U.K.).

*How Often Must an Employer Check Immigration Documentation?*

When an employee is entitled to stay in the U.K. indefinitely, the employer will be entitled to rely on the initial checks for the duration of his or her employment. However, when an individual's right to stay is of limited duration, the employer must repeat the checks outlined above at least every 12 months in order to be able to rely on the statutory defense. All this should motivate U.S. employers with U.K. operations to take a number of practical steps to ensure compliance with the law (see box on next page).

## Corporate Manslaughter

A new law makes an organization guilty of the criminal offense of corporate manslaughter if the way its activities are managed or organized causes a person's death and amounts to a gross breach of a duty of care. Corporate manslaughter is punishable by an unlimited fine.

**Practical Considerations for Avoiding IANA Violations**

An employer should take reasonable steps to ensure the validity of the documents the prospective employee provided, including examining closely any photographs and personal details the documents contain and also taking and retaining copies of the documents. Employers must retain copies for two years following the termination of the employee's employment.

To avoid liability under race discrimination law, it is recommended that employers routinely carry out immigration checks on all prospective employees (not merely those who appear to be of non-British descent) before hiring them.

It is essential that employers put in place proper systems to reduce the potential exposure with regard to the employment of foreign workers and regularly monitor those procedures to ensure that they remain effective.

### *Background*

Under the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA), in force since April 6, 2008, an organization will be guilty of corporate manslaughter if the way in which its activities are managed or organized:

- causes a person's death;
- amounts to a gross breach of a duty of care to the deceased; and
- is attributable in substantial part to the way in which the organization's senior management managed or organized its activities.

### *Why Has the Offense Been Introduced?*

CMCHA replaces the common law offense of gross negligent manslaughter. Under the former common law offense, an organization could only be found guilty of a person's death when a court established a gross breach of a duty of care the organization owed to the victim and its *directing mind* (a director or member of senior management found to embody the organization in his or her acts and decisions) was similarly guilty.

Very few organizations have been convicted of the common law offense. In practice, organizations rarely appoint a director or member of senior management to take sole responsibility for health and safety issues. In any event, the English courts have been reluctant to hold any individual director responsible for a breach of a duty of care leading to death. CMCHA is intended to facilitate prosecution of organizations by removing the requirement for the court to identify a directing mind.

### *Who Can Be Guilty of Corporate Manslaughter?*

Among the entities that may commit corporate manslaughter are corporations, limited liability partnerships, partnerships, trade unions, employer's associations, Crown bodies and police forces. Individuals cannot be guilty of the offense.

It is worth noting, however, that directors of an organization will continue to remain liable under the existing common law offense of gross negligent manslaughter, and have onerous responsibilities under other health and safety laws.

### *What Is a Gross Breach of a Duty of Care?*

Only an employer's specific breaches of its duty to provide a safe system of work will give rise to liability, including its duties:

- as an occupier of premises;
- to persons held in detention or custody; and
- in connection with the supply of goods or services, the carrying out of any other activity on a commercial basis, construction or maintenance operations, or use or keeping by the organization of any equipment or vehicle.

### *What Factors Will a Court Take Into Account?*

If it can be established beyond reasonable doubt that an organization owed a duty of care in the above circumstances, the jury must determine whether a gross breach of that duty occurred and whether a substantial part of that breach is attributable to how senior management managed or organized its activities.

Factors that the jury will be directed to take into account in making the latter determination include:

- the systems of work employees used;
- the level of training and adequacy of equipment;
- the level of immediate supervision by middle management;
- its strategic approach to health and safety; and
- its arrangements for assessment of risk, monitoring and auditing of its processes.

### *What Is the Criminal Sanction for Corporate Manslaughter?*

Corporate manslaughter is punishable by an unlimited fine. Guidelines relating to the level of fines are due to be published in autumn 2008. Since individuals cannot be guilty of corporate manslaughter, the offense is not punishable by imprisonment.

### *What Other Penalties May Be Imposed?*

CMCHA provides that the court may impose publicity orders and/or remedial orders. In short, a publicity order requires an organization to publicize the fact of a conviction of corporate manslaughter and certain details of the offense. A remedial order requires an organization to address and remove the risk of death.

### *Practical Considerations: Safety First*

The fact that specific corporate manslaughter legislation has now been enacted into U.K. law will generally make employers focus more on safety, particularly those whose operations entail particular risks to the physical safety of employees. The risk of unlimited fines and the reputational risk of criminal prosecutions will only reinforce the need to ensure a safe and healthy working environment for staff in line with employers' other obligations under statutory contractual and common law health and safety principles.

## Worker Consultation

Changes in effect since April 6, 2008, extend considerably the legislative framework for employees to require an employer to establish works councils for information and consultative purposes. The framework now applies to all U.K. employers with 50 or more employees.

### *Background*

The Information and Consultation of Employees Regulations 2004 (the ICE Regulations) implement the European Information and Consultation Directive.

The ICE Regulations provide a mechanism U.K. workforces can use to establish a representative forum (known as an information and consultation committee or works council) to which an employer must provide information and, in certain circumstances, with which the employer must consult.

### *How Can Employees Require Their Employer to Establish a Works Council?*

Employers are only required to set up consultation committees when employees make a relevant request under the ICE Regulations. To be valid, a request must be:

- supported by 10 percent of the organization's workforce;
- dated and in writing; and
- sent to the employer's registered, head office or principal place of business.

To assist employees in assessing the level of support among the workforce, the regulations provide that an employer must, on request, provide information relating to the number of employees in its workforce.

In circumstances in which an employer does not respond to a request for workforce information within one month (or when it provides inaccurate information) the workforce may apply to the Central Arbitration Committee (CAC) for an order that the employer provide the correct information.

### *Must the Employer Create a Works Council on Receipt of a Request?*

When faced with a valid workforce request for an information and consultation committee, the ICE Regulations provide that an employer must (unless it has certain information and consultation mechanisms already in place) negotiate with employees to develop an information and consultation agreement to set out the procedures for the employer provision of information and for committee consultation.

When an employer does not have in existence arrangements for the provision of information to and consultation with employees, it must take the following steps on receipt of a valid request:

- make immediate arrangements for the election or appointment of negotiating representatives for all employees; and
- initiate negotiations with the workforce to enter into an information and consultation agreement as soon as reasonably practicable (and in any event within three months after the request has been received).

If a written consultation agreement already exists, and fewer than 40 percent but more than 10 percent of employees support the request for a new consultative forum, the employer may convene a ballot to establish whether at least 40 percent of the workforce supports the request to establish the new forum. If less than 40 percent of the workforce vote in favor, the employer's existing arrangements will continue to apply without any obligation on that employer to establish a new consultative body.

### *What Form Does an Information and Consultation Agreement Take?*

The form of an information and consultation agreement will depend on whether it is successfully negotiated between the workforce and the employer. If negotiations are unsuccessful within six months, the default statutory information and consultation provisions will apply.

### *Negotiated Information and Consultation Agreements*

Following the appointment of negotiating representatives, the parties have six months to negotiate an information and consultation agreement, unless the parties agree to an extension. The parties are required to work in a spirit of cooperation. Here are the required features of a negotiated agreement (see box).

**Required Elements of a Negotiated Agreement**

A negotiated agreement must:

- be in writing and dated;
- cover all employees in the undertaking;
- explain the circumstances in which employees will be informed and/or consulted (either directly or through representatives);
- be signed by, or on behalf of, the employer; and
- either all the employees' elected representatives must sign it, or, alternatively, a majority of the representatives must sign and at least 50 percent of the employees must approve it (either in writing or by a ballot).

### *Default Statutory Information and Consultation Agreement*

The default information and consultation provisions will apply when an employer fails to initiate mandatory negotiations, or when the parties have failed to reach agreement. The default provisions take effect on the earlier of:

- six months from the date of the workforce request;
- the failure to reach agreement; or
- the election of information and consultation representatives in accordance with the ICE Regulations.

The default provisions provide that representatives shall be elected by ballot. There must be at least one representative for every 50 employees (subject to a minimum of two representatives and a maximum of 25).

The standard default provisions provide that the employer must:

- inform representatives of recent and probable developments in the organization's activities and economic situation (such as the launch of new products, potential takeovers, changes in senior management and the organization's financial situation);
- inform and consult representatives regarding the situation, structure and probable development of employment within the organization and any anticipated measures (such as the recruitment of new employees, voluntary and compulsory redundancies, the transfer of posts to different locations and changes to retirement schemes); and

- consult with a view to reaching agreement with representatives in respect of decisions likely to lead to substantial changes in work organization or in contractual relations (including collective redundancies or under the Transfer of Undertakings (Protection of Employment) Regulations 2006), changes to overtime, shift patterns, disciplinary and grievance procedures, and the introduction of a compulsory retirement age.

Appropriate and timely information must be provided so representatives may canvas constituents and prepare for consultation.

The employer and the elected representatives may agree to vary the default statutory provisions at any time.

### *Can a Workforce Make Multiple Requests for a Works Council?*

Once a consultation agreement has been negotiated, neither the employer nor the employees may make a further request for three years.

Similarly, if a workforce request for negotiation is defeated by ballot, no further request may be made within three years of the unsuccessful ballot (unless as a result of a material change within the organization the consultation arrangements no longer apply to all employees; for instance, this could such occur after an acquisition).

### *What Happens in the Event of a Dispute About the Information and Consultation Agreement?*

When an agreement has been negotiated or the standard information and consultation provisions apply, a representative may refer any dispute about the procedures' operation to the CAC.

When the CAC upholds a complaint against an employer for failing to comply with its information and consultation procedures, it may make an order specifying the steps the employer must take. Where the CAC upholds such a complaint, the person bringing the claim may also apply to the Employment Appeal Tribunal, which may order the employer to pay a penalty of up to £75,000 (approximately $150,000 payable to the secretary of state). The tribunal does not have the power under the law to compensate affected employees.

With the strengthened legislative provisions, many more employers will need to understand their obligations under this law and potentially be prepared to deal with a request for information and consultation. Proactive employers may wish to consider whether establishing voluntary or informal staff consultative committees may be useful in addressing employee consultation issues without having to become embroiled in the detailed establishment and operation of an information and consultation procedure under the statutory regime.

## Changes to Pension Plans

As part of the worker consultation provisions, the scope of the obligation on employers to consult with the workforce over changes to employee pension plans now applies to employers with 50 or more employees.

### *Background*

Since April 6, 2008, organizations with 50 or more employees had to comply with the Occupational and Personal Pensions Scheme (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the Pensions Regulations), which establish the requirement for employers to consult with employees over proposed changes to pension plans. The Pension Regulations previously applied only to organizations with 100 or more employees.

### *When Must Employers Consult?*

The Pension Regulations differentiate between an employer's obligations by referring to whether the relevant pension plan is a money purchase plan or final salary plan.

### *Money Purchase Plans and Final Salary Plans*

Any employer proposal to change a money purchase and final salary plan in any of the following ways will result in an obligation to consult with employees:

- increasing pensionable age;
- changing eligibility conditions;
- changing future accrual of benefits under the scheme;
- introducing member contributions for the first time;
- increasing members' contributions; and
- reducing the employer's contributions.

Regarding a final salary plan, the Pension Regulations also require an employer to consult with employees in relation to any proposal to:

- reduce the rate of future accruals;
- change the basis for determining accrual benefits; and
- convert the plan to a money purchase scheme.

### *What Form Does Consultation Take?*

Where an employer's proposal to change the rules of a pension plan requires an employer to consult with employees, the employer must give written notice of the change to each employee who is an active or prospective member of the pension scheme and to give such employees information describing the proposed changes.

If the employees have a recognized trade union representative, it may represent affected employees for consultative purposes as to any proposed changes. If not, an information or consultation representative may represent employees, or the employer may be required to consult directly with the affected employees under a pre-existing agreement. When the employer does not recognize a trade union, no consultative body exists and there is no pre-existing consultation agreement, the employer must consult directly with each employee.

The Pensions Regulations provide that consultation should be conducted in a spirit of cooperation. The employer must provide details of the length of the consultation period (the minimum consultation period is 60 days) and of the deadline for submitting written comments.

The employer will be deemed to have complied with its consultation obligations if, after 60 days, the affected employees' representatives (or the individual employees in the circumstances that they have been consulted directly) have not responded to the employer about the announced proposals.

An employer cannot contract out of its obligations under the Pensions Regulations.

### *What Is the Penalty for an Employer for Failure to Comply With its Consultation Obligations?*

Any representative of an affected member, or active or prospective member who is an affected member, may file a complaint to the Pensions Regulator alleging noncompliance with the Pensions Regulations.

The Pensions Regulator may issue an improvement notice requiring the employer to remedy its breach. The improvement notice will identify the provision of the Pensions Regulations the employer has violated and state the period (of not less than 21 days) within which the contravention must be remedied.

If an improvement notice is not obeyed, the Pensions Regulations may require a pension plan trustee or manager to pay a penalty of up to £5,000 (approximately $10,000) (when the employer is an individual), or up to £50,000 (approximately $100,000) (when the employer is a company). A person who receives a determination or fine from the Pensions Regulator may appeal to the Pensions Regulator Tribunal within 28 days of the decision.

The Pensions Regulator cannot reverse a change that an employer has made in violation of the consultation requirements. The Pensions Regulations expressly provide that the employer's failure to comply with the requirements does not affect the validity of such a change.

Given the changes in the law, there are several practical steps an employer can take before making any changes to pension benefits (see box).

**Practical Considerations Under Pension Law Changes**

When considering the implementation of a change to pension arrangements, employers need to check that they have the contractual power to make the relevant change. An employee's contract or the relevant pension scheme rules may contain this power. Even if such power exists, it needs to be exercised in a noncapricious way and consistent with the obligation to maintain trust and confidence. Actuarial and other financial evidence will often be valuable in justifying the need for a change to pension arrangements. Employers with 50 or more employees – as well as larger employers – should be aware of the need to establish the contractual validity of pension changes, factor in the potential need to consult with employee representatives and adjust communication processes to meet these obligations.