Employment Law in England and Wales

Dechert LLP

Charles Wynn-Evans
Kate Anderson
London Office

October 2012

Employment Law in England and Wales

Introduction

For any business which has employees in England and Wales, a basic knowledge of employment law is vital. Knowing what your rights are, and the rights of your employees, will help prevent problems arising. Ignorance of the law will almost certainly cost you money and will do nothing to improve relations with your workforce.

This guide is intended to be a detailed introduction to the main issues and pitfalls faced by employers in England and Wales. It does not address the regimes in Scotland and Northern Ireland which differ in certain respects from the position in England and Wales.

As this guide is only intended to be an introduction to the area, it does not cover all the complexities of the legislation and case law which it addresses. You should take specific advice before you take action. The law is described as at 1 October 2012, so please bear in mind that it may have changed by the time you read it.

Charles Wynn-Evans, Partner
E-mail: charles.wynn-evans@dechert.com
DDI: +44 20 7184 7545

Kate Anderson, Associate
E-mail: kate.anderson@dechert.com
DDI: +44 20 7184 7346

Dechert LLP
160 Queen Victoria Street, London
EC4V 4QQ
Tel: +44 20 7184 7000
Fax: +44 20 7184 7001

1. The Contract of Employment

Introduction

An employer may lawfully employ whom it wishes, subject to certain restrictions relating to the employment of children and young persons and work permit and immigration issues. An individual may, however, have a right of action under the United Kingdom's discrimination legislation if a decision not to employ the individual relates to one of the characteristics protected by the legislation such as, for example, the individual's race, sex, marital status, age, religion or belief, sexual orientation, disability or trade union membership.

Express Terms

In English law the employment relationship is constituted primarily by the contract of employment, which can be oral or written. The contract is formed when an offer is accepted or conditions to which an offer is made subject are satisfied. Employers should take care in formulating the terms and conditions upon which employment is offered, as seeking subsequently to impose additional terms or change existing terms can be problematic. The contents of the contract of employment are regulated in certain respects by way of minimum prescribed obligations–examples include rights to maternity and parental leave, the national minimum wage, the statutory minimum period of notice and rights in relation to holidays and working time. These minimum obligations are covered elsewhere in this guide.

Implied Terms

Whilst an employee's contract of employment will set out express terms relating to matters such as salary, place of work and hours of work, certain terms are implied into all employment contracts. Examples include:

- the employee's duty to take reasonable care in performing his or her duties;
- the employee's duty to comply with the employer's lawful and reasonable instructions;
- the employee's duty of confidentiality;
- the employer's responsibility to take reasonable care for the employee's safety; and
- both parties' obligation to conduct themselves so as to maintain 'mutual trust and confidence'.

Changes to Terms and Conditions of Employment

Changing the terms and conditions of employees' employment can be problematic. Unless the change is already permitted by the scope of the contract (for example, changing the emphasis of a role within a widely defined job title) or there is an express power to change the contract (which must nonetheless be exercised on a legitimate basis), unilaterally imposing changes to a contract can entitle an employee to resign and claim constructive dismissal (which can lead to damages and/or unfair dismissal claims) or remain employed but bring a breach of contract action for damages in cases of changes to financial laws or refuse to comply with the conditions imposed by the employer. If an employee continues to work without protest following the imposition of changes to his or her contract, he or she may be taken to have accepted them, but much will depend on the circumstances.

2. Written Particulars of Employment

Legal Obligation

Employers are required by statute to provide to employees a written statement setting out certain 'particulars' of their terms and conditions of employment. The law does not prescribe the substantive content of those actual particulars of employment. The required particulars can be set out in a formal contract of employment or a written statement. They should be given in a single document but can cross-refer to other documents in respect of sickness and pension entitlements and disciplinary and grievance procedures. These should be reasonably accessible documents, the most obvious examples of which are a staff handbook and pension rulebook. For the purposes of certainty, notwithstanding this obligation to record written particulars, employers are best advised in any event to set out in writing all the detailed terms upon which they employ their employees.

Required Particulars

The particulars of employment which should be recorded in writing to comply with this legal obligation include the name of the employer and employee, the date employment began, the rate of remuneration (or method of its calculation), how often remuneration is paid, terms and conditions relating to hours of work, holidays, holiday pay, sick pay, pension schemes, notice entitlements, job title, term of employment (for example, if the employment is for a fixed term), place (or places) of work, details of disciplinary and grievance procedures and details of any collective agreements which affect the terms and conditions of the employee's employment. If there are no particulars applicable to the individual in relation to a particular item, this fact should be stated.

Timing

The written statement of particulars of employment must be given to the employee before the individual has been employed for two months. Any changes to the initial particulars must be confirmed in a further written statement given at the earliest opportunity (but no later than one month after the change takes effect). Employers should note, however, that simply notifying the employee of changes to the written particulars provided to the individual in order to comply with this notification obligation, does not of itself render them contractually effective.

Penalty

Absent another substantive employment claim, an employee's sole remedy for an employer's failure to provide accurate or complete particulars is to seek a declaration from the employment tribunal. The employment tribunal will make a declaration effectively as to the true contractual or factual position in relation to the relevant matter or matters. Where the employee succeeds with another substantive employment claim, if the employment tribunal finds that, as at the date the employee brought the claim, the employer had not complied with its duty to provide the requisite written particulars of employment, it will award the employee additional compensation of either two or four weeks' pay (capped at the statutory maximum, which is currently £430 a week).

3. Confidential Information, Restraint of Trade and Departing Employees

Confidentiality

Employees are under a duty, in broad terms, not to disclose (either during or after termination of employment) any 'trade secrets' in their possession relating to their employer's business. What amounts to a 'trade secret' is narrowly confined. Employers can, however, contractually oblige their employees after termination of employment not to disclose confidential information (a wider concept than trade secrets) but should take care to define or identify in the contract what amounts to confidential information in the context of their business. This obligation can be enforced by an injunction and proceedings can be taken to recover documents and property improperly retained by departing employees. Obligations regarding confidentiality are nonetheless subject to the "whistleblowing" legislation thereby enabling employees to make "protected disclosures" in the limited circumstances outlined elsewhere in this guide notwithstanding the confidentiality provisions of their contracts.

Departures and Garden Leave

An employer cannot force an employee to continue to work (for example, during his or her notice period) if he or she does not wish to do so. If the employer or the employee serves notice of termination but the employee refuses to honour that notice period, the employer's remedy is to sue the employee for damages for breach of contract (although the recoverable damages are often difficult to assess) or to seek an injunction preventing the employee from working elsewhere during the balance of the required notice period.

To assist in protecting its business following a key executive's departure, an employer will wish to include in its employees' contracts an express 'garden leave' provision that permits the employer to keep the employee out of the market during his or her notice period by enabling the employer to exclude the employee from its premises and not to provide any work during that period. The employee remains employed by the employer during any period of garden leave. He or she therefore remains entitled to receive any pay and (unless the contract otherwise provides) contractual benefits and also remains obliged, if his or her contract so provides, not to commence new employment. However, if the employee nevertheless seeks to join a competitor during the garden leave period, an employer can seek an injunction preventing the employee from doing so. If the court grants an injunction in this situation it will, however, limit the duration of the injunction to such period as is strictly necessary to protect the employer's business.

If there is no express garden leave clause in the contract, the employee may (depending on his or her security and the nature of his or her role) argue that to exclude him or her from work during the notice period amounts to a breach of contract entitling the employee to resign, claim constructive dismissal and ignore any post-termination restrictive covenants.

If there is no express garden leave clause in the employee's contract, it may still be possible to obtain an injunction preventing the employee from working for a competitor during his or her notice period where the employee seeks to commence employment with a new employer in breach of his or her obligation to give notice. Such an injunction will only be granted if the employer is prepared to continue to pay the employee and if the employee's proposed activities will harm the employer's business to a sufficiently material extent. Again, the court will only grant an injunction preventing an employee from working for the competition for such part of the outstanding notice period as is strictly necessary to protect the employer's legitimate business interests.

Restrictions After Employment

It is possible to include express terms in the contract of employment which restrict the ability of an employee to compete with the employer or to poach clients or customers for the purposes of a competing business for a limited period after the termination of his or her employment. In order to ensure that such covenants are enforceable, they must, however, be drafted carefully and precisely to conform with the detailed case law requirements for such provisions to be enforceable as otherwise they will be invalid as a matter of public policy. The courts will only enforce such provisions to the extent they are necessary to protect the employer's 'legitimate interests' (such as its confidential information and goodwill in terms of its customer connections or stable workforce) and are reasonable in terms of their duration, scope and geographical application.

4. Key Executives' Contracts of Employment

Introduction

Quite apart from the legal obligation to provide a written statement of the prescribed particulars of employment, it is prudent for employers to enter into detailed employment agreements with their directors and other key employees setting out their respective rights and obligations. Detailed contractual provisions not only ensure clarity but also provide the employer with rights which may only be available by express agreement. Matters commonly addressed in such employment agreements include:

- notice period;
- retirement age;
- job title and reporting obligations;
- 'garden leave' provisions;
- place of work and relocation obligations;
- prohibition of, or limitation on, outside interests;
- salary and review provisions, bonuses and benefits;
- limitations on and procedures for reimbursement of expenses;
- holiday entitlement and approval procedures;
- payment during sickness absences;
- limitations on authority to incur liabilities on behalf of the employer;
- ownership of intellectual property rights;
- express confidentiality obligations;
- compliance with applicable regulatory provisions (with regard, for example, to directors' dealings in securities of listed companies and the rules of relevant financial regulators);
- the right to suspend for the purposes of investigation of misconduct or other serious matters;
- obligations to resign directorships and offices and to return property and papers on termination of employment;
- identifying the circumstances entitling the employer to effect summary dismissal for 'cause' such as gross misconduct, neglect of duties, bankruptcy, becoming of unsound mind and conviction of a criminal offence; and
- post-termination restrictions.

5. Income Tax and National Insurance

PAYE

Pay-As-You-Earn (PAYE) is the statutory system under which employers are obliged to deduct income tax and National Insurance contributions from the 'emoluments' of their employees at the time they are paid. The employer effectively acts as a tax collector for HM Revenue & Customs (HMRC). HMRC codes determine the appropriate amount of tax to be deducted.

An employer must send the tax and national insurance contributions deducted from an employee's salary by no later than the 19th of the month following payment or, if electronic payments are made, by the 22nd of the month following payment. Payments may be made quarterly instead of monthly if the average monthly total tax and National Insurance to be paid is less than £1,500. Interest is charged on late payments.

At the end of each tax year (i.e. 5 April) an employer must give to each employee a Form P60 which shows the employee's total taxable emoluments in that year, the net tax deducted, the relevant tax code for the individual, the employer's PAYE reference, the employee's name and national insurance number and the employer's name and address. On termination of an employee's employment, an employer must give to the employee a Form P45 which gives details of the employee's total pay and tax deducted in the tax year to date.

National Insurance

National Insurance contributions are a social cost borne by employers and employees based on an employee's earnings. Employees' contributions are deducted by their employer in the same way as income tax. Statutory sick pay, statutory maternity pay, sickness benefit, gains on the exercise of share options and sums received as consideration for restrictive covenants are 'earnings' for National Insurance purposes. Payments made to cover business expenses incurred by an employee are not. However, the employer must have evidence which identifies the business expense incurred and its amount and show that the expense was incurred as part of the employee's work. Many benefits in kind attract National Insurance, including private medical cover, company cars, nursery places, relocation costs, credit cards, preferential loans and educational or other assistance. No National Insurance is payable by either the employee or the employer if the employee is under 16 and none is payable by the employee if he or she is over the State retirement age.

National Insurance is based on the employee's pay in an earnings period. This is the period for which earnings are normally paid if they are paid on a regular basis. For example, if an employee is paid weekly, the earnings period is a week.

Employees from outside the UK (including any country within the European Economic Area, Austria, Australia, Barbados, Bermuda, Canada, Cyprus, Finland, Guernsey, Iceland, Israel, Jamaica, Jersey, Malta, Mauritius, New Zealand, Norway, Philippines, Sweden, Switzerland, Turkey, the U.S. or Yugoslavia) and who continue to pay social security in their own country can claim exemption from National Insurance.

The current National Insurance rates are as follows:

Employee's contribution:

Gross pay per week	National Insurance contribution
Up to £146	0%
£147 to £817	12%
More than £817	2%

Employer's contribution:

Gross pay per week	National Insurance contribution
Up to £144	0%
More than £144	13.8%

Itemised Pay Statements

All employees have the right to a written itemised pay statement.

6. Immigration

Introduction

Nationals of most countries of the European Economic Area (EEA) and Switzerland are free to come to England, Scotland, Wales and Northern Ireland to seek or take up employment and do not require a work permit. Nationals from the countries which joined the EU in 2004 (Poland, Lithuania, Estonia, Latvia, Slovenia, Slovakia, Hungary and the Czech Republic) who find a job in the UK are required to apply to register with the Home Office under the 'Worker Registration Scheme' as soon as they find work.

Other individuals who do not require a work permit to work in the UK include Gibraltarians, Commonwealth citizens who are allowed to enter or remain in the UK on the basis that a grandparent was born in the UK, individuals with no conditions attached to their stay in the UK, spouses of UK work permit holders and those who qualify under other immigration categories (see below), provided that the endorsement in their passport places no restriction on their employment in the UK.

The Work Permit Scheme

The work permit scheme closed for new applications on 26 November 2008, although Bulgarian and Romanian nationals are still allowed to apply for work permits for the time being.

Work permits which were applied for or extended before 26 November 2008 will continue to be valid. Anyone who wishes to extend an existing work permit will need to be sponsored under Tier 2 (see below). However, if his or her employer remains the same, the employee will automatically be deemed to meet the Tier 2 criteria.

The New Points-Based Scheme

The points-based scheme is made up of five tiers of individuals that are permitted to work in the UK. These are as follows:

- Tier 1: highly skilled migrants;
- Tier 2: skilled migrants with job offers who are coming to the UK to fill a gap in the UK labour market (this replaced the work permit scheme);
- Tier 3: low skilled migrants who are recruited to fill specific temporary labour shortages (although there is currently no plan to use this scheme);
- Tier 4: students; and
- Tier 5: youth mobility and temporary migrants, those coming to the UK for primarily non-economic reasons.

Tiers 1 and 2 are likely to be most relevant to employers.

Employees entering the UK under Tier 1 are required to score a minimum of 100 points from a number of "attribute tests", based on education, earnings, UK experience, age, English language and maintenance tests.

Tier 2 allows employers with a Licence to Sponsor (see below) to sponsor individuals and bring them to the UK if:

- the vacancy is for a "shortage occupation"; or
- the post was advertised to the resident labour market before the individual was employed and it was not possible to recruit anyone; or
- it is an intra-company transfer and the individual has worked for the company overseas for at least six months; or
- the individual is switching from a post-study category; or
- the employee scores a minimum of 50 points from "attribute tests" and 10 points on each of the English language and maintenance tests.

In addition, the employer must show that the:

- post requires skills of at least NVQ level 3;
- post has been advertised at Job Centre Plus (for at least two weeks if the salary is under £40,000 or at least one week if the salary is over £40,000);
- post cannot be filled by an EEA national;
- salary is at market rate;
- employee will qualify for at least 70 points (these points are awarded, for example, for qualifications and earnings);
- employee can speak a certain amount of English; and
- employee has at least £800 to support themselves and £533 to support each dependant in the first month of employment.

In order to obtain a Licence to Sponsor, an employer must register online at the UK Border Agency website. It must:

- be able to show that it is a genuine employer that is able to comply with employment and immigration law and good practice; and
- agree to take on a number of obligations.

The licence must be renewed every four years.

If the employer is satisfied that the qualifying criteria are met, it will provide the individual with a secure pin number to be entered on their application. If the individual is successful, they will be entitled to work in the UK for three years.

Obligation to Check Entitlements

The Immigration, Asylum and Nationality Act 2006 applies in relation to those who started work in the UK on or after 29 February 2008. Under this Act, it is an offence for an employer to knowingly employ a person who is not entitled under immigration laws to work in or be in the UK. An employer that commits this offence will be liable to a prison sentence of up to two years or an unlimited fine. An employer will also commit a civil offence if it negligently employs someone without permission to work in the UK.

Employers have a defence if they have obtained and checked certain specified original documents of potential employees before employing them. The documents that are acceptable differ depending on whether the potential employee is subject to immigration control or restrictions on their stay in the UK. In respect of all documents, employers must take reasonable steps to check their validity, make copies of them and retain those copies for two years following the termination of employment. A variety of documents are acceptable, the most common ones being documents issued by a previous employer or HMRC showing the individual's national insurance number (e.g. a P45, P60 or national insurance card), or a passport showing the individual to be a British citizen or issued by an EEA state.

Employers may only rely on this defence for employees with time-limited leave to be in the UK if they carry out repeat checks at least once every 12 months. An employer cannot rely on the defence if it carries out the checks and allows the employee to work illegally. Failure to comply can lead to a fine of up to £10,000 for each employee in breach.

To avoid allegations of breach of the race discrimination legislation, appropriate checks should be carried out in relation to all new employees.

7. Time Off Work

In addition to holidays, employees have the statutory right to time off work during working time in certain circumstances. These include the right to time off:

- for an official of an independent trade union (which is recognised by his or her employer) to take part in defined trade union activities;
- for performance of public duties such as a Justice of the Peace, prison visitor and member of a local authority, a police authority, a statutory tribunal, or certain health and education authorities;
- for safety representatives to perform their duties and undergo training in health and safety matters;
- for ante-natal care during pregnancy;
- for employee representatives (who are appointed for the purposes of consultation during a redundancy exercise or on a transfer of an undertaking) to perform their duties and to receive appropriate training;
- for jury service;
- to deal with an emergency involving a dependant, for example if a dependant falls ill or is injured;
- for those under notice of dismissal by reason of redundancy to look for new employment or make arrangements for re-training for future employment; and
- to act as a companion for a fellow worker at a disciplinary or grievance hearing.

Save in the case of the performance of public duties, jury service and time off for dependants, the right of the employee to time off work in these circumstances is generally to take paid rather than unpaid time off. In all cases time off can only be for reasonable periods.

Other rights to time off include various 'family friendly' rights (such as maternity, paternity, parental and adoption leave) and holiday and rest break entitlements under the Working Time Regulations. These are dealt with elsewhere in this guide.

Time Off Work for Training

Employees of businesses with 250 or more employees have the right to request time off work to train or study.

Requests can only be made by employees who have at least 26 weeks' continuous service with their employer. Employees can make requests to undertake any training which they believe will improve their effectiveness at work and the performance of their employer's business.

There is no limit on the amount of time or the amount of training that an employee can request. However, employees do not have the right to be paid for the time spent training and employers are not obliged to pay for any training costs.

Employees may only make one request in any 12 month period. The request must be made in writing and should include certain prescribed information such as the subject matter of the training, when and where it would take place and what the qualification would lead to.

The employer then has to meet with the employee within 28 days to discuss the request. The employee has a right to be accompanied at that meeting by a fellow work colleague or trade union representative.

An employer may reject a request for time off work for training made under the statutory provisions in the following specified circumstances:

- the employer is unable to re-organise work amongst existing staff or to recruit new staff to cover the work of the employee seeking time off for training;
- the burden of the additional costs that would be incurred by the employer is prohibitive;
- the employer is planning to undergo structural change during the proposed period of training; or
- the employer does not consider that the employee's proposed training will improve their effectiveness or the performance of the employer's business.

The employee's request may be accepted in part. Alternatively, different training arrangements which are acceptable to both parties may be agreed upon.

Notice of the employer's decision should be given to the employee in writing within 14 days. The employee may appeal in writing against the employer's decision to reject a request for time off work for training within 14 days.

8. Maternity and Paternity Leave Rights

Introduction

Female employees who satisfy certain eligibility requirements enjoy the following statutory rights in relation to pregnancy:

- paid time off to receive antenatal care;
- up to 52 weeks' maternity leave (including two weeks' compulsory leave after childbirth);
- protection from dismissal or unfair treatment by reason of pregnancy or childbirth; and
- maternity benefits by way of Statutory Maternity Pay (SMP) or Maternity Allowance.

Statutory Maternity Pay

Female employees may be entitled to a specified level of pay during maternity leave under their contract of employment or their employer's maternity policy. However, if this is not the case, the employee will only be entitled to statutory maternity pay (SMP) if she has been employed for at least 26 weeks as at the end of the 15th week preceding her expected week of childbirth. Moreover, SMP is only payable if the employee's earnings meet a statutory threshold. At present, for SMP to be payable, the employee's average weekly earnings in the eight weeks up to and including the 15th week before the baby is due must be at or above the lower earnings limit for the payment of national insurance (currently £107 per week).

The right to SMP is not conditional upon the employee intending to return (or actually returning) to work after childbirth, but to qualify the employee must give her employer advance notice of her intentions. An employee who does not qualify for SMP may qualify for the Maternity Allowance which is payable by the Government and obtainable from her local benefits agency. To qualify for Maternity Allowance the individual must have been employed for at least 26 weeks in the 66 weeks up to and including the week before the expected date of childbirth (known as the 'test period'). Earnings must have reached an average of at least £30 a week or more in any 13 weeks of the test period.

SMP is payable for the 'maternity pay period' of 39 weeks. During the first six weeks of the maternity pay period SMP is 90% of the employee's average weekly earnings. For the remaining 33 weeks, the current weekly rate of SMP is £135.45 or, if lower, 90% of an employee's average weekly earnings. SMP is paid by the employer in the same manner as salary.

There are specific rules governing calculation of 'average weekly earnings'. In particular, employees on maternity leave have the right, in relation to the calculation of their SMP entitlements, to benefit from all pay rises granted between the 23rd week before the expected week of childbirth and the end of their maternity leave. Where a woman is awarded a pay rise (or would have been awarded a pay rise had she not been absent receiving SMP), the normal weekly earnings used in calculating her SMP must take account of the pay rise. This means that she will be entitled for her SMP to take into account any pay rise for the entire period, and not simply from the date on which the rise became effective. There is no limit to the number of pay increases which must be taken into account.

All employers are entitled to claim back 92% of SMP paid by deducting it from their next payment of NI contributions, PAYE and other payments to HM Revenue & Customs. Small employers whose gross national insurance liability was £45,000 or less in the preceding tax year can deduct 103% of the SMP they pay out. Certain small employers may claim money in advance to help with their cash flow.

The Right to Maternity Leave

A female employee's contract may entitle her to a specified period of maternity leave. Under the statutory regime of employment or her employer's maternity policy, female employees are entitled as a minimum to 52 weeks' maternity leave. Continuity of employment for the purposes of the various statutory employment rights is preserved throughout such statutory maternity leave.

Compulsory Leave

An employer is prohibited from allowing an employee to return to work within the period of two weeks following childbirth, known as Compulsory Maternity Leave (CML). Failure to comply with this prohibition is a criminal offence.

26 Weeks' Ordinary Maternity Leave

Any pregnant employee is entitled to 26 weeks' Ordinary Maternity Leave (OML) regardless of her length of service. This 26-week period may not commence prior to 11 weeks before the week in which childbirth is expected. However, the maternity leave period commences automatically if the employee is absent because of pregnancy at any time after the beginning of the fourth week before childbirth is expected. The employee is entitled to return to her previous job on terms and conditions no less favourable than those applicable if she had not taken OML.

During OML, the employer is not obliged to continue to pay the employee any salary (unless she has a contractual entitlement to enhanced maternity pay). The employee is entitled to receive SMP if the relevant eligibility requirements described above are met. However, contractual benefits other than "remuneration" (which, in simplistic terms, effectively means cash payments) must continue to be provided (for example, free canteen meals or use of a company car may need to be continued and holiday entitlement must continue to accrue).

26 Weeks' Additional Maternity Leave

Any pregnant employee is also entitled to Additional Maternity Leave (AML) of 26 weeks regardless of her length of service. This period of leave follows on from her OML, giving a maximum total maternity leave period under the statutory regime of 52 weeks. There is no distinction between terms and conditions which apply during OML and AML.

During OML and AML, all terms and conditions of employment remain in place, such as the obligation to maintain mutual trust and confidence, the obligation to give notice of termination of employment, confidential information obligations and the duties of good faith and fidelity.

An employee is entitled to be paid SMP for the first 13 weeks of AML. The remaining 13 weeks of AML are unpaid unless the employee is entitled to pay during this period under her contract of employment or her employer's policy.

Return to Work

Employers must notify an employee who proposes to take maternity leave of the date on which she is due to return to work from her maternity leave within 28 days of the employee confirming when she intends to start her maternity leave. The employee is not obliged to confirm to her employer that she intends to return to work from her maternity leave. Further, if an employee intends to return to work at the end of AML she is not obliged to give her employer advance notice of her return at the end of that period.

If the employee wishes to return to work before the end of AML, she is required to give her employer 8 weeks' notice. If she does not provide the correct notice the employer may postpone her return until she has done so (although the return may not be postponed to a date later than the end of her AML).

If the employee does not wish to return to work from her maternity leave she should give her employer notice of termination of employment as provided for in her contract of employment.

After OML an employee is entitled to return to the job in which she was previously employed on the same terms and conditions unless a redundancy situation arises (see below).

After AML an employee is entitled to return to the job in which she was previously employed on the same terms and conditions. If that is not reasonably practicable, she should be offered a similar job (if available) on terms and conditions which are no less favourable than those of her original role.

If a redundancy situation arises during an employee's OML or AML she is entitled to be offered a suitable alternative vacancy, where one is available.

An employee's seniority, pension and similar rights must be preserved on her return from OML. AML is not counted for these purposes unless specifically provided for in the employee's contract. The period of employment prior to AML is treated as being joined with the period on her return as if they were continuous.

An employee may also qualify for statutory parental leave (the right to which is described below) and choose to take this immediately following OML or AML. If parental leave of four weeks or less is taken after OML, an employee is entitled to return to her original job on the same terms and conditions as if she had not been absent. If she takes parental leave lasting more than four weeks after OML or parental leave for any period immediately following AML, she is entitled to return to the same job unless it is not reasonably practicable to do so (in which case she is entitled to be offered a similar job).

An employee who becomes pregnant during OML or AML is entitled to another consecutive period of both OML and AML.

'Keeping in Touch' Days

An employee is entitled to work for up to 10 days during her maternity leave in order to keep in touch with the workplace without prejudicing her statutory rights to SMP or maternity leave. 'Work' for these purposes includes training. Whether an employee should be paid for Keeping in Touch days is not dealt with under the legislation and is a matter for agreement between the employer and the employee.

Right to Make Reasonable Contact

Employers have an express right to make reasonable contact with employees whilst on maternity leave. An employer should use this ability to keep the employee updated on important developments at work and any promotions or vacancies that arise not least to avoid the risk of sex discrimination complaints. She should also be kept informed of social events and kept on relevant email lists.

Statutory Paternity Leave

Fathers of newly born children are entitled to statutory paternity leave (SPL), provided they have 26 weeks' continuous service with their employer at the 15th week before the expected week of childbirth (EWC) and continue to work for the employer until the baby is born. The leave must be taken for the purpose of caring for the baby or supporting the baby's mother. In addition, the father must expect to have responsibility for the child's upbringing and, if he is not the biological father, be the mother's husband or partner.

Eligible employees can take either one or two weeks' SPL (they cannot take odd days or two separate weeks) to commence on the baby's birth or some later date decided with reference to the date of birth (for example, a specific number of days after the baby is born) or a chosen date (provided it is after the first day of the EWC). In any event, SPL can only be taken within 56 days following the date of birth or, if the baby is born early, between the birth and 56 days following the EWC. The entitlement is only to one period of leave irrespective of whether more than one child is born as the result of the same pregnancy.

To claim SPL an eligible employee must inform his employer of his intention to take paternity leave by the end of the 15th week before the EWC (unless this is not reasonably practicable) and confirm when the baby is due, whether he will take one or two weeks' leave and when leave will start. Employees may only vary their SPL start date on 28 days' notice to their employer.

Most employees eligible for SPL are entitled to Statutory Paternity Pay (SPP). SPP is payable by employers at the same rate as SMP (i.e. the lesser of 90% of average weekly earnings or (currently) £135.45 per week). Employees earning below the lower earnings limit for national insurance purposes (currently £107 per week) do not qualify for SPP, but may be entitled to Income Support whilst on paternity leave. Employers can recover the amount of SPP they pay out in the same way they can claim back SMP. To claim SPP the employee must, in addition to the information required above, complete a declaration confirming he is the baby's father or mother's partner, that he expects to have responsibility for the baby and is taking the leave to care for the baby and/or mother.

Additional Paternity Leave

Fathers are also entitled to Additional Paternity Leave (APL), which effectively allows them to share up to six months of the mother's maternity leave. APL must comprise one continuous period of leave of between two and 26 weeks and must be taken for the purpose of caring for a child aged between 20 weeks and one year old. The right to APL is in addition to the father's statutory entitlement to SPL. For the father to be eligible, he must meet the eligibility requirements of SPL and the mother of the child or relevant partner must have returned to work without having exhausted her entitlement to AML.

Whilst on APL, an employee is entitled to Additional Statutory Paternity Pay (ASPP). ASPP is the lesser of 90% of the employee's normal weekly earnings and £135.45, the prescribed rate set by the Government, which changes each year. ASPP can only be claimed during the 39-week period during which the mother would have received SMP had she been on maternity leave. Any APL falling outside this period will be unpaid. ASPP will be paid at the same rate as SPP if taken during the 39-week SMP period.

Return to Work

All terms and conditions, except for remuneration, continue during APL and the father is entitled to return to the same job on the same terms and conditions at the end of APL. Keeping in Touch days also apply to APL in the same way as they do to maternity leave (see above).

Self-Certification

The APL regime is subject to "light touch" governance. Broadly, fathers must provide their employer with at least 8 weeks' notice of their intention to take APL along with:

- a notice of leave which sets out the child's date of birth and the proposed APL start and end dates;
- a declaration signed by the father confirming that he satisfies the eligibility requirements for APL (as outlined above); and
- a declaration signed by the mother setting out her name, address, National Insurance number and the date on which she intends to return from maternity leave. She must also confirm that the information in the father's declaration is accurate.

In order to minimise the risk and level of abuse of the APL system, HMRC has the power to carry out compliance checks on both employers and employees and there are financial sanctions for anyone found abusing the system. Employers may also require fathers to provide details of the name and address of the mother's employer and the child's birth certificate on request.

9. Parental Leave

Employees have a statutory right to take parental leave to look after a child or to make arrangements for the care of a child. Only those with one year's continuous service are eligible to take parental leave. The right also extends to those who have adopted children or have acquired formal parental responsibility for a child, subject to slightly different rules which are not addressed in this guide.

Parental leave must currently be taken before the child is five years old or, in relation to disabled children, up to the child's 18th birthday. (For the purposes of parental leave a 'disabled child' is one for whom an award of disability living allowance has been made.) In respect of adopted children, leave can be taken until the earlier of the child's 18th birthday and the expiry of five years from adoption.

Maximum Period

The maximum period of parental leave which an employee can take in respect of one child is 13 weeks or 18 weeks for parents of disabled children. As the entitlement relates to each child, parental leave in respect of twins, for example, is 26 weeks.

On return from parental leave, the employee is entitled to return to the same job as before or a similar job that has the same or better status and terms and conditions as the old job. If a period of parental leave lasts for less than four weeks, the employee is entitled to return to the same job.

When a redundancy situation arises whilst an employee is on parental leave and that employee is affected, he or she should be treated in the same way as any other employee with regard to consultation and consideration for other job vacancies. It is unlawful to select an employee for redundancy solely or mainly on the basis that the employee has taken or is taking parental leave or proposes to do so in the future.

Taking Leave

Employers and employees are free to decide themselves how parental leave will operate in their workplace, either individually or through collective agreements. If no agreement is reached then a statutory 'fallback' scheme applies. Agreements reached between employers and employees can improve on statutory rights but cannot provide for less favourable terms. An individual may claim the rights offered by the fallback scheme if his or her employer offers or purports to offer less favourable rights than those provided by the fallback scheme.

Under the fallback scheme parental leave can only be taken in blocks or multiples of a minimum of one week. Taking less than a week by way of parental leave counts as a full week of the statutory entitlement (although parents of disabled children are able to take leave a day at a time if they wish). Employees must give a minimum of 21 days' notice before taking parental leave. No more than four weeks of the 13-week entitlement may be taken per year by way of parental leave in respect of any individual child. The employer is entitled to postpone an employee's request for parental leave for up to six months where the business would be unduly disrupted (save where the leave is taken immediately after birth or placement for adoption when such postponement is not permitted).

Under the statutory scheme, parental leave is unpaid. During parental leave, various terms and conditions of employment remain in place, such as the obligation to maintain mutual trust and confidence, the obligation to give notice of termination of employment, confidential information obligations and the duties of good faith and fidelity.

Employees have the right to apply to an employment tribunal if the employer prevents or attempts to prevent them from taking parental leave. The employment tribunal may make a declaration that the employee was prevented from taking parental leave, or that parental leave was unreasonably postponed, and may award compensation having regard to the employer's fault and any loss suffered by the employee. An employee who takes parental leave will also be protected from victimisation, including dismissal, for doing so. In such a case the employment tribunal may order the employee's reinstatement or reengagement or award such compensation to the employee as it considers just and equitable.

10. Time Off for Dependants

An employee must be granted time off:

- to provide assistance or to arrange care when a dependant falls ill, gives birth or is injured or assaulted;
- in consequence of the death of a dependant;
- because of the unexpected disruption or termination of arrangements for the care of a dependant; or
- to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him or her.

For these purposes, a dependant is defined as the relevant employee's wife, husband, child, parent or someone who lives in the same household as the employee but is not his or her employee, tenant, lodger or boarder. A civil partner also falls within the definition of a dependant. A person who reasonably relies on the employee for assistance on an occasion when that person falls ill or is injured or assaulted or to make arrangements for the provision of care in the event of illness or injury can also qualify as a dependant.

This right to time off work is intended to cover genuine emergencies only. There is no limit on the number of times an employee can be absent from work under this right. However, the amount of time off to which an employee is entitled in these circumstances is only that which is 'reasonable' and time off can only be taken for action which is 'necessary'. The employee is required to inform the employer of the reason for absence as soon as reasonably practicable and to inform the employer of the expected length of the absence (unless this is impossible until after he or she returns to work). It is not necessary to give notice in writing. Under the statutory scheme, time off for dependants is unpaid.

If an employee is unreasonably refused permission to take such time off, an employment tribunal claim can be brought. The tribunal may make a declaration that the complaint is well founded and may award compensation having regard to the employer's default and any loss suffered by the employee.

11. Health and Safety at Work

Employers are required to safeguard the health and safety of all their employees by virtue of a variety of detailed obligations to which they are subject, including:

- a common law duty to have regard to employees' safety;
- obligations to consult with elected trade union safety representatives or, where there is no trade union, establish a means of consultation with employees with regard to health and safety matters;
- vicarious liability for accidents caused by employees who are acting in the course of their employment;
- a duty of care owed to employees and other visitors to the premises which the employer occupies;
- where applicable, obligations under the Provision and Use of Work Equipment Regulations 1998, covering such things as safety measures, lighting and cleanliness in factories;
- an obligation to prepare a written health and safety policy;
- a requirement to report accidents, injuries, diseases and dangerous occurrences;
- an obligation to give health and safety representatives facilities and time off for training;
- an obligation to maintain insurance against liability for bodily injury or disease sustained by employees through their employment in the UK; and
- specific obligations concerning health and safety on offshore installations.

12. Sickness

Statutory Sick Pay

Subject to certain exceptions, all employees are entitled to receive statutory sick pay (SSP) from their employer in respect of absences from work due to sickness. The limit on payments of SSP which an employer is required to make to an individual is, generally, 28 weeks' SSP in any three year period. The main requirements for an employee to be entitled to SSP are that the employee must:

- have had four or more consecutive days of sickness during which he or she is too ill to be capable of doing his or her work;
- notify his or her employer of their absence; and
- supply evidence of incapacity. It is not unusual for illness to be self-certificated for periods of absence of four to seven days and thereafter by means of a doctor's certificate (see "Fit Notes" below).

Employees excluded from the right to receive SSP include those:

- engaged for a specified period of less than three months;
- earning less than a specified amount (currently £107 per week);
- who have done no work under their contract;
- who have exhausted their entitlement to 28 weeks' SSP; and
- who are away from work because they are taking part in trade union action or if they are in legal custody.

The amount payable by way of SSP is currently £85.85 per week. SSP is considered as earnings or PAYE, income tax and National Insurance contribution purposes. Employers may be entitled to recover some of the SSP paid to its employees under the Percentage Threshold Scheme. Employers are obliged to keep records for SSP purposes which must be retained for at least three years.

Fit Notes

Medical practitioners called upon to certify an employee's incapacity for work are required to provide their opinion in the form of a "fit note" which assesses the employee as "fit for work", "not fit for work" or "may be fit for some work now". In the final category details may be included about the different types of work the employee is able to perform, including recommendations for a phased return, amended duties, altered hours or workplace adaptations.

A doctor's recommendations in a fit note are not binding and it is a matter for the employer, in consultation with the employee, to consider whether it can accommodate the recommended changes. If a change cannot be accommodated, the same statement is sufficient proof that an employee has a health condition preventing him or her carrying out

the current role. Employers should however be mindful of their duty to make reasonable adjustments in relation to disability (see section 23 below) since a failure to implement a doctor's recommendations to allow for an earlier return to work could expose employers to a claim on that basis.

Access to Medical Reports

The Access to Medical Reports Act 1988 provides that an employer cannot apply for a medical report about an employee from a doctor who has had care of the individual unless the employer has notified the employee that it is proposing to make the application and the employee has consented to the application. The employee must be notified of his or her rights under this legislation. The employee is entitled to give his or her consent on the basis that he or she has the opportunity to see the report before it is supplied to the employer and to prevent it being supplied. The individual has the right to ask the doctor to amend anything which he or she considers to be misleading or inaccurate and, if the doctor refuses, to attach a statement giving his or her comments.

13. Notice Entitlements

There is no concept of employment 'at will' in English employment law. The individual employee's contract of employment may (and should, especially in relation to senior executives) specify the period of notice which the individual is entitled to receive from and required to give to the employer to terminate his or her employment. Certain minimum periods of notice are prescribed by statute which override any lesser contractual notice provision. If there is no explicit contractual term as to notice, employees are entitled to receive and are required to give 'reasonable' notice. This may be more than (but cannot be less than) the applicable statutory minimum period of notice.

Statutory Minimum

The statutory minimum periods of notice that an employer is required to give to an employee are as follows:

- not less than one week's notice for those employees who have been continuously employed for a least one month but less than two years;
- not less than one week's notice per completed year of employment for those with two or more years' continuous service, subject to a maximum of 12 weeks' notice after 12 years' completed service.

The statutory minimum period of notice that an employee is required to give to his or her employer to terminate his or her employment is, after completing one month's service, one week.

Complex rules govern what counts as 'continuous employment' for the purposes of these statutory minimum notice entitlements (as well as rights such as those to maternity leave, statutory redundancy payments and unfair dismissal compensation). For example, these rules preserve the continuity of an employee's employment on a business acquisition and where an employee works successively for different associated or group companies.

Reasonable Notice

If the employee's contract does not specify a notice period, the employee is entitled to receive and required to give 'reasonable' notice. What is 'reasonable' notice depends on the employee's length of service, seniority and salary and the notice periods applicable to similar employees. 'Reasonable' notice may exceed, but cannot be less than, the statutory minimum notice period.

14. Working Time and Holidays

Introduction

The Working Time Regulations 1998 (the "WTR") set out various provisions regulating working hours. The Regulations apply to workers (a wider definition than employees) over the minimum school-leaving age, although certain activities and sectors are currently excluded (including the armed forces). Temporary and agency workers are therefore covered by the regulations but not genuine independent contractors. Special provisions govern young workers (those over the minimum school leaving age but less than 18).

Those who determine their own hours or whose hours are not measured or pre-determined (such as 'managing executives' and family workers) are normally only covered by the annual leave provisions set out in the WTR.

The provisions concerning night work and rest breaks do not apply to special categories of worker, such as those who have to travel long distances between home and work or different workplaces, activities requiring continuous service or production and certain other specified areas. 'Compensatory rest' should be provided in these circumstances or where a collective or workforce agreement has varied the rules.

Statutory duties are imposed on employers to ensure compliance with the relevant provisions, to prevent night workers being exposed to hazards and physical or mental strain and to ensure that a person whose work puts his health and safety at risk is given adequate breaks. Liability for psychiatric injury caused by stress at work is generally no different in principle from liability for physical injury. Breach of these statutory duties can lead to claims for civil damages and constructive dismissal.

48-Hour Week

Under the WTR, the maximum number of hours that a worker may work, on average, in one week is 48. This limitation does not apply to autonomous 'managing executives' who have the ability to determine their own hours. 'Average' hours are calculated over a 17-week period (subject to exceptions and a standard formula) but this can be adjusted by agreement between employers and workers. Individuals can, however, voluntarily agree to 'opt-out' of the 48-hour week. A worker may opt back into the statutory protection at any time by giving a minimum of seven days' notice (although the employer and worker may agree to a longer notice period, not exceeding three months). Employers are required to retain any 'opt-out' agreements (which should be in writing).

Night Workers

A night worker is any person who works for at least three hours during "night time" on the majority of their shifts, or does so "as a normal course". Night time is defined in the WTR as the period between 23.00 and 06.00. It is possible, however, for an employer and an employee to agree an alternative definition of "night time" as long as it lasts at least seven hours and includes the hours between midnight and 05.00. Night workers are subject to a limit of an average of eight hours' work in each 24-hour period. Again, the standard averaging period is 17 weeks (and a formula is provided) but can be extended by agreement. Night workers whose work involves special hazards or heavy physical or mental strain may not work

more than eight hours in each 24-hour period. Adult night workers are entitled to a free health assessment (and young workers to a health and capacities assessment) before being transferred to night work. Free assessments must be provided periodically after such a transfer.

Night workers should be transferred to day work (if available) if health problems arise which are connected with the fact that the worker performs night work.

Weekly and Daily Rest Periods

In terms of 'weekly rest', adults are normally entitled to a day off each week and young workers to two days off. In terms of 'daily rest', adult workers are normally entitled to 11 hours' consecutive rest per day and young workers to 12 hours' consecutive rest per day. In terms of 'rest breaks', adult workers are normally entitled to a minimum 20-minute rest break if their working day is longer than six hours. Young workers are entitled to a minimum 30-minute rest break if their working day is longer than four and a half hours.

Holidays

Workers have the statutory right to 28 days' holiday per annum—when assessing compliance with this provision, public holidays count towards the 28-day entitlement. An employer may give notice in advance of any particular days during which the worker is required to take or not to take his statutory holiday leave. Many employers provide holiday in excess of this entitlement but this is a contractual matter.

General

Collective agreements with trade unions or workforce agreements (reached with workers or their representatives) can disapply or vary some of the provisions of the WTR. Special provisions govern the valid election of representatives to act on behalf of workers in agreeing variations to the different rules.

Unusual and unforeseeable circumstances beyond the employer's control can allow employers to require work which would otherwise be in breach of the WTR.

Health and safety authorities are entitled to enforce the weekly working time and night work limits, together with the employer's obligations to keep records (prosecutions can result). Individual entitlements to rest periods, breaks and paid annual leave etc., are enforced by individuals through the employment tribunals.

The WTR also impose various record keeping obligations on employers in order to enable monitoring to take place. The records should be 'adequate to show' whether the various limitations are being complied with and should be kept for a minimum of two years.

Dismissal for a reason relating to the WTR is automatically unfair and requires no qualifying period of employment. It is also unlawful to subject a worker to any detriment as a result of any refusal to opt out of the limit on working hours or a decision to opt back in, and that compensation may be awarded by the employment tribunal for such treatment.

15. Flexible, Part-Time and Fixed-Term Working

Overview

Any male or female employee with a child under 17 (or a disabled child under 18) with responsibility for that child's upbringing and 26 weeks' continuous employment has the right to request to work flexibly to enable him or her to care for that child. Employees caring for adults may also make a flexible working request. The adult must either be married to, the civil partner of or partner of the employee, a relative of the employee or living at the same address as the employee. 'Relative' is defined very widely and includes adoptive relationships and relationships of half-blood. Flexible working includes, for example, a change to the hours or times an employee works or for flexible working from home.

Procedure

An employee making a request for flexible working should do so in writing. Within 28 days of receipt of the request the employer must either confirm acceptance of the request in writing or meet with the employee to discuss the request in more detail. The employee may be accompanied to the meeting by a colleague. A request can only be made once every 12 months under the statutory scheme.

Within 14 days of the meeting the employer must write to the employee, giving either an agreed new work pattern and start date, or alternatively providing details of the reasons for rejection of the request and setting out the appeal procedure. If the employer accepts the request it will, unless otherwise agreed, result in a permanent change to the employee's working pattern. If the employee wishes to appeal against the employer's decision to reject a flexible working request he or she must do so in writing within 14 days.

Refusal

There are certain specified business grounds on the basis of which an application for flexible working can be refused by an employer. These are:

- the burden of additional costs;
- the detrimental effect on the employer's ability to meet customer demand;
- the employer's inability to re-organise work among existing staff;
- the employer's inability to recruit additional staff;
- a detrimental impact on quality or on performance;
- an insufficiency of work during the periods the employee proposes to work;
- planned structural changes; and
- such other grounds as the Secretary of State may specify by regulations.

Remedy

An employee may only complain to the employment tribunal under the flexible working regime on the basis that the employer failed to follow the correct procedure or that its decision was based on incorrect facts. An employee is not able to challenge an employer's decision on the basis that it was unreasonable or unfair. In terms of remedy, the tribunal may award up to eight weeks' pay if a complaint succeeds (currently capped at a maximum of £430 a week) and/or reconsideration of the request following the correct procedure. The employment tribunal cannot order the employer to allow the employee to work flexibly.

That said, employers should exercise some caution when dealing with flexible working requests. Unreasonably refusing a request may amount to a breach of trust and confidence entitling the employee to resign and claim constructive dismissal. Alternatively the refusal may amount to indirect sex discrimination.

Part-Time Workers

It is unlawful to treat part-time workers (including part-time home workers, agency workers and contract workers) less favourably than full-timers unless the treatment is justified on objective grounds. Such treatment will include, for example, less favourable terms and conditions of employment, pay, training opportunities, annual leave entitlement, contractual maternity leave and parental leave benefit. In determining whether a part-time worker has been treated less favourably, the 'pro rata' principle is applied unless this is inappropriate. This means that a part-time worker is entitled to receive not less than a pro rata entitlement to pay or any other benefits when compared with a comparable full time employee. For example, if a full-time worker is entitled to 25 days' holiday per year, a part-time worker working three days a week is entitled to not less than 15 days' holiday per year.

Part-time workers may compare themselves to full-time workers working for the same employer irrespective of whether either party's contract is permanent or fixed-term. A comparable full-timer must be engaged in broadly similar work, taking into account qualifications, skills and experience, etc. Employees who change to part-time work (for example, after maternity leave or other absence) are able to compare their part-time conditions with their previous full-time contract (unless the period of absence exceeds 12 months).

Part-time workers can request a written statement of reasons for their treatment from their employer if they believe they are being treated less favourably than a comparable full-timer worker. The employer must respond within 21 days giving particulars of the reasons for the treatment. Failure to comply with this may entitle the employment tribunal to draw inferences as to the infringement of the relevant right.

It is unlawful to dismiss a worker or subject him or her to a detriment (such as, for example, a refusal to provide promotion and pay rises) for relying on these rights.

Fixed-Term Employees

Fixed-term employees (which include employees on contracts which last for a definite period of time or end on completion of a specific task or the occurrence (or non-occurrence) of a specific event) are entitled not to be treated less favourably than comparable permanent employees on the grounds that they are employed for a fixed-term, unless such treatment is objectively justified. Employers can either seek objectively to justify a less favourable term or, alternatively, argue that less favourable

treatment is justified on the basis that, in terms of the fixed-term employee's contract taken as a whole, it is at least as favourable as a permanent employee's package. Fixed-term employees can compare their terms and conditions to permanent employees who are employed by the same employer to do the same or similar work. The comparator should have similar skills and qualifications.

Fixed-term employees can request a written statement of reasons for their treatment if they believe they are being treated less favourably than a comparable permanent employee, to which the employer must respond within 21 days.

An employee may be re-employed continually under successive fixed-term contracts. However, once the individual has been employed for four years on such a basis he or she will be deemed to be a permanent employee unless the continued use of a fixed-term contract is objectively justified.

Fixed-term employees are entitled to receive details of any permanent vacancies which the employer has. Further, fixed-term employees on contracts of three months or less are entitled to statutory sick pay and payments on medical suspension as well as guarantee payments. They are also entitled to give (and to receive) statutory minimum periods of notice of termination of their employment.

16. Agency Workers

Introduction

Temporary agency workers are entitled to certain working and employment conditions as if they had been employed directly by the hirer (i.e. the end user of the agency worker) to perform the same or a similar role. The regime governing these rights is contained in the Agency Workers Regulations 2010 (the "Regulations").

To Whom do the Regulations Apply?

The Regulations apply to workers who have a contract with a temporary work agency which is either a contract of employment with the agency or any other contract to perform work or services personally for the agency.

The Regulations do not apply where the agency or the hirer is a client or customer of a professional business carried on by the individual in question or to individuals who are genuinely self-employed.

Rights From Day 1

From the outset of a temporary work assignment, an agency worker is entitled to:

- access information on the hirer's vacant permanent roles such that the worker has the same opportunity as a comparable permanent employee or worker to apply. A hirer may satisfy this requirement by providing the information in a general format such as on its intranet site, general notice board or by an all staff email; and

- enjoy access to the hirer's collective facilities and amenities as though he or she were a permanent employee or worker. For these purposes, facilities include a canteen, crèche and transport services. Less favourable treatment afforded to agency workers in respect of access to these sorts of facilities may be justified but only on objective grounds.

Rights From Week 12

Following 12 weeks of service with the hirer, an agency worker is entitled to enjoy the same "basic working and employment" conditions to which he or she would have been entitled had he or she been engaged permanently by the hirer to do the same or a broadly similar job as the temporary assignment.

A hirer is deemed to have complied with its obligations if it can show that an agency worker is working under the same terms and conditions as a comparable employee and those terms are ordinarily applied to comparable employees.

The agency worker is not entitled to equal treatment in respect of all terms and conditions, but only to basic working and employment conditions, i.e. those which relate to pay, working time, night work, rest periods, rest breaks and annual leave.

For the purposes of the Regulations, "pay" means any sum payable in connection with the work carried out, such as salary or wages, holiday pay, overtime pay, commission and incentive bonuses referable to individual performance or contribution. Certain payments are excluded from this definition, such as benefits in kind, sick pay, redundancy pay and maternity pay.

Continuity of the 12 week qualifying period is broken if the agency worker starts a new and substantively different role with the same hirer for which a work description (effectively demonstrating that the job is substantively different) is provided in writing.

Various specific types of absence do not count towards completion of the 12-week continuity qualifying period, but do not break its continuity, such as an absence for any reason of up to six weeks, sick leave for up to 28 weeks and maternity leave.

The Regulations include specific anti-avoidance provisions which prevent the hirer from structuring temporary work assignments in such a way so as to prevent an agency worker of acquiring the right to equal working conditions.

Maternity Protections

The Regulations confer additional rights, following the 12 week qualifying period, on a temporary agency worker who is pregnant, breastfeeding or who has given birth within the previous six months providing she has notified the hirer and the agency of her situation.

A pregnant temporary agency worker is entitled to reasonable paid time off during her working hours to attend ante-natal appointments. In addition, hirers are under a duty to alter the working conditions of workers who are pregnant, breastfeeding or who have recently given birth to avoid risks. If potential alterations are not reasonable or do not remove the relevant risks the hirer must inform the agency which must in turn stop supplying the worker. The agency is then required to offer appropriate alternative work on terms which are not substantially less favourable than, and for the same period as, the original assignment. If no alternative work can be found, the agency is required to pay the worker for the remainder of the original assignment unless she unreasonably refuses a suitable alternative assignment.

Who is Liable - Hirer or Agency?

The agency is usually responsible for breaches of an agency worker's right to equal basic working and employment conditions. However, the agency has a defence to a complaint if it can show that it took reasonable steps to obtain relevant information from the hirer and, when it received the information, it acted reasonably in determining the conditions which would apply to the temporary worker. Liability passes to the hirer if it provided inaccurate information to the agency or failed to update the agency of any changes to relevant employment conditions.

The hirer is liable for any breach of the obligation to provide access to job vacancy information and/or collective facilities and amenities.

Right to Information on Equal Treatment

An agency worker who considers an agency has breached his or her right to equal basic working conditions is able to make a request for information to the agency about his or her treatment compared with the hirer's permanent employees. An agency has 28 days to respond to the information requested. If the agency worker does not receive a response from the agency he or she can request the information from the hirer.

An agency worker who believes his or her right to access to the hirer's permanent employment vacancies and/or facilities has been breached may make a written request to a hirer for a written statement outlining the rights of a comparable employee and the reasons for the alleged less favourable treatment. A hirer has 28 days to respond.

Where an agency or a hirer fails to respond or provides a clearly inadequate response to the request for information a tribunal is entitled to draw adverse inferences.

Tribunal Complaints and Remedies

An agency worker can issue a complaint in the employment tribunal that a hirer has breached its obligation to provide access to permanent employment vacancy information and facilities and/or against an agency for breach of its obligation to provide equal basic working conditions. An agency worker can also bring a complaint that he or she has been subjected to a detriment for asserting rights under the Regulations.

If the agency worker succeeds in his or her complaint, the employment tribunal can:

- make a declaration as to the worker's rights;
- award compensation for loss suffered by the worker (usually a minimum of two weeks' pay for a breach of basic working and employment conditions); and
- recommend action to remove or reduce the adverse effect of the breach on the worker.

An agency worker who is an employee is automatically unfairly dismissed if he or she can show that the reason for dismissal was that he or she asserted rights under the Regulations. The usual principles of unfair dismissal compensation apply in these circumstances: the employee is entitled to a basic award plus a compensatory award based upon his or her loss, currently capped at £72,300.

An employment tribunal may make an additional award of up to £5,000 if it finds that "a structure of assignments" has been implemented so as to deprive an agency worker of his or her rights under the Regulations. The award may be made against the hirer or the agency or both according to the tribunal's assessment of where responsibility lies.

17. Stakeholder Pensions

Requirement

There is currently no requirement for employers to contribute to employees' pension schemes (other than in relation to the continuation of pension entitlements after the change of employer consequent upon a transaction falling within the scope of undertakings legislation). Employers are nonetheless, unless they are exempt, required to provide stakeholder pensions. These do not require any actual employer contribution—the requirement is simply to set up a pension scheme to which employees can contribute. These pensions are designed to be flexible, securely funded and good value. One condition for approval is that annual expenses do not exceed a certain level (at present this is 1% of the fund value for a stakeholder scheme established before 6 April 2005, and 1.5% for new stakeholder pensions set up on or after 6 April 2005, reducing to 1% after 10 years). Stakeholder schemes are usually provided by financial services companies and affinity groups, such as employer federations and trade unions, and provide pensions on a money purchase basis.

Exemptions

An employer is exempt from providing access to a stakeholder pension scheme if:

- it has fewer than five employees;
- it has an existing occupational pension scheme providing that employees are permitted to join at any time after a waiting period of not more than 12 months after starting work (if aged over 18) and not within five years of the normal retirement age; or
- as a term of the employment contract, the employer is required to contribute at least 3% of basic pay to a personal pension scheme in respect of each eligible employee (see below) and there are no exit charges to employees.

If an employer is exempted from registering a scheme but subsequently becomes covered by the regulations, that employer will have three months within which to commence provision of a scheme.

An employer is also exempt from providing access to a stakeholder scheme to:

- those employees who earned less than the lower earnings limit for national insurance contribution purposes (currently £107 a week) in each week in the previous three months; and
- those employees who have not worked for the employer for three months or more in a row.

There are detailed restrictions not covered by the scope of this guide that prevent certain employees from making contributions to a stakeholder pension scheme.

The minimum monthly contribution to a stakeholder pension cannot be set higher than £20 (schemes may set a lower minimum contribution if they wish). Employees are entitled to vary or suspend their contributions not more than once in every six months.

18. Automatic Enrolment Pension Scheme

Under the Pensions Act 2008, employers have a duty to automatically enrol eligible jobholders in an automatic enrolment pension scheme. Employers are also obliged to provide certain information jobholders, including information about automatic enrolment, what it means and their right to opt out.

Definition of 'jobholder'

A worker:

- who is working or ordinarily works in Great Britain under the worker's contract;
- who is aged at least 16 and under 75; and
- is paid 'qualifying earnings' by an employer in the relevant pay reference period.

The 'qualifying earnings' band for the 2012/13 tax year comprises annual gross earnings (including bonuses, overtime, sick pay and statutory maternity, paternity and adoption pay) between £5,564 and £42,475. These figures are reviewed annually. Earnings above the qualifying band will not disqualify a worker from 'jobholder' status, but contributions will only be payable on qualifying earnings.

Eligibility of jobholders

Jobholders are eligible if they are:

- aged at least 22;
- have not reached state pension age; and
- receive annual gross earnings of more than £7,475.

The duty to automatically enroll eligible jobholders will not apply if, at the automatic enrolment date, the jobholder is already an active member of a qualifying scheme (a scheme satisfying the qualifying criteria – see below).

Although employers are not under a duty to automatically enroll non-eligible jobholders in the scheme, such jobholders do have the right to opt in.

Jobholders can also opt out of the scheme during the 'opt-out period', which is a period of one month starting from the later of:

- the date when the jobholder first becomes an active member of an occupational pension scheme (or, if they have joined a personal pension scheme, the date when they are first given the scheme terms and conditions); and
- the date when the jobholder is provided with written enrolment information.

Jobholders can opt back in, but can only do so once in a 12-month period. Workers who have opted out of the scheme will be automatically re-enrolled every three years.

Automatic enrolment

Employers must enrol eligible jobholders with effect from the 'automatic enrolment date', which is the first day on which the worker meets the requirements of an eligible jobholder on or after the employer's staging date. Employers have a one month 'joining window' from this date to implement active membership in the scheme for the jobholder (although such membership is with effect from the automatic enrolment date). A jobholder's automatic enrolment date can be postponed for up to three months by giving the relevant jobholder notice.

What is an automatic enrolment scheme?

A pension scheme must meet the following sets of requirements to be considered an automatic enrolment scheme:

- Automatic enrolment criteria – the scheme must not:
  - prevent the employer from making the required arrangements automatically to enrol, opt in or re-enrol a jobholder; nor
  - require the jobholder to express a choice in relation to any matter or to provide any information in order to remain an active member (that is, the scheme must provide a default fund for all jobholders who do not express an opinion or choice).
- Qualifying criteria – the scheme must:
  - be an occupational or a personal pension scheme;
  - be tax-registered under Chapter 2 of Part 4 of the Finance Act 2004; and
  - satisfy the minimum 'quality requirement' in relation to a particular jobholder whilst that jobholder is an active member. This requirement varies depending on pension type; details are set out in sections 20 to 28 of the Pensions Act 2008.

Failure to comply and prohibited conduct

Employers who willfully fail to comply with the duties of automatic enrolment or re-enrolment or the duty to allow jobholders to opt in will commit a criminal offence. Employers cannot ask job applicants whether they intend to opt out of automatic enrolment, as they are prohibited from making any statement to or asking any question of job applicants which indicates (expressly or impliedly) that the application might be affected by whether the applicant intend to opt out.

Staging period

Employers will not be required to comply with the key duties imposed by the automatic enrolment regime until the applicable staging date, which will vary depending on the size of the employer's largest PAYE scheme.

Number of people in largest PAYE scheme	Staging date	Number of people in largest PAYE scheme	Staging date
120,000 or more	1 October 2012	6,000 to 9,999	1 April 2013
50,000 to 119,999	1 November 2012	4,100 to 5,999	1 May 2013
30,000 to 49,999	1 January 2013	4,000 to 4,099	1 June 2013
20,000 to 29,999	1 February 2013	3,000 to 3,999	1 July 2013
10,000 to 19,999	1 March 2013	Fewer than 3,000	To be confirmed

19. Wrongful and Constructive Dismissal

Dismissal Claims – Overview

Leaving aside discrimination claims, an employee may have two claims arising from the termination of his or her employment. One is a claim for wrongful dismissal (i.e. a claim for damages for breach of contract). The other is a claim for unfair dismissal, which is a statutory right afforded to all employees who (save in specified circumstances) have completed a minimum of one year's or, if they started employment on or after 6 April 2012, two years' service. The right not to be unfairly dismissed is distinct from the rights and obligations set out in an employee's contract of employment. A dismissal may be effected in accordance with the employee's contract of employment (e.g. summary dismissal for cause) and still be unfair.

Employees can bring both unfair dismissal and wrongful dismissal claims if eligible to do so. Unlike compensation for wrongful dismissal, however, an employee can recover unfair dismissal compensation even if it represents loss incurred (by way of unemployment or reduced earnings) after the end of the applicable notice period (or, in the case of a summary dismissal, what would have been the employee's notice period).

Constructive dismissal describes the situation where the employee is entitled to treat himself or herself as dismissed by the employer due to its conduct and may lead to claims of both wrongful and unfair dismissal, as explained in further detail at the end of this section.

Wrongful Dismissal

If an employer dismisses an employee in breach of the employee's contract of employment, then the employee may bring proceedings in the High Court, County Court or employment tribunal for wrongful dismissal damages (although in the employment tribunal the maximum award available is £25,000). The employer will also lose the protection of any post-termination restrictive covenants in the employee's contract of employment following a wrongful dismissal. Dismissal without the applicable notice being given will be wrongful assuming that the employer is not entitled to dismiss the employee on the basis of the employee's gross misconduct or other breach of contract.

In the example of an employee being dismissed without having been served with due notice and without the contract entitling the employer to take the step of summary dismissal in the particular circumstances, the employee's claim for wrongful dismissal is for damages representing the value of his or her net salary and benefits during the notice period. In assessing the damages due in respect of such a wrongful dismissal, the dismissed employee is under a duty to use reasonable efforts to mitigate his or her losses by seeking alternative employment. If the employee obtains new employment during what would have been their notice period, any damages to which he or she may be entitled will be reduced to reflect the earnings from the new employment. Further, if the employee fails to make reasonable efforts to seek alternative employment, the damages which he or she recovers will be reduced to reflect this failure.

If the employer has the right under the employee's contract to terminate employment immediately by making a payment in lieu of notice and this right is exercised by the employer, there will be no wrongful dismissal.

Constructive Dismissal

The term "constructive dismissal" describes the situation where an employer commits a fundamental breach of an employee's contract (for example, a unilateral salary reduction or material demotion without the power to take such a step) or its conduct is otherwise so serious as to entitle the employee to resign and treat himself or herself as dismissed. An employee who has been constructively dismissed may bring a wrongful dismissal claim and/ or an unfair dismissal claim.

To be able to claim constructive dismissal, the breach must be serious, the employee must resign in response to it (and not for some other collateral purpose, such as being able to join a new employer) and the employee must not delay resigning for too long (or he or she will be found to have 'waived' or accepted the breach). Employees claiming constructive dismissal will normally (but not always) resign immediately without serving their notice.

An employee can resign in response to a series of breaches of contract or a course of conduct by his or her employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. The test is whether, viewed objectively, the course of conduct demonstrates that the employer over time evinced an intention no longer to be bound by the contract of employment.

Written Reasons for Dismissal

Employees who have been employed for at least one year have the right to receive written reasons for their dismissal if they request them. If the employer fails to provide written reasons for dismissal when requested to do so and has no reasonable excuse for this failure, the employee will be entitled to an award of compensation of two weeks' pay. The employment tribunal may, in a subsequent unfair dismissal claim, draw adverse inferences from a failure by an employer to provide reasons in time when requested to do so.

20. Unfair Dismissal

Unfair Dismissal

In most cases, an employee must have completed one year's continuous service with the employer to be able to claim unfair dismissal. As a result of recent reforms to employment legislation, however, if the employee commenced employment on or after 6 April 2012 they must have completed two years' continuous service in order to claim unfair dismissal. For these purposes, any notice period served out by the employee and, if the employee is dismissed without full notice, the applicable statutory minimum notice period will be taken into account in determining whether a full year's service has been completed. However, an employee is not required to have completed a minimum amount of service in order to be able to claim unfair dismissal in certain specific cases, which include:

- dismissal on grounds of membership of or involvement in a trade union (or non membership or refusal to take part in the activities of a trade union);
- dismissal on grounds of the carrying out of the functions of a health and safety representative or by reason of having raised issues of health and safety, taken appropriate steps to protect others from danger at work or leaving the workplace in circumstances of serious and imminent danger;
- dismissal on grounds of the employee's assertion of a statutory right (such as the right to take time off work or not to have deductions made from his wages without consent); and
- dismissal related to pregnancy.

Dismissal on these specific grounds will be automatically unfair, in which case the employer will only be able to dispute the remedy awarded to the employee and/or the amount of any compensation.

Fair Reason for Dismissal

Where an eligible employee has been dismissed for a reason which is not automatically unfair, in order to defend an unfair dismissal claim the employer must show that the dismissal was fair. To do so, the employer must establish a 'fair reason' for dismissal and show that the dismissal was procedurally fair (see below). The following are fair reasons for dismissal:

- the employee's employment contravenes a duty or restriction imposed by or under an enactment;
- the capability or qualifications of the employee;
- the misconduct of the employee;
- redundancy; or
- 'some other substantial reason' justifying the dismissal of an employee holding the position which that employee held (this is a residual category which covers, for example, dismissal on a reorganisation or refusal to accept new terms).

The employer must also (save in cases of retirement, where a specific procedure applies which is described later in this guide) establish that in all the circumstances it acted within the 'range of reasonable responses' in treating the potentially fair reason for dismissal as justifying termination.

Fair Procedure

A dismissal may be unfair if the employer does not follow an appropriate procedure prior to dismissal. What is 'fair' depends upon the individual circumstances of the dismissal.

In cases of poor performance, the employer should normally go through a warning process, whereby, during the course of appropriate disciplinary/review meetings, the employee is informed of the aspects of his or her performance which are unsatisfactory, given details of the improvement(s) required and the time scale for the improvement. If the employee continues to perform poorly, prior to dismissal the employer should hold further meetings and give the employee appropriate additional warnings/opportunities to improve.

In cases of ill health, the employer should obtain a prognosis of the medical position, consult with the employee as to whether any suitable alternative employment is available and fully consider the needs of its business before dismissal. In ill health situations the risk of a claim of unlawful disability discrimination may also need to be considered.

In cases of less serious misconduct, the employer may issue the employee with a warning. Further incidents of misconduct should be dealt with by way of further hearings and warnings leading ultimately to dismissal. More serious incidents of misconduct may amount to gross misconduct entitling the employer to dismiss the employee immediately ('summary' dismissal). Only in the most extreme circumstances will immediate dismissal be fair and the employer will need to establish that the misconduct was sufficiently serious to warrant summary dismissal. The employer should, in any event, convene a disciplinary hearing prior to issuing an employee with a warning (or dismissing him or her) during which any allegations are put to the employee and he or she is given the chance fully to state his or her case. A proper investigation to establish a reasonable belief of misconduct justifying dismissal may also be crucial.

The appropriate procedure to follow in a redundancy situation is discussed later in this guide.

ACAS Code

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code") sets out specific requirements for employers to comply with when conducting dismissal procedures. Breach of the ACAS Code has potential consequences for both employers and employees in terms of the compensation awarded in respect of successful statutory employment claims. ACAS has also issued non-statutory guidance on disciplinary and grievance issues, which is explanatory in effect but to which employment tribunals are entitled to refer, and by which they will be influenced, in their consideration of what should constitute good practice.

The ACAS Code aims to establish for employers and employees, in the context of disciplinary and grievance matters, the basic requirements of fairness and the standard of reasonable behaviour in most cases.

Compensation Adjustments

Breach of the ACAS Code can have material financial consequences for employers and employees. If an employer or an employee fails to comply with the provisions of the ACAS Code and that failure is unreasonable, then the employment tribunal will be entitled to adjust the award of compensation made to an employee in a successful employment tribunal claim in respect of the various relevant jurisdictions, such as unfair dismissal and unlawful discrimination. This power is to adjust compensation upwards or downwards by up to 25% (subject, in normal unfair dismissal cases, to the maximum compensatory award of £72,300 discussed in more detail below). The employment tribunal may make such an adjustment if it considers that it is just and equitable to do so in all the circumstances of the particular case and will take into account the size and resources of the employer in reaching its decision. The availability of compensation uplifts reinforces the importance of following proper procedures in handling disciplinary and grievance issues (especially in discrimination cases where compensation is unlimited).

Disciplinary Situations – General Principles

So far as disciplinary situations are concerned, the ACAS Code makes clear that, for its purposes, its provisions extend to misconduct and/or poor performance. The general principles established by the ACAS Code to be borne in mind when dealing with disciplinary situations are as follows:

- Promptness – meetings should be held without unreasonable delay whilst allowing the employee reasonable time to prepare his or her case.
- Consistency – employers should approach disciplinary situations and apply sanctions consistently.
- Investigation – employers may need to conduct investigations to establish the facts of the case.
- Informing – the employer should inform the employee of the problem as part of the process.
- State case – the employee should be given the proper opportunity to state his or her case.
- Companion – employees have the right to be accompanied to any formal meeting.
- Appeal – there should be a right of appeal at each stage.

Disciplinary Situations – Particular Issues

The ACAS Code's guidance on disciplinary matters raises a number of particular issues that need to be borne in mind by employers:

- The ACAS Code does not of itself apply to capability or sickness dismissals (although it indicates that it provides the basic principles of fairness for those situations).
- In principle, different people should conduct the investigatory and disciplinary hearing stages.

- So far as witness statements are concerned, the principle is that an employee being put through a disciplinary process should be given sufficient information in order to enable the employee to prepare. This may require the provision of witness statements to the employee.

- The ACAS Code also makes clear that, in cases of persistent non-attendance at disciplinary meetings without good cause, an employer may be entitled to proceed to make a decision about a disciplinary action on the basis of the information available to it.

- With regard to the issue of whether employees are entitled to be accompanied to investigatory (as opposed to disciplinary) meetings, the ACAS Code does not require this nor does it suggest that it is good practice. The ACAS Code provides that a companion "may be allowed".

- Warnings should specify their duration, the nature of the problem, the required improvement (with a timescale) and set out the consequences of further issues arising.

- Employers should not normally dismiss for a first offence save in cases of gross misconduct.

- A criminal conviction should not of itself be a reason for disciplinary action. The employer should focus on the impact of the conviction on the employee's ability to do the job in question.

- If disciplinary action is proposed in relation to a trade union representative, then it is recommended that (with that representative's agreement) the employer discuss the matter direct with the union at an early stage.

- Suspension should be as brief as possible and it should be made clear that suspension on full pay is not a disciplinary sanction.

- Disciplinary procedures should give examples of gross misconduct.

Witnesses

So far as the role of witnesses in disciplinary hearings is concerned, the ACAS Code provides that:

- Employees should have a reasonable opportunity to call witnesses.
- Employees should have an opportunity to raise points about the information provided by witnesses.
- Where an employer or employee intends to call witnesses, advance notice should be given of this intention.

Overlapping Grievances and Disciplinary Processes

Where a grievance is lodged in connection with an ongoing disciplinary process, the ACAS Code indicates that it may be appropriate to suspend the disciplinary process pending resolution of the relevant grievance or for the grievance and disciplinary process to be conducted concurrently. Employers will still need to consider carefully whether a grievance potentially affects the ongoing disciplinary procedure sufficiently that the grievance needs to be resolved first in order for the disciplinary process then to proceed without being open to undue criticism.

Companions

The ACAS Code refers to the statutory right (see Section 20) of an employee to be accompanied to a disciplinary or grievance meeting by a fellow employee or trade union representative. The fact that the ACAS Code reflects this statutory requirement as part of its own requirements potentially leaves an employer open to a double penalty if the right is breached (i.e. the two weeks' pay award payable under the Employment Rights Act 1999 for failure to allow an employee to be accompanied, together with the compensation uplift that is available for unreasonable breach of the ACAS Code). The ACAS Code also makes clear that an employee's request to be accompanied may not be reasonable if the attendance of the proposed companion would prejudice the hearing or if the proposed companion is from a remote geographical location and a suitable and willing alternative is available on site.

General Requirements

The ACAS Code emphasises the need for manager training and to ensure that employees are aware of the relevant procedures which the employer adopts. Since, in order to comply with the obligations imposed by Section 1 of the Employment Rights Act 1996, employees also need to be made aware of where disciplinary and grievance rules can be located, it will be sensible to notify staff of the introduction of new rules in any event.

The ACAS Code recommends that employers should have separate policies on bullying, harassment and whistleblowing.

The ACAS Code also recommends that employers' disciplinary and grievance policies should be set down in writing, should be specific and clear and that employees or their representatives should be involved in the development of employers' policies.

Unfair Dismissal Remedies

An employee who has been unfairly dismissed may seek compensation, reinstatement in his or her old job or reengagement with his employer. Reinstatement and reengagement are rarely awarded.

Unfair dismissal compensation comprises two elements. The first is the 'basic award' which is calculated by reference to a statutory formula based on the employee's age, weekly wage (subject to a maximum of £430 per week currently) and length of service (subject to a maximum of 20 years' service). The maximum basic award (for an individual who has completed 20 years' service and is aged 61 or above) is currently £12,900. This basic award is not payable to an unfairly dismissed employee if the employee has been dismissed by reason of redundancy and has received the statutory redundancy payment (which is calculated on the same basis).

The second element is the 'compensatory award'. The maximum compensatory award is reviewed annually and is currently £72,300 although in relation to certain specific unfair dismissal claims relating to matters such as health and safety and whistleblowing, the limit does not apply. Specific enhanced penalties also apply in cases of automatic unfair dismissal on union grounds. The extent to which an employee can recover this sum depends on establishing that he or she has suffered (or will suffer) that level of loss by reason of unemployment or reduced earnings after termination of employment and could not reasonably have (and has not) mitigated that loss by finding alternative employment. The issue of actual or potential mitigation is therefore crucial. Compensation may also be increased or decreased if either the employee or employer did not follow the applicable statutory procedure (subject always to the above cap on the compensatory award). Further, even if the employee's dismissal is held to be unfair (for example, due to an inadequate procedure), the employment tribunal may reduce the award of compensation to reflect the individual's contributory fault by reason of his or her conduct.

Other than in respect of an award for loss of statutory rights, compensation for unfair dismissal cannot extend beyond financial loss and does not cover injury to feelings. This means that damages for distress, humiliation, damage to family life and damage to reputation in the community will not be awarded in unfair dismissal claims. Awards for injury to feelings are available in claims of unlawful discrimination.

21. Grievances

Employers have an implied contractual duty to afford a reasonable opportunity to their employees to obtain redress of any grievance. It is therefore likely to be a fundamental breach of contract if an employer ignores an employee's grievance or significantly delays in dealing with a grievance. A fundamental breach such as this risks the employee resigning in response and claiming constructive dismissal.

The ACAS Code also sets out various principles which are intended to help employers and employees resolve grievances effectively in the workplace, breach of which can (in the relevant claims) have the compensation consequences described in Section 18:

- Employers should seek informal resolution of their employees' grievances.
- Employees should raise their grievances in writing, setting out the nature of their complaints, and should direct the grievance to a manager who is not the subject of the grievance.
- A grievance hearing should be held at which the employee has the right to be accompanied by a fellow worker or trade union representative.
- There should not be an unreasonable delay in convening the meeting and the employee should be notified in advance of its time and place.
- The employer should seek the employee's view on how the grievance should be resolved.
- There should be an appeal against any grievance decision to a manager not previously involved.

22. The Right to be Accompanied to Disciplinary and Grievance Hearings

Introduction

Workers (a concept which has a wider definition than that of employees) have the right to be accompanied to a disciplinary or grievance hearing by a trade union official or work colleague. The financial penalty on employers for failure to permit the reasonable exercise of this right is two weeks' pay (subject to the statutory limit on a week's pay which is currently £430 and is reviewed annually). Failure to honour this right can also lead to an adjustment to compensation for breach of the ACAS Code (see Section 18). Failing to allow a worker to exercise this right may also have potential consequences in any related unfair dismissal proceedings as employment tribunals may be influenced, in considering the procedural fairness of a dismissal, by a failure to honour this right.

Definition of Disciplinary Hearing

For the purposes of this right, a disciplinary hearing is a hearing which:

- could result in the administration of a formal warning;
- could result in the taking of some other action by the employer;
- could result in the confirmation of a warning issued or other action taken.

Definition of Grievance Hearing

A grievance hearing is a hearing which concerns 'the performance of a duty by the employer in relation to a worker'. The subject matter of the grievance need not relate only to the particular worker who raises a complaint (i.e. it can relate to another worker's treatment). A grievance hearing will include meetings held as part of the statutory grievance procedure and will include grievance meetings held after the worker has left the employment.

ACAS Code

This right to be accompanied applies in relation to disciplinary and grievance procedures held in compliance with the ACAS Code on Disciplinary and Grievance Procedures.
Consequently, failure to allow an employee to exercise the right to be accompanied can lead to compensation uplifts as described in more detail in section 18.

Right to Request

Where a worker is 'invited or required' to attend a disciplinary or grievance hearing, he or she may 'reasonably' request to be accompanied by a worker or a trade union official. The trade union official may be a colleague who has been elected as a trade union representative (i.e. a shop steward). He or she may, however, be an employed official and therefore external to the employer's organisation. The following detailed provisions apply:

- there can only be one companion;

- the companion is permitted to confer with the worker during the hearing;
- the companion may address the hearing in order to put or sum up the worker's case and may respond on their behalf to any view expressed at the hearing. The representative may not answer questions on the worker's behalf, however, and must not address the hearing if the worker does not want them to;
- if the chosen companion is unavailable and the worker proposes an alternative time which is 'reasonable' and within five working days of the originally scheduled hearing, the employer must postpone the original hearing. The five days may be extended by mutual consent, but the employer is only under a duty to rearrange the hearing once to accommodate the companion; and
- a fellow worker chosen to act as a 'companion' in these circumstances is entitled to paid time off work.

A worker who relies on this right or who acts as a companion is entitled to compensation if subjected to a detriment as a consequence and, if dismissed as a result, can claim automatic unfair dismissal regardless of his or her length of service. Interim relief (i.e. an application to the tribunal to order the employer not to dismiss the worker until the complaint is resolved) is also available.

23. Redundancy

Introduction

A redundancy situation arises where the employer has (or anticipates that it will have) a reduced requirement for employees carrying out a particular type of work (e.g. a downsizing), or where an employer ceases to carry on the sort of work which the employees were engaged to do at the place where they were originally employed (e.g. a site closure).

Redundancy Payments

In principle, on dismissal due to redundancy, in addition to any rights which the employee may have to a particular period of notice of termination and potentially to claim unfair dismissal, he or she is normally entitled to a statutory redundancy payment. This is calculated on the same statutory formula as the basic award for unfair dismissal. Only employees who have been employed for at least two years and are dismissed by reason of redundancy are entitled to this payment.

Claims on Redundancy

The termination of an individual's employment by reason of redundancy constitutes a dismissal for statutory employment law purposes. The employee may therefore be able to claim unfair dismissal (regardless of length of service) if the reason for the individual's selection for redundancy is one which gives rise to automatic unfair dismissal (as described above). An individual made redundant may also be able to claim unfair dismissal if he or she has completed one year's service (or two years if they commenced employment on or after 6 April 2012).

For a dismissal on the grounds of redundancy to be fair an employer will need to show that:

- there was a genuine redundancy (e.g. a redundancy situation was not simply engineered to enable the employer to dismiss an employee who, for example, does not 'fit in');
- the employer explored the possibility of alternative employment within the employer's business and group with the employee;
- the employer selected the employee fairly for redundancy on the basis of criteria that are both objective and objectively applied; and/or
- the employer consulted properly with the employee in advance of the employee being made redundant.

If alternative employment is offered, the employee has a statutory four week trial period in the new job. If the new job is suitable but the employee unreasonably refuses it, he or she will lose the right to receive a statutory redundancy payment.

Collective Consultation

Collective consultation obligations may also arise in relation to a redundancy exercise. If 20 or more employees are to be dismissed for redundancy at one establishment in a 90-day period, the employer must consult with 'appropriate representatives'. Consultation must begin 30 days or, if more than 100 employees are being dismissed, 90 days before any employee is dismissed. This period must be completed before notices of dismissal are given. Failure to consult for this period renders the employer liable to

pay a protective award of up to 90 days' gross pay to each employee affected, depending on the employment tribunal's view of the seriousness of the employer's default. The employer must also notify the Department of Business Innovation and Skills on Form HR1 of the proposed redundancies when it begins consultation. Failure to do so is a criminal offence.

Consultation should start 'in good time' (and in any event in accordance with the timescale described above) and ideally should cover:

- an explanation for the need for redundancy;
- agreement as to the steps to be taken to avoid redundancies;
- agreement on selection criteria;
- the availability of suitable alternative employment; and
- the timetable.

Prior to commencing consultation, the employer must give in writing to the appropriate representatives:

- the reasons for the proposals;
- the number and descriptions of the employees whom it proposes to dismiss as redundant;
- the total number of employees of any such description employed by the employer at the establishment in question;
- the proposed method of selection;
- the proposed method of carrying out dismissal; and
- the method of calculating redundancy entitlements.

For these purposes, appropriate representatives are either representatives of an independent union (if recognised for collective bargaining purposes) or employee representatives elected by the employees for that purpose in accordance with a detailed statutory regime. If there are no unions or any existing appropriate representatives, employees must be given the opportunity to elect representatives. If a union is recognised, the employer must deal with it.

24. Deductions from Wages

Unlawful Deductions from Wages

An employer may not deduct monies from a worker's wages unless it is required or permitted to do so by a statutory requirement or provision (such as tax withholding obligations) or a contractual provision or the worker has given his or her prior written consent.

If impermissible deductions are made, the worker may make a complaint to the employment tribunal and seek compensation. If the employer is ordered to repay the sums which it has wrongfully deducted, it is debarred from recovering those sums by any other means, such as a County Court action.

There are certain exceptions to these provisions, the most important of which relates to deductions relating to overpayments of wages or expenses (in which case the employer is permitted to make deductions without prior written authorisation).

Retail Workers

Specific provisions relate to the wages of workers in retail employment. These provisions extend to employment involving the carrying on by workers of retail transactions directly with members of the public. The employer of a worker in retail employment may not deduct for cash shortages or stock deficiencies more than one-tenth of the gross wages payable to the worker on a particular pay day. The employer must make such a deduction, or the first in a series of deductions relating to a particular shortage or deficiency, not more than 12 months after the date when it discovered or ought reasonably to have discovered the shortage or deficiency. In addition, the employer of a worker in retail employment may not receive from the worker any payment on account of a cash shortage or stock deficiency unless certain requirements are met.

25. Unlawful Discrimination

Introduction

The United Kingdom's discrimination legislation is now contained in the Equality Act 2010. There are numerous 'protected characteristics' in respect of which discrimination in the employment context is unlawful: sex, pregnancy, marital status, sexual orientation, race, nationality, religion or belief, disability, age, civil partnership and gender reassignment. Protection from less favourable treatment is also offered to other groups such as part-time workers and fixed-term employees, which are dealt with elsewhere in this guide.

Discrimination is also prohibited not just against an individual who has that protected characteristic, but also on grounds of:

- the association of an individual with someone who has a protected characteristic (such as less favourable treatment of an employee because they take time off to care for their disabled child); and

- the perception that an individual possesses a protected characteristic (such as less favourable treatment of a man because the employer believes he is gay when he actually is not).

If an employer unlawfully discriminates against an employee, the individual may be able to recover compensation by bringing a claim in the employment tribunal. There is no cap or limit upon the compensation which can be recovered. This compensation reflects an individual's loss of earnings, but can also involve an award of damages for injury to feelings of between £600 and £30,000, depending upon the nature and extent of the discrimination suffered. In extreme cases, aggravated or exemplary damages may be awarded. The tribunal may also make a declaration of the complainant's rights and make a non-binding recommendation of steps to be taken by the employer to reduce or eliminate the adverse effect of discrimination in the workplace (for example, by introducing an equal opportunities policy). Failure to comply with such a recommendation could be used as evidence to support future discrimination claims.

An employee does not need to be employed for a minimum period in order to bring a claim of unlawful discrimination. Job applicants, workers and contractors are also protected from unlawful discrimination.

In discrimination cases, once the complainant has established facts from which discrimination could be inferred (i.e. differential treatment), the burden of proof to show that unlawful discrimination did not occur falls on the employer.

Key Concepts in Discrimination Law

The specific types of discrimination are explored in more detail below. There are, however, several concepts common to the various types of unlawful discrimination:

- Direct discrimination: 'Direct' discrimination occurs where, because of a protected characteristic, an individual is treated less favourably than the employer treats or would treat others. Refusing to employ, promote or provide training to an individual simply because they are, for example, female, Muslim or gay amounts to direct discrimination. Unlike indirect discrimination (see below), where an employer has directly discriminated, it cannot (save in relation to age discrimination) defend its actions by arguing that the less favourable treatment is objectively justified.

- Indirect discrimination: 'Indirect' discrimination occurs where an employer (or prospective employer) applies a 'provision, criterion or practice' (PCP) which is discriminatory in relation to an individual's protected characteristic. A PCP is discriminatory if it appears to apply equally to all individuals but in fact puts a protected group of individuals (such as women or disabled individuals) at a particular disadvantage (and the individual is also subjected to that disadvantage). The employer has a defence to a claim of indirect discrimination, however, if it can show that the PCP is a "proportionate means of achieving a legitimate aim." This means that the aim in question should be a real need of the employer, and the PCP must be appropriate with a view to achieving that objective. If there is a less or non-discriminatory way of achieving the aim the employer will not be able to take advantage of the defence.

- Victimisation: It is also unlawful to commit any act of victimisation. Victimisation occurs where an individual is subjected to a detriment because he or she has instituted proceedings under the relevant discrimination legislation, given evidence in connection with such proceedings, done anything else by reference to the relevant anti-discrimination legislation or has alleged that the discriminator has committed an act in contravention of the legislation (or intends to do any of these things). Victimisation also occurs if the employer believes that an individual has done, or may do, any of these things. Provided that an allegation is made or information is given in good faith the individual will still be protected, even if the allegation or information in question is actually false.

- Harassment: Harassment is a separate form of unlawful conduct under the Equality Act 2010. A person suffers harassment if he or she has been subjected to 'unwanted conduct' related to a protected characteristic which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment in the workplace. Employers can be liable for harassment of their employees by third parties if the employer has not taken reasonable steps to prevent such treatment and the employer knows that the employee has been harassed on at least two previous occasions.

- Discrimination in the employment field: Discrimination may occur with regard to the arrangements for the purpose of deciding whom should be offered employment (including a refusal to offer someone a job), the terms on which an offer of employment is made, access to promotions, transfers, training or to benefits, facilities or services.

- Occupational requirement: In limited circumstances, an employer may have a defence to a direct discrimination claim if the reliance by the employer in its actions on gender, race, religion, sexual orientation, age or other protected characteristic is an 'occupational qualification' (for example, in the acting profession, or where segregation of sex is required to preserve decency) or privacy.

- Vicarious liability: Employers can be held to be vicariously liable for acts of discrimination committed by their employees during the course of their employment unless the employer can show that it took such steps as were reasonably practicable to prevent the employee from doing the discriminatory act (or other similar acts). This underlines the importance of putting into place, publicising and enforcing a comprehensive equal opportunities policy that is supported within the organisation at the highest level.

- Positive action: an employer may take positive action to achieve greater equality within its workforce where it reasonably considers that:

    - persons who share a protected characteristic suffer a disadvantage connected to the characteristic;

    - persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or

- participation in an activity by persons who share a protected characteristic is disproportionately low.

Employers are therefore permitted to take proportionate steps to:

- enable or encourage persons who share the protected characteristic to overcome or minimise that disadvantage;
- meet those needs; or
- enable or encourage persons who share the protected characteristic to participate in that activity.

The actions that employers can take to minimise or prevent disadvantage and address different needs or under representation amongst its workforce are not limited under the legislation. Some examples include:

- targeting training to specific groups of current employees with different needs;
- organising open days for prospective employees sharing a protected characteristic; or
- mentoring those employees who suffer a disadvantage in connection with a protected characteristic.

Any measures taken need to be justifiable and proportionate.

Employers are also permitted to take a protected characteristic into consideration when deciding who to recruit or promote, where people sharing that protected characteristic are disadvantaged as a result of the characteristic or are underrepresented within its business. This is only permitted where the candidates being considered for recruitment or promotion are as qualified as each other and the employer does not have a policy of automatically choosing people with the protected characteristic in these circumstances.

Protected Characteristics

Sex

Discrimination on the grounds of sex is unlawful in employment and certain other fields. Discrimination on the grounds of marital status, pregnancy or the fact that an employee has taken maternity leave or sought to do so is also unlawful. It is also unlawful to discriminate against a person on the grounds that they intend to undergo, are undergoing or have undergone a sex change. Those who have registered a civil partnership have the right not to be discriminated against on the grounds that they have entered into a civil partnership.

Claims of indirect discrimination in the sex discrimination context can arise, for example, where an employee requests to work part-time on their return to work from maternity leave. If an employer refuses the employee's request, the employee may argue that this amounts to indirect discrimination on the basis that childcare responsibilities fall more on women and it is therefore less easy for them to comply with the requirement of full-time work. The employer then needs to be able objectively to justify its position by showing its position is a proportionate means of achieving a legitimate aim. A more straightforward example of indirect sex discrimination would be an unjustifiable height requirement for a position.

There are two forms of harassment which are specific to sex discrimination: unwanted conduct of a sexual nature and less favourable treatment because an individual submits to or rejects sexual harassment related to sex or gender reassignment.

Race

Discrimination on racial grounds includes discriminating against someone on account of his or her race, ethnic or national origin, colour or nationality.

An example of indirect discrimination in the race discrimination context is a requirement to wear protective headgear, as this is likely to have a disparate effect on Sikhs, although the employer may have a defence if it can demonstrate the requirement is a proportionate way of achieving a legitimate aim (such as health and safety).

Religion or Belief

Discrimination on the grounds of an individual's actual or perceived religion or belief is unlawful. 'Religion or belief' is broadly defined to include 'any religion, a lack of religion, religious or philosophical belief or a lack of belief'.

Disability

One of the more complex aspects of disability discrimination is identifying whether or not a person is disabled. The Equality Act defines a disability as where a person suffers from a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out his or her day-to-day duties. Learning difficulties, if sufficiently serious, can amount to a mental impairment. Individuals with the progressive conditions of HIV, MS and cancer are also considered to be disabled from the point of diagnosis, regardless of whether they are experiencing any symptoms. A substantial long term adverse effect needs to be more than minor or trivial and either to have lasted for 12 months or be likely to last for 12 months or for the rest of the person's life or be likely to recur.

The types of discrimination about which complaints can be brought by employees who are disabled for the purposes of the Equality Act differ in some respects from other types of discrimination. Direct discrimination, indirect discrimination, harassment and victimisation are all unlawful. However, discrimination "arising from" disability and a failure to comply with the duty to make 'reasonable adjustments,' are also unlawful, and these are summarised below.

An employer discrimates against a disabled person unlawfully if that person is treated less favourably because of something arising in consequence of his or her disability. Employers can defend a claim of discrimination arising from disability on the basis of justification for its action (i.e. that its treatment of the complainant was a proportionate means of achieving a legitimate aim) or if it did not know and could not reasonably be expected to know that the complainant had the disability in question.

Employers are under a duty to take reasonable steps to prevent any provision, criterion or practice applied by or on behalf of them or physical features of their premises from placing a disabled applicant for employment or an existing employee at a substantial disadvantage to non-disabled persons. This is known as the duty to make reasonable adjustments. In order to comply with this duty an employer may have to make adjustments to premises, allocate some of the disabled person's duties to another person, transfer the disabled person to fill an existing vacancy (this may include a transfer to a post at a higher grade if the individual concerned has the necessary skills and if there are no posts available at their existing grade), alter the disabled person's working hours, assign him or her to a different place of work, acquire or modify equipment, manuals, procedures and instructions and to provide supervision or training. If a disabled person would, but for the provision of an auxiliary aid, be at a substantial disadvantage in comparison with non-disabled persons, the employer need take such steps as is reasonable to have to take to provide the auxiliary aid.

Employers are also obliged not to ask health-related questions prior to the making of an offer of employment (whether or not conditional) except for the following purposes:

- establishing whether an applicant will be able to comply with a requirement to undergo an interview or other assessment;
- establishing whether a duty to make reasonable adjustments is, or will be, imposed on the employer in relation to an applicant in connection with a requirement to undergo an interview or other assessment;
- establishing whether an applicant will be able to carry out a function that is intrinsic to the work concerned;
- monitoring diversity in the range of persons applying to the employer to work for;
- if the employer applies, in relation to the work, a requirement to have a particular disability, establishing whether an applicant has that disability;
- taking "positive action", as described above enabling disabled people to overcome a disadvantage; and
- vetting of applicants for work for reasons of national security.

These provisions do not prevent employers from asking medical questions or requiring individuals to undergo a medical assessment after an offer has been made but prior to commencement of employment. That said, the withdrawal of an offer of employment based on the results of a medical could still lead to a complaint of unlawful disability discrimination.

If an employer asks an applicant a prohibited health question prior to making an offer of employment, the applicant is not offered the job and then brings a direct disability discrimination claim against the employer as a result, it is for the employer to show that no unlawful discrimination took place. The Equality and Human Rights Commission (EHRC) also has the power to investigate the use of non-permitted questions and take enforcement action where prohibited questions have been used, regardless of whether discrimination has occurred.

Age

Discrimination against an employee on the grounds of age is unlawful. Unlike the United States, it is unlawful to discriminate against all age groups on grounds of age and not just older individuals.

Unlike other protected characteristics, an employer may defend a claim of direct age discrimination by showing that the treatment in question is justified (i.e. it is a proportionate means of achieving a legitimate aim).

Sexual Orientation

Discrimination on the grounds of sexual orientation (whether actual or perceived) is unlawful. 'Sexual orientation' means 'a person's sexual orientation towards persons of the same sex, persons of the opposite sex or persons of either sex.

Equal Pay

Under the Equality Act an 'equality clause' is implied into all contracts of employment. This gives an employee the contractual entitlement to equal pay with a person of the opposite sex employed by the employer at the same establishment (or at another establishment where common terms apply). If an employee can show that he or she is paid less than a member of the opposite sex who does 'like work', 'work rated as equivalent' or 'work of equal value' he or she will have a potential equal pay claim. There is a defence to claims for equal pay if the employer can show that the variation between a woman's pay and a man's pay is genuinely due to a material factor which is not the difference of sex.

Pay Secrecy Clauses

The Equality Act also provides that any secrecy clause which purports to prevent employees from disclosing details of their pay is unenforceable if the employee is making a "relevant pay disclosure". A "relevant pay disclosure" is one made in the context of establishing a connection between pay and having (or not having) a particular protected characteristic.

Employees are able to seek a remedy in the employment tribunal against an employer if they have been the subject of victimisation due to seeking or making a relevant pay disclosure or receiving information from that disclosure. The tribunal can make a declaration of the employee's rights, require payment of any arrears (in the case of pay) or damages (in the case of a non-pay related contractual term).

26. Transfers of Undertakings

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the UK statutory regime under which employees' rights are protected on the transfer of the business in which they work from their current employer (the transferor) to another person (the transferee).

The main effects of TUPE are as follows:

- those employees who are employed in the transferring business automatically become employed by the purchaser;
- certain information must be provided to (and, in some circumstances, consultation must take place with) representatives of affected employees;
- dismissals in connection with the transfer will be automatically unfair unless justified for economic, technical or organisational reasons; and
- the seller is obliged to provide the purchaser with prescribed information in relation to the transferring employees.

TUPE applies where there has been a 'relevant transfer' of an undertaking. It does not apply to share transfers or sales (where the relevant employees remain employed by the company whose shares are the subject of the deal). A 'relevant transfer' occurs where, rather than a share ownership transaction:

- there is a transfer of a business or undertaking (or part thereof) (a 'business transfer'); or
- there is a 'service provision change'. This concept specifically ensures the application of TUPE to outsourcing, re-tendering or bringing work in-house.

Business Transfers

There are two conditions for there to be a business transfer:

- there must be an undertaking. This can be a business or part of a business. It extends to anything which is an economic entity or could be run as one (including an undertaking which is not in the nature of a commercial venture); and
- the undertaking must transfer. In other words, the operation must be continued or resumed after the transfer by the new employer conducting the same or similar activities and the operation must retain its identity.

There are a variety of (non-exhaustive) factors which are relevant in deciding whether a business transfer has occurred:

- whether buildings, moveable property and goodwill have changed hands;

- the value of the intangible assets in the undertaking at the time of the transfer;
- whether employees and/or customers have been taken over; and
- the degree of similarity between the activities carried on before and after the transfer and the extent of any disruption. The mere fact that an undertaking is absorbed into the existing operations of the putative transferee will not of itself avoid the conclusion that TUPE applies.

Whether there has been a business transfer of an undertaking is an issue that will be examined by a court or tribunal in light of all the relevant facts and circumstances. The matter must be viewed as a whole and no one factor is conclusive. The size of the activity or undertaking is irrelevant—TUPE has been held to apply to the transfer of economic activities carried on by just one person.

Service Provision Changes

A 'service provision change' occurs where:

- there is an organised grouping of employees which is wholly or mainly dedicated to carrying out activities for a client;
- those activities cease to be carried out by one provider and are instead carried out by another provider;
- immediately prior to the transfer it is intended that the activities will be carried out by the new provider other than in connection with a single specific event or a task of short-term duration; and
- the activities are not for the supply of goods.

Unlike in the case of a 'business transfer', there is no need for there to be a 'transfer' of an economic activity for there to be a service provision change—it is simply necessary for one person to cease to conduct or provide the services in question and another to take them over provided the other requirements set out above are satisfied.

Consequences of TUPE

Those employees who are wholly or mainly assigned to the undertaking (or activity) which is the subject of the transfer, transfer automatically to and become employed by the transferee. Other than the change to the identity of their employer, in all other respects (save for occupational pension arrangements, which are dealt with below) the transferring employees remain entitled to all existing contractual benefits and retain their continuity of employment and other statutory rights. The old employer's rights, powers, duties and contractual, statutory and all other liabilities (excluding criminal liability) transfer to the new employer.

Which Employees Transfer?

The employees who will transfer pursuant to TUPE are those who are wholly or mainly assigned to the undertaking or activities (or part thereof) transferred. Factors which point to which part of a business an employee is assigned include the amount of time spent by the employee on one part of the business or another, the value given to each part by the employee, what the contract of employment states the employee can be required to do, and how the cost to the employer of the employee's services is allocated between different parts of the business.

Employees' Right to Object to the Transfer

Under TUPE, employees have a right to object to the transfer of their employment to the new employer. If they object, their employment comes to an end automatically and without notice as at the date of transfer and they are not treated as dismissed by either the transferor or transferee so no claim can then be brought. It is possible, by agreement, to arrange for an employee to stay in employment with the seller so that his or her employment does not transfer to the transferee. However, to be effective this would have to be done by a freely negotiated and express agreement.

Employees also have the right to refuse to transfer if the transfer involves a substantial change in their working conditions to their material detriment or if constructively dismissed (in which case an unfair dismissal claim may be available).

Dismissal of an Employee in Connection with a Transfer

Dismissing an employee in connection with a TUPE transfer is in principle automatically unfair. The classic example is dismissing employees to facilitate the sale of a business. Provided that the employee has one year's continuous service, the employee may be able to bring a claim for unfair dismissal in such circumstances.

A dismissal which is connected with a TUPE transfer will not, however, be automatically unfair if it can be established that an 'economic, technical or organisational reason entailing changes in the workforce' (ETO Reason) exists to justify the dismissal, such as a genuine redundancy. If such an ETO Reason can be established, then the dismissal may still be unfair, but will be assessed on the normal principles of unfair dismissal law.

Changes to Terms and Conditions of Employment

Even if agreed by the relevant employees, changes to the transferring employees' terms and conditions of employment are void if the reason for the changes is the transfer itself or if the changes are made for a reason connected with the transfer, unless there is an ETO Reason justifying the change. The extent to which transfer-related changes can be made to transferring employees' contracts is a complex area.

Employees' Rights upon Transfer

On a TUPE transfer, employees retain all their statutory rights (for example, continuity of employment) and contractual entitlements. However, rights relating to old age, invalidity or survivors benefits under occupational pension schemes do not transfer. That said, following certain ECJ decisions, other rights relating to, for example, early retirement benefits (whether on redundancy or otherwise) under such a scheme may nonetheless transfer to the transferee. Where, however, transferring employees enjoy a right to participate in an occupational pension scheme maintained by the seller, the transferee must make arrangements to provide a specified minimum level of pension benefit, although it has considerable latitude over the arrangements they put in place and are not obliged to replicate the pension arrangements offered by the seller. It has the option of offering transferred employees either a defined benefit (final salary) scheme, a defined contribution (money purchase) scheme, or a stakeholder pension scheme. Where the new employer chooses to provide either a money purchase or stakeholder pension scheme, it is required to match employees' contributions up to 6%.

Trade Unions

Provided that the transferring business or activities retain their identity, a recognised trade union retains its recognition rights as against the new employer. The transferee also inherits any collective agreements which the seller had agreed with any recognised trade unions in relation to the employees whose employment transfers.

Employee Liability Information

The transferor is required to provide certain employee liability information regarding the transferring employees to the transferee. The information includes:

- the identity and age of the transferring employees;
- the employment particulars required to be provided by section 1 of the Employment Rights Act 1996;
- information on any collective agreements that will still have effect after the transfer;
- certain disciplinary or grievance proceedings in the previous two years; and
- any legal action brought by an employee in the previous two years and any potential actions.

The information must be provided in writing or some other accessible form (such as an online data room) at least 14 days prior to the transfer unless it is not reasonably practicable to do so. Any subsequent changes to the information must also be provided. If the transferor fails to provide this information as required, the transferee may bring a claim for compensation for consequent loss and the transferee may be ordered to pay compensation of a minimum of £500 per employee in respect of whom the requisite information has not been provided.

Information and Consultation

A transferor has a duty, in relation to a TUPE transfer, to inform appropriate employee representatives in writing of the following matters:

- the fact that the transfer is to take place;
- when, approximately, it will take place;
- the reasons for the transfer;
- the 'legal, economic and social implications' of the transfer for the affected employees such as the impact of the transfer on the employees' contractual and statutory rights, their pay and prospects and their pensions and place of work;
- the measures which the transferor envisages that the transferee will take (in connection with the transfer) in relation to those employees. This will include any proposed redundancies and may include loss of pension benefits; and
- the measures which the transferor envisages it will take (in connection with the transfer) in relation to those employees.

The transferee is obliged to notify the transferor of the measures it intends to take in relation to the employees.

Appropriate representatives are established in the same way as in the collective consultation obligations in a redundancy situation (see Section 21).

Consultation

If the transferor or the transferee envisages taking any measures in relation to the transferring employees, there is also a duty to consult with the employee representatives about those measures. Information must be given and consultation must begin 'in good time'. There is no specific requirement as to the period over which consultation is required to take place—this will depend on the circumstances. Consultation must be conducted with a view to seeking agreement.

Failure to Inform and Consult

Where there has been a failure to inform and/or consult the employee representatives may bring a claim in the employment tribunal for up to 13 weeks' gross pay per affected employee. The employment tribunal will award such compensation as it considers just and equitable in all the circumstances, although it will only reduce the award below the maximum if there is good reason to do so. An employer may seek to rely on a 'special circumstances' defence in limited circumstances, although this rarely applies.

Insolvency

Special provisions apply where the transferor is the subject of certain insolvency proceedings. Broadly, if the proceedings are conducted with a view to liquidating the business' assets, employees employed in the business will not automatically transfer. If there is no view to liquidate the assets the employees will transfer, but there is greater scope to vary their terms and conditions and the State will be responsible for debts that would otherwise have passed to the transferee. This is a complex and uncertain area especially in relation to administrations.

27. National Minimum Wage

The Right

Workers are contractually entitled to be paid an hourly rate not less than the national minimum wage (the NMW).

The current minimum hourly rates are:

- workers aged 21 and more: £6.19;
- 18-20 year olds and those aged 21 and more who have agreed in writing to do at least 26 days' accredited training during their first six months: £4.98; and
- 16-17 year olds (more than the compulsory school age): £3.68.

Nearly all workers (including agency and home workers) aged 16 and more are entitled to the NMW. The definition of 'worker' encompasses employees and persons performing services personally for an employer. Certain self-employed persons are excluded as are, for example, apprentices aged less than 19 or aged 19 to 25 in the first year of their apprenticeship, au pairs, members of the armed forces, prisoners and voluntary workers.

Whether the NMW has been paid depends upon the worker's average hourly rate. This is calculated by calculating gross pay (but not benefits) per hour worked over a one-month period (or, if the worker is paid more frequently (e.g. weekly), over that lesser period). The number of hours worked is calculated differently according to the type of work: time work (e.g. hourly rate), salaried hours work (e.g. annual salary), output work (e.g. piece work) and unmeasured work (a residual category that covers work that does not fall within the other three categories). For output work employers must pay their workers either the NMW for each hour they work or a 'fair piece rate' for each piece produced set by reference to the time that an average worker would take to produce the piece. The rate is 120% of the time taken by the average worker. For example, if the average worker produces three items an hour, the fair piece rate is the NMW times 120% divided by three.

Records

By law employers must keep records going back at least three years that establish that workers have received not less than the NMW. A failure to do so is a criminal offence punishable by a fine of up to £5,000.

A worker may request to see the employer's records. If the employer does not provide the records within 14 days the worker may complain to the employment tribunals. If the claim succeeds the tribunal can make an order and award compensation equivalent to 80 times the NMW hourly rate.

Enforcement

If a worker is not paid at least the NMW he or she can claim unlawful deductions from wages or breach of contract (up to a maximum of £25,000) in the employment tribunals. A breach of contract claim may also be brought in the civil courts (and must be brought in the high court where the damages sought exceed £25,000). In either case, the burden of proof is on

the employer to satisfy the tribunal or the court that either the worker did not qualify for the NMW or was remunerated at a rate not less than the NMW.

Additionally, HM Revenue & Customs officers may inspect the employer's records or require them to produce records or provide additional information. Where it appears that the employer has failed to pay the NMW, HM Revenue & Customs may serve an 'enforcement notice' on the employer requiring it to pay the NMW and to make up previous underpayments. Failure to comply may result in a penalty notice being served. The penalty is twice the NMW hourly rate in respect of each worker named in the enforcement notice for each day that the enforcement notice is not complied with. If the employer does not comply with the penalty notice the enforcement officer can issue civil proceedings or even prosecute the employer.

A worker may claim unfair dismissal or victimisation if dismissed or subjected to some other detriment as a result of becoming entitled to the NMW or exercising his or her rights under the NMW legislation, regardless of his or her length of service.

28. Data Protection

Statutory Protections

The Data Protection Act 1998 (DPA) permits employees to access personal data and regulates the 'processing' of such data.

'Personal data' is data which relates to the employee as an individual and which affects his or her privacy in a personal, professional or business context or which contains any indication of the intention of the 'data controller' (the employer) in respect of that employee. It must be either held on a computer (or some other automatic processing equipment) or in a 'relevant filing system'. The courts have held that personal data must be biographical in a significant sense and have the individual as its focus. The mere mention of an individual in a document will not necessarily mean that it amounts to personal data.

A relevant filing system is one which is structured in such a way so as to make any specific information relating to an individual readily accessible. A box of documents relating to a team of people may therefore be unlikely to be a relevant filing system. A file which relates solely to an individual and which has dividers such as 'medical records', 'salary details' and so on, probably is.

Anyone who processes data must adhere to eight data protection principles (the 'Principles') set out in the DPA. According to the Principles, data should:

- be processed fairly and lawfully—this means that consent must have been given by the employee, that all of the processing must be necessary for the performance of the contract to which the employee is a party or the processing must be necessary for compliance with any legal obligation to which the employer is subject (for example, PAYE obligations);
- be obtained for one or more specified and lawful purpose(s);
- be adequate, relevant and not excessive in relation to the purpose for which it is processed—personnel files should be regularly reviewed to ensure they do not contain unnecessary, outdated or irrelevant information;
- be accurate and, where necessary, kept up to date;
- not be kept for longer than is necessary—employers may nonetheless wish to retain papers until the relevant time limits for potential claims have passed (up to six months or more for unfair dismissal and most employment tribunal claims, three years for personal injury and six years for breach of contract claims);
- be processed in accordance with the rights of the individual to whom the personal data relates (the data subject);
- be secure—appropriate technical and organisational measures should be taken to avoid unauthorised or unlawful processing and accidental loss, destruction or damage. If the data controller transfers data outside the organisation to a third party for processing, that third party should agree in writing to take certain security precautions in order to protect the data. This should also protect the data controller's position; and

- not be transferred to a country outside the European Economic Area without the express informed consent of the data subject (unless adequate data protection exists in that country).

Sensitive Personal Data

The DPA provides special protection for 'sensitive personal data' which includes information concerning the individual's ethnic or racial origin, political opinions, religious beliefs, physical and mental health, sexual life and trade union membership. This may apply to health questionnaires, information about disabilities or special needs, results of eye, blood, alcohol, drug and genetic tests and assessments of fitness for work or to determine entitlement to benefits. Employers should take great care when dealing with sensitive personal data.

In order to be entitled to process sensitive personal data without breach of the DPA, the employer needs to show either that explicit consent has been given by the employee or that one of a number of other conditions has been satisfied including, for example, that the processing is necessary for performing or exercising a right or obligation imposed by or in connection with employment, that it is necessary in connection with legal proceedings or for the obtaining of legal advice, for the administration of justice or for the purposes of monitoring equality opportunity or treatment.

Automated Decision Taking

An individual has the right to prevent an employer from basing any decisions about such matters as their performance at work, their reliability or their conduct solely on the processing by automatic means of personal data. If a decision has been reached based solely on automatic processing, the data controller must notify the individual that the decision was reached by this method and the individual is entitled to require the data controller to reconsider the decision, or base the decision on different grounds.

Data Subject Access Requests

Provided an individual makes a request in writing and pays an administration fee to the employer of up to £10, they are entitled:

- to be informed whether personal data relating to them is being processed by the data controller;
- to be given a description of the personal data, the purpose for which is being processed and the recipients to which it may be disclosed; and
- to have the data communicated to them in an intelligible form and any information available to the employer as to the source of the data. If providing copies of the data is impractical, the data subject may be given access to inspect the data without taking it away.

This request is known as a Data Subject Access Request. Provided the request is clear with regard to exactly what information is required, an employer must make a thorough search of their systems to find all personal data requested. There are a limited number of exemptions relating to what is required to be disclosed including:

- if the personal data contains personal data relating to a third party (and consent from that third party cannot be obtained, or if the relevant information cannot be redacted);
- if the personal data consists of an employment reference to be given by the data controller;

- if the personal data relates to management forecasts to assist in the conduct of the data controller's business, provided that the disclosure of the personal data would be likely to prejudice that business; and

- if the personal data relates to negotiations between the data subject and the data controller and the disclosure of the personal data is likely to prejudice those negotiations.

Other than any parameters set out in the subject access request itself, there are no restrictions on the scope of the search. Accordingly, the time, effort and expense involved in conducting searches may prove onerous. While they are not designed to be a litigation tool, Data Subject Access Requests are inevitably used by employees as a means of gathering information prior to issuing proceedings against their employer (or, more likely, ex-employer).

Registration and Enforcement

Subject to some exceptions, those who determine how and for what purpose data on other individuals is processed have to notify the Information Commissioner, and the DPA makes it an offence to process data without first having notified the Information Commissioner. Any changes to the data registered must be made within 28 days and failure to do so is a criminal offence.

If there has been a breach of the applicable data protection principles, the Information Commissioner has the power to issue an enforcement notice which will set out the remedial action to be taken. A failure to comply with an enforcement notice can lead to criminal penalties.

The Information Commissioner has issued detailed guidance on data protection issues in the workplace.

29. Whistleblowing

The Right

The Employment Rights Act 1996 protects workers (a wider concept than employee) against victimisation or dismissal if they make disclosures about fraudulent, unlawful or dangerous conduct carried on by their employers. It is unlawful to dismiss a worker or subject him or her to a detriment because he or she makes a 'protected disclosure' covered by the legislation. In order to be a protected disclosure, the subject matter must fall within a specified category and the disclosure must have been made in a specified way. An employee does not need to have completed one year's service in order to be able to claim unfair dismissal on grounds of having made a protected disclosure and there is no cap on the financial compensation recoverable for such an unfair dismissal.

Qualifying Disclosure

To be protected by the whistleblowing legislation, the worker must make a qualifying disclosure. This is a disclosure which a worker reasonably believes shows that:

- a criminal offence has been committed;
- a person has failed to comply with any legal obligation to which he is subject;
- a miscarriage of justice has occurred;
- the health and safety of any individual has been endangered;
- the environment has been damaged; and/or
- information showing that any of the above events has been deliberately concealed.

If the worker believes that any of the above events are occurring or are likely to occur, this will also amount to a qualifying disclosure.

Acquiring Protection

In order to acquire the protection of the legislation, the worker must use one of the prescribed methods of disclosure:

- disclosure to the employer will be protected if the worker has an honest and a reasonable suspicion that the malpractice has occurred and acts in good faith; or
- disclosure to one of the 'prescribed persons' is protected if the worker has an honest and reasonable suspicion that the malpractice has occurred, acts in good faith and reasonably believes that the information disclosed is substantially true; or
- disclosure to persons other than the 'prescribed persons' is protected if the following additional requirements are met:
    - the worker makes the disclosure in good faith; and

- disclosure is reasonable in all circumstances; and
- disclosure is not made for personal gain; and
- the worker reasonably believes that he or she would be victimised if the matter were raised internally or to a prescribed person; or
- there was no prescribed person and the worker reasonably believes that the relevant evidence was likely to be concealed or destroyed or the concerns had already been raised with the employer or a prescribed person.

In deciding what is reasonable, relevant factors include the seriousness of the alleged failure, whether the disclosure has been made in breach of a duty of confidentiality, the identity of the person to whom the disclosure is made and any action previously taken by the employer or a prescribed person.

The 'prescribed persons' are specified under the legislation and include a variety of regulatory bodies, including the Civil Aviation Authority, the Financial Services Authority, the Commissioner of Customs & Excise, the Commissioner of HM Customs & Revenue, the Auditor General of the National Audit Office, the Data Protection Registrar, the Director Generals of Electricity and Gas Supply, the Director General of Fair Trading, the Director General of Telecommunications, the Director of the Serious Fraud Office, the Environment Agency, the Health and Safety Executive and various others.

A worker will not be protected by the whistleblowing legislation if he or she commits a criminal offence by making a disclosure.

30. Trade Union Recognition

Introduction

Unions are able, pursuant to a specific statutory regime, potentially to require employers to grant them recognition. The procedure for recognition is complex and the following is only a brief summary of its provisions. There are specific time frames which need to be complied with in relation to the various stages. It should be noted that an independent trade union seeking recognition needs to make a formal request to the employer if it is to commence the statutory recognition process. An employer can only be required to recognise a union in accordance with the statutory procedure if it, together with associated employers, employs at least 21 workers. One of the key issues is the identity of the relevant 'bargaining unit' by reference to which support for recognition is assessed. The legislation provides criteria for identifying the relevant bargaining unit and a mechanism for resolving disputes.

The statutory scheme only provides for recognition over pay, hours and holidays. Wider recognition rights are voluntary and generally not legally enforceable.

Automatic Recognition

An independent trade union can apply to the Central Arbitration Committee (CAC) for a declaration of automatic recognition if it can show that a majority of workers constituting the relevant bargaining unit are members of the union. The CAC will only accept an application if it is 'valid'. The conditions for a valid application are as follows:

- the union must have made a valid request to the employer;
- the union must have served the application on the employer;
- there must be no collective agreement in force under which a union is recognised as being entitled to conduct collective bargaining on behalf of the workers in the bargaining unit;
- the CAC must be satisfied that at least 10% of the bargaining unit are members of the union and that a majority of workers within the bargaining unit would favour recognition if asked; and
- the union must not have submitted substantially the same request within the past three years.

A secret ballot must be arranged before recognition is awarded if:

- the CAC is satisfied that the ballot should be held in the interests of good industrial relations;
- a significant number of union members within the relevant bargaining unit inform the CAC that they do not wish the union to negotiate on their behalf; or
- membership evidence is produced which leads the CAC to conclude that are doubts whether a significant number of union members wish the union to be recognised on their behalf.

Ballot

If a ballot is ordered/arranged, it must be secret. The employer has a duty to co-operate generally in relation to the ballot and specific provisions govern how it is to be conducted.

Where a ballot is ordered to be held, recognition will be awarded if a majority of those voting and at least 40% of those constituting the relevant bargaining unit vote in favour of recognition.

After Recognition

When recognised under the statutory regime, a union is entitled to engage in collective bargaining only in relation to pay, hours and holidays, unless the parties agree otherwise. Negotiations about matters such as disciplinary or grievance procedures are not covered. The statutory procedure provides for the parties to be able to agree a method by which they will conduct collective bargaining (i.e. the process by which the trade union representatives negotiate with the employer or an employers' association). However, if this cannot be agreed, the CAC will determine and impose a specified bargaining unit method.

The employer or the employees can seek de-recognition but normally no earlier than three years from the date of the voluntary agreement or declaration of recognition.

Trade Unionists' Rights

A worker has the right not to be subjected to any detriment (by way of any act or any deliberate failure to act) by the employer as a result of:

- acting with a view to obtain or prevent recognition;
- indicating support or lack of support for recognition;
- acting with a view to securing or preventing the ending of bargaining arrangements;
- supporting or not supporting the ending of bargaining arrangements;
- influencing the way in which votes are cast;
- voting in a ballot; or
- refusing to do any of the above.

31. Industrial Action

General

An employee who takes part in industrial action is in breach of contract and can be dismissed without compensation save as otherwise provided by statute. A trade union which causes or encourages industrial action itself commits an unlawful act for which it may be sued (in tort) for damages or an injunction to prevent it from encouraging or supporting further action. That said, statutory protection is provided for industrial action taken by a trade union in contemplation or furtherance of a trade dispute provided that various complicated requirements in terms of balloting, etc. are complied with. A trade dispute for these purposes means matters directly affecting the workplace (in relation, for example, to salaries, terms and conditions of employment or matters of dismissal, discipline or membership of trade unions). Secondary action can be prevented by way of an injunction.

Lawful Industrial Action

In order to avoid legal action, trade unions must comply with various formalities. These include ensuring that the employer receives written notice of the industrial action and obtaining the support of a ballot complying with the statutory requirements. A ballot in favour of industrial action is effective for four weeks or such longer period as may be agreed between the employer and the union.

Picketing

Peaceful picketing is lawful in contemplation or furtherance of a trade dispute at or near the individuals' place of work or the place of work of a member of the union whom the individual is accompanying and whom he represents. Picketing is only permitted for the purposes of peacefully obtaining or communicating information or peacefully persuading a person to work or abstain from work.

Dismissal of Employees Taking Part in Industrial Action

If the action is official strike action (i.e. the union has not disavowed it or has authorised or approved it), dismissal of a participating employee is automatically unfair if the dismissal takes place:

(a) within eight weeks of his or her first taking part in the action;

(b) after the eight-week period has elapsed but after the employee had ceased to take part in the industrial action; or

(c) after the eight-week period has elapsed but without the employer having first followed an appropriate procedure for resolving the dispute.

This unfair dismissal claim can be brought without satisfying any qualifying period of employment. No upper age limit applies. Once this protection ceases to apply, unfair dismissal can be avoided if all those participating are dismissed and none are selectively re-engaged in the following three months.

Those engaged in unofficial action can be dismissed with impunity even on a selective basis provided that they are dismissed while participating in unofficial action.

32. Worker Consultation Obligations

European Works Councils

The Transnational Information and Consultation of Employees Regulations 1999 provide for the establishment of European level information and consultation procedures or work councils. The Regulations apply to organisations employing at least 1,000 workers in the European Economic Area with at least 150 employees in at least two states whose central management is situated in the UK. The EEA comprises the member states of the European Union, together with Norway, Iceland and Lichtenstein. Disputes over compliance with these obligations are referred to the Central Arbitration Committee.

If no voluntary agreement satisfying the requirements of the legislation was concluded by 15 December 1999, central management is required to initiate negotiations on the establishment of an EWC or an information and consultation procedure if it receives a written request from at least 100 employees (or their representatives) from at least two different undertakings or establishments in at least two EEA countries. Central management is entitled to initiate the process itself.

The employees are to be represented in negotiations by a special negotiating body (SNB). The SNB consists of representatives of employees from all EEA states in which the undertaking has a presence as an employer. In the UK, the members of the SNB are required to be elected by ballots of all UK employees. The UK management must arrange for the ballots and comply with a variety of requirements imposed by the regulations. The UK management must appoint and pay for an independent ballot supervisor whom the UK management reasonably believes will carry out his or her functions competently and whom management legitimately believes to be independent. He or she must publish the results of the ballot and make them available to management and employees. The Regulations are largely concerned with the establishment of the SNB and details of the EWC itself are left for the parties to agree between themselves (as a "Bespoke EWC" or information and consultation procedure). If the SNB and central management agree to establish an EWC, the agreement governing the EWC must determine the undertakings or establishments covered by the agreement, the EWC's composition and terms of office of members, the functions and procedures for information consultation, the venue frequency and duration of meetings, financial and material resources, duration of agreements and the procedure of renegotiation.

If the parties fail (or management refuses) to start negotiations within six months or agreement is not reached within three years of a request, a statutory EWC is set up; the legislation provides a standard set of rules for composition of a statutory EWC governing competence, composition, meetings, etc. The Employment Appeal Tribunal is the forum which hears disputes about the operation or the establishment of an EWC.

Information and Consultation Requirements

Employees in organisations employing 50 employees or more have the right to be informed and consulted about issues in the business which affect their employment and the business for which they work.

These rights do not arise automatically but will only apply if at least 10% of the workforce makes a written request for information and consultation (I&C) arrangements or employers start negotiations for an I&C agreement on their own initiative.

Where there is a valid pre-existing I&C agreement in place and a request is made by less than 40% of the workforce, the employer may ballot the workforce to see if it endorses the request.

Where at least 40% of the workforce and a majority of those voting in the ballot endorse the request, the obligation to negotiate a new agreement will apply. Otherwise, the pre-existing agreement may continue.

.83 As with an EWC, provided the parties can reach agreement, they are free to tailor their I&C arrangements as they see fit. However, if an employer fails to initiate negotiations when required to do so, or if, following negotiations, the parties fail to reach agreement, standard I&C provisions will apply. These provisions take effect six months from the date of the request (if the employer fails to initiate negotiations) or the failure to reach agreement (if negotiations fail) or, if earlier, from the formal election of the I&C representatives.

Under the standard provisions employers must:

- inform representatives of recent and probable developments in the undertaking's activities and economic situation (e.g. new products, potential takeovers, and the undertaking's financial situation);

- inform and consult representatives regarding the situation, structure and probable development of employment, and any "anticipatory measures" (especially where there is a threat to employment) within the undertaking (e.g. recruitment, voluntary and compulsory redundancies); and

- consult representatives with a view to reaching agreement in respect of decisions likely to lead to substantial changes in work organisation or in contractual relations, including by way of collective redundancies or under TUPE.

Complaints for any breach of these requirements can lead to a financial penalty of up to £75,000.

Other Consultation Obligations

As discussed earlier in this guide, employers are also required to consult their workforce in the event of collective redundancies or in the event of a transfer of all or part of their undertaking.

Further obligations arise under relevant health and safety legislation, and may also be triggered on the takeover of a listed company, or if an employer proposes changes to its employees' pension arrangements.

Dechert's International Employment Practice — Primary Contacts

Belgium

Karla Vuyts
Associate
+32 2 535 5433
karla.vuyts@dechert.com

China – Hong Kong

Basil H. Hwang
Partner
+852 3518 4 788
basil.hwang@dechert.com

China – PRC

Jingzhou Tao
Partner
+8610 5829 1308
jingzhou.tao@dechert.com

France

Philippe Thomas
Partner
+33 1 57 57 80 91
philppe.thomas@dechert.com

Germany

Giovanni Russo
Associate
+49 89 21 21 63 21
giovanni.russo@dechert.com

Luxembourg

Marc Seimetz
Partner
+352 45 62 62 23
marc.seimetz.@dechert.com

Russia

Evgenia Korotkova
National Partner
+7 499 922 1160
evgenia.korotkova@dechert.com

United Kingdom

Charles Wynn-Evans
Partner
+44 (20) 7184 7545
charles.wynn-evans@dechert.com

Jason Butwick
Partner
+44 (20) 7184 7569
jason.butwick@dechert.com

Georgina Rowley
Associate
+44 20 7184 7800
georgina.rowley@dechert.com

United States

Alan D. Berkowitz
Partner, Philadelphia
+1 215 994 2170
alan.berkowitz@dechert.com

Nicolle Jacoby
Partner, New York
+1 212 698 3820
nicolle.jacoby@dechert.com

Thomas K. Johnson II
Partner, Philadelphia
+ 215 994 2756
thomas.johnson@dechert.com

Andrew Wong
Partner, Los Angeles
+1 213 808 5710
andrew.wong@dechert.com

About Dechert LLP

With offices throughout the United States, Europe, Asia and the Middle East, Dechert LLP is an international law firm focused on corporate and securities, complex litigation and international arbitration, financial services and asset management, energy, life sciences, labour and employment, business restructuring and reorganisation, intellectual property, trade and government affairs, real estate finance and tax law.

Visit us at dechert.com

EMPLOYMENT LAW IN ENGLAND AND WALES