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Employment law for line managers

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Employment law for line managers

Collinson Grant is a management consultancy that helps to improve the performance of employers in the private sector, in central government and in healthcare. Our work focuses on costs, people and organisation. Our specialists support line and personnel managers in every aspect of managing people, particularly on assignments to do with employment law, employee relations and reward. The notes at the back will tell you more about what we do.

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1. Introduction and the nature of employment law

The information presented in this book is intended as a day-to-day guide for managers on employment law in England, Wales and Scotland. Only the official wording of Acts, Regulations and Statutory Instruments and the interpretation given by the Courts are authoritative. No responsibility can be accepted for errors or omissions, or their consequences. If you require further information or advice on the subjects covered by this book or any other employment matters, please contact the employment law team at Collinson Grant.

1 Introduction and the nature of employment law

Collinson Grant started work in the early 1970s. 'Employment law' only truly became a discrete subject with critical mass in 1971, when the Industrial Relations Act was passed. So we have grown up with it. The law concerning formal relationships and day-to-day behaviour of employees has been a constant consideration in our work supporting clients. And that means we have seen the shape and content of the subject evolve and we understand how best to work with it. It also goes some way to explaining why, by first publishing *The Line Manager's Employment Law* as far back as 1978, we wanted to emphasise to managers the importance of employment law to their day-to-day responsibilities.

The legal aspects of employment are, thankfully, not the most important elements in relationships at work, which are also shaped by custom, responsibility and mutual expectation. Traditionally, the law dealt rather with the exceptional situation in which normal affiliations and behaviour were disrupted. Even today, dialogue in the workplace rarely turns on the nuances of the latest statute or judicial pronouncement

The extended scope and influence of employment law

Legislation, often supported by codes of practice, has greatly increased the number of rights and duties associated with employment and has affected what each party expects of the relationship. Consequently, the law has moved from the wings towards the centre of the stage. Workers may challenge managers' decisions, and may apply to the employment tribunal for redress. Most of these rights are here to stay, and the institutions of the European Union will continue to demand more. Meanwhile, the law on the responsibilities of trade unions, their officers and their actions in support of their members' interests often changes under political pressure. The relative importance of the two basic strands, individual and collective, as well as that of particular subjects within them, changes. But it cannot be seriously doubted that the overall significance of employment law has grown.

The direct financial cost of infringing legal standards can be over-estimated: perceptions are fuelled by reports in the media of the atypical awards of compensation in some high-profile cases. But, even in more commonplace situations, they can still be high. And the calculation of that particular

exposure does not encompass the frequently irrecoverable legal fees, the 'opportunity cost' of managers' lost time, possible damage to employee relations, and adverse publicity in the wider community.

Know the law – constraints and opportunities

Line managers must acquire a working knowledge of the basic contours of employment law to avoid elementary errors that might damage the business. They should be able to recognise when specialist advice is necessary. And they might also conclude that the law's standards can help improve motivation and performance by providing a foundation for better communication, greater consistency and a sense of participation.

This book, the successor to *The Line Manager's Employment Law*, which ran for 25 editions over 30 years, is intended to continue providing that required understanding. Although still clearly based on its predecessor, it aims to give the law more life. So it adds detail, essential points, tips on practical things to do, and illustrations of common errors or misconceptions.

It covers the main provisions of employment law in England, Wales and Scotland. In Northern Ireland the substantive law can be different in some aspects, so seek more guidance if you need it. The law described in this book generally covers only people working in the UK. But the House of Lords has decided that some of the main statutory protections can also be extended to employees of UK entities working overseas. Again, professional advice should be sought on the specific situation.

Employment law – some introductory concepts

Scope and foundations

Our employment law is made up of legislation (EU Directives or UK Acts and Regulations) and decisions of the courts (case law). These two sources establish the rules that regulate the relationship between an employer and an employee. Sometimes the law makes a distinction between an 'employee' and a 'worker'. In either case, the relationship is based on the existence of a contract.

Contracts

There are different types of contract. These are discussed in more detail later. Generally, a contract is based on freely-given agreement. So an employer has the freedom to decide with whom to make a contract and with whom not to. There are some restrictions on this freedom, most of which are in the laws against discrimination. The detailed contents, or 'terms and conditions', of a contract between an employer and employee or worker record the agreed rights and duties, the provisions for terminating the contract and, sometimes, responsibilities (such as confidentiality) after termination.

Minimum rights

Although it is assumed that both parties enter into the contract voluntarily, legislation establishes minimum rights and standards that apply to the relationship. These override even a contract that does not mention them, or says that some or all of them do not apply, or specifies inferior provisions. Most of the standards described in this book are the minimum ones prescribed by legislation. Although the book is not overlain with statutory references and sources (of which there are many), the main pieces of current UK employment legislation are:

- Employment Rights Act 1996
- Equality Act 2010
- Trade Union and Labour Relations (Consolidation) Act 1992
- Transfer of Undertakings (Protection of Employment) Regulations 2006
- Working Time Regulations 1998

So, contractual provisions will only be effective if they at least match, or improve on, any overlapping statutory rules. They will be ineffective, and unenforceable, if they attempt to lessen or avoid the statutory provisions. If a subject is not directly regulated by legislation, the parties (although usually the employer) may specify whatever terms they wish, provided that this does not result in an agreement to do something illegal.

How are employment rights and duties enforced?

Statutory rights and duties are enforced through the employment tribunal system. Employment tribunals can also deal with some contractual claims that are not established by legislation. Otherwise, contractual claims are heard by the County Court or High Court.

2. Employees – establishing who they are

2 Employees – establishing who they are

Many statutory rights at work are available only to ‘employees’ who work under a ‘contract of employment’. They are not available to other providers of work or services who operate as independent contractors under a ‘contract for services’. For this reason, it can become necessary to determine whether someone is (or was) an employee or some other type of provider of work. This may also be important to determine who should pay income tax and National Insurance contributions.

Is someone an employee or not?

The main questions to be considered are:

- Who has control over how the work is done?
- To what extent is the person integrated into the structure of the organisation? For example, is he or she subject to the employer’s disciplinary procedure?
- Who provides the equipment or materials necessary to do the work?
- Must the work be done personally, or may it be delegated to someone else?
- Is there ‘mutuality of obligation’ (an obligation on one party to provide work and on the other to do it)?
- How are payments processed and how are they treated for tax and National Insurance?
- Does the person have access to benefits, such as sick pay and pension?
- Are there restrictions on the person’s freedom to work for others?

Workers

Some workplace rights are available to ‘workers’. A ‘worker’ is defined more widely than an employee. The term includes people who are technically self-employed but who are nevertheless obliged to do work personally. This could include an independent contractor.

Someone who is neither a worker nor an employee is not covered by statutory employment rights. Such people are regarded as being ‘in business on their own account’. The distinction between workers and people in business on their own account is that workers have an obligation of personal performance, that is, to do the work themselves.

Casual workers

Casual workers, who include the intermittent, 'bank' and seasonal staff, often operate under short-term contracts of employment, each lasting for the brief period they are engaged to work. If they have been engaged to work with sufficient frequency, they may also be able to argue that their overall relationship with the work-provider, spanning all the separate, short-term periods of work, is an 'umbrella' contract of employment. This would be on the grounds that the regular provision of work and agreement to do it create a 'mutuality of obligation' (see above). If this is the case, continuous service (important for some statutory rights) can be calculated to include even the weeks that fell between the discrete periods of actual work.

Conflicting terms and practice

Even if a contract contains terms that are associated only with a certain status (generally, 'self-employment'), a court or tribunal can look behind it to examine the way the relationship actually operates, or did operate. If that analysis points to another status (generally, 'employment'), the court or tribunal can ignore the words of the contract.

Agency temps (workers hired out by 'employment businesses')

Regulation of employment businesses

An 'employment business' (often known as an employment agency) may directly employ people seeking work under a contract of employment and supply them temporarily to work for, and be controlled by, a hiring organisation. Or the person supplied by the agency may work under a contract for services and so not be regarded as an employee of the agency. The agency must confirm to both the work-seeker and the hirer in writing whether the worker is its employee or is working under a contract for services.

An employment relationship directly with the hirer?

Courts or tribunals have been known to decide that someone hired out by an employment business had, through a lengthy relationship and 'mutuality of obligation', an implied contract of employment with the hirer. However, that approach is now favoured only in very exceptional circumstances.

Parity of terms

From 1st October 2011, new regulations will give hired-out ('agency') workers who have completed a 12-week qualifying period on or after that date the right to the same pay and standard terms and conditions (such as hours, rest breaks/periods and annual leave) from the employment business/temporary work agency ('TWA') as would have applied had they been recruited directly by the hirer.

Note: there is an exemption from the pay element for a TWA that has engaged the agency worker under a 'permanent' contract of employment that provides for payment between assignments at a rate that is at least 50% of that for assignments and at least equivalent to the national minimum wage (see Chapter 4).

The agency worker must accrue the 12-week qualifying period with the same hirer (but not necessarily through a single TWA) and in the same job or substantively similar ones, on one or more 'assignments'. A break of less than 6 weeks within an assignment or between assignments will not break continuity. Any change in job that does occur will not break continuity unless the TWA has confirmed it in writing to the agency worker.

Although the central responsibility and liability for any necessary improvement in the agency worker's terms lie largely with the TWA, the hirer also has direct obligations:

- to give hired agency workers, immediately on 1st October, the same access to 'facilities' (such as canteen and childcare) as its own employees;
- to notify the TWA about any changes in the agency worker's role.
- to provide the TWA with information about the pay and terms and conditions applicable if the agency worker had been directly recruited; and
- if the TWA has failed to pass that information on to an agency worker, to provide the agency worker directly with that information within 28 days.

Enforcement, by application to the employment tribunal, is generally against the TWA that has the contract of employment or contract for services with the worker, but, if the hirer has caused or contributed to a breach, may be against it too. The tribunal can award loss of earnings or, for denial of facilities, appropriate compensation.

A tribunal also has the power to deem the 12-week qualifying period satisfied if it considers that actual satisfaction was intentionally defeated by an artificial 'structure of assignments' (and to make an award of up to £5,000).

Use of temporary labour during industrial action

Legislation prohibits an employment business from knowingly supplying a worker (a) to do the work of one of the hirer's employees if that employee is participating in official industrial action, or (b) to do the job of another employee who has been transferred by the hirer to cover for the employee who is on strike or taking other industrial action.

3. The contract

3 The contract

Restrictions on an employer's freedom to make (or not make) a contract

There are three main types of statutory restriction:

Discrimination

The first restriction concerns discrimination on the grounds of any of the 'protected characteristics' featured in the equality legislation (see Chapter 8).

Membership of a trade union

The second restriction is concerned with membership of a trade union. It is unlawful to refuse employment on grounds that a person:

- is, or is not, a member of a trade union
- will not agree to become, to cease to be, to remain or to refuse to be a member of a union
- will not agree to make payments or have deductions made from pay for not being a member of a trade union
- features on a prohibited 'blacklist' (see below).

Compensation for a successful complaint to an employment tribunal is a minimum of £5,000 and can be up to £68,400.

Note: legislation prohibits the making, use, sale or supply of 'blacklists' of trade unionists. Infringements are subject to an action for breach of statutory duty. The court can issue orders to restrain or prevent a party from breach and can award damages (which may cover injury to feelings). Separately, proceedings in the employment tribunal are available for alleged refusals to employ (see above) and for discrimination and dismissal to do with reliance on information on a 'blacklist'.

Employment of illegal immigrants

The third restriction is concerned with legislation on illegal immigrants. For employment that started on or before 28th February 2008, it is a criminal offence to employ a migrant aged 16 or over who does not have permission to live or work in the UK. The offence carries a fine of up to £5,000.

For employment that started after 28th February 2008, there are two types of offence:

- *negligently employing an illegal immigrant*. This carries a fine of up to £10,000. It is a possible defence if the employer conducted a pre-employment check of one or more specified documents (the legislation provides lists of what are acceptable documents) that prove the person's right to work in the UK, either indefinitely or for a limited period. However, if it is for a limited period, any defence derived from the pre-employment check will lapse after 12 months, unless further checks have been made.

If TUPE (see Chapter 9) applies, the incoming employer has 28 days to comply with the checking requirements for this offence.

- *knowingly employing an illegal immigrant*. This offence carries a prison term of up to two years and/or an unlimited fine.

In both cases it is not only the employing company that faces prosecution. Its directors, managers and other senior officers can also be prosecuted if the offence is committed with their consent or collusion, or because of their neglect.

It is a defence to show that, before recruitment, the employee produced a document specified in the legislation that appeared to refer to him or her and the employer kept it or took a copy of it. This defence applies even if the document turns out to be fraudulent, unless the employer knew that it would be illegal to employ the person.

The creation of a contract, and its consequences

A contract of employment (and a contract for services) is formed as soon as a candidate accepts an offer of employment from an employer. However, a candidate's acceptance will have no effect if the employer has communicated withdrawal of the offer before that acceptance is received.

It is also legitimate for an offer to make any agreement on subsequent acceptance conditional on the prospective employer's receipt of satisfactory references, criminal record checks and medical reports (but do note that enquiries about a candidate's health before an offer or shortlisting could be problematic – see Chapter 8). If those conditions are not satisfied, the

contract did not, technically, ever come into being and employment can be terminated.

Once a contract is formed, the employee (or worker) and the employer are bound by its terms. A basic contract will be created even before the work has started or payment has been made for it. This contract could be terminated before the person starts work. If, as sometimes happens, an employer terminates the contract without notice (often saying, incorrectly, that the offer is being withdrawn), the amount of damages is normally pay for the contractual period of notice.

Basic types of contract

A contract can be either:

- 'open-ended', of indefinite duration (sometimes called 'permanent') but capable of being ended with a period of notice; or
- for a limited term (the parties agree at the outset that it will expire on a given date or on the completion of a particular task), but often capable of being ended sooner with a period of notice.

Common misconception (1)

'...the expiry of a limited-term contract cannot have any legal consequences'

It can, even though the parties agreed at the outset that it would come to an end. Expiry without renewal amounts to a dismissal (see Chapter 10). And, although the employer generally has a head start in defending any allegation of unfair dismissal (the expiry was agreed at the outset and is often because there is no more work), there can be problems.

Difficulties can arise if a particular employee was not offered continuation in the post under another contract (and someone else was recruited) because of some unacceptable reason. Or, it could be that, although the particular post lapsed with the expiry of the contract, there was alternative employment that was not properly considered.

In any event, there is always the need for an employer to notify (or remind) the employee of the prospect that employment will end and to apply an appropriate pre-termination procedure.

Recording terms

To reduce the likelihood of and scope for misunderstanding or dispute, written contracts or a written record of the main provisions are desirable.

The written statement of employment particulars

In any event, it is a statutory requirement that an employee must be provided with this statement within two months of starting work. The statement is not, strictly, the contract of employment – it is merely evidence of the main terms of the contract. However, employers often include the subjects required by law in a broader, formal contract of employment. This also contains provisions on other matters (such as company cars, other benefits, and restrictions on post-termination activities).

What the statement of employment particulars must contain:

- 1 date(s) when employment and continuous employment began
- 2 scale or rate of remuneration or method of its calculation
- 3 intervals at which remuneration is paid
- 4 hours of work
- 5 holiday entitlement and arrangements
- 6 place of work or, if various places of work are contemplated, an indication of that and the employer's address
- 7 job title or brief description of the work
- 8 arrangements for sickness and pension
- 9 disciplinary rules and procedure, and procedures for dismissal
- 10 grievance procedure
- 11 particulars of any collective agreements directly affecting terms and conditions or, if none, a statement to that effect. If there is such a collective agreement, its terms, for example on pay, become incorporated into the employee's contractual terms)
- 12 entitlement to notice
- 13 expiry date of a fixed-term contract or the expected duration of any other temporary contract
- 14 if the employee is required to work outside the UK for more than one month, the duration of that period, any additional remuneration or benefits and any terms and conditions about return to the UK.

Information can be given in instalments and by reference

Employment particulars (1) – (14) may be given in instalments, as long as the employee is provided with all the information within two months of starting.

Points (1) to (7) must, however, be contained in a single document. This is known as the 'principal statement'. Items (8) to (14) may also be in that document, or in a subsequent statement.

For items (8) to (11), it is permitted to make reference to other documents, specifying where those other documents may be found. For item (12), it is permitted to make reference to legislation or a collective agreement with a trade union.

If no information is to be provided under any heading, this must be stated.

If there are changes to the required content

Any change to the required content of the statement must be notified to the employee personally, in writing, within a month of the change. Of course this does not, in itself, mean that the employer has the legal right to change contractual terms without the employee's consent – it simply imposes an obligation on the employer to record a change.

The employee's right to consult the employment tribunal

An employee can apply to the employment tribunal to determine employment particulars. In addition, if an employee succeeds in a claim to the tribunal about a separate right (such as unfair dismissal) and the tribunal finds that the employer has not complied with the duty to provide particulars, it can award between two and four weeks' pay to the (ex-) employee.

There are four main types of contractual term:

- Express – they have been stated orally and/or recorded in writing. They have been expressly agreed between the parties and can only be overridden by legislation. An express term will be void if it attempts to deprive someone of statutory rights.
- Implied – derived from case law, where necessary, to plug gaps left by the express terms and make sense of the employment relationship.
- Incorporated – expressly or by implication, from other sources such as a collective agreement, works rules or company handbook. But terminology can be important. In one case, the (unsuccessful) claimant's statement of employment terms said the 'basic terms and conditions of [your] employment are in accordance with and subject to the provisions' of the collective agreement. The collective agreement included a redundancy procedure. But the court decided it was not incorporated. The words used were 'the basic terms and conditions' are to be found in the collective agreement. The basic terms were only those required by the statutory principal statement of employment particulars – so the redundancy procedure was not contractual.
- Statutory – derived from provisions of statutes (such as an 'equality clause' inserted by the law on equal pay – see Chapter 4).

Implied terms in a contract

Implied terms exist in every contract. They are not shown in the statement of particulars or a written contract of employment, yet they still place obligations on the employer, the employee, or both. Implied terms are those that are:

- regarded as integral to a personal relationship, such as mutual trust and confidence, or the exercise of reasonable care and skill
- considered so obvious to the relationship, or a particular aspect of it, that the parties would have included them had they been asked or thought about it
- based on 'custom and practice' or the conduct of the parties.

The relationship between implied terms and express terms

An implied term in a contract cannot override an express (explicitly stated) term that contradicts it on the same subject (an aspect of pay for example, such as overtime rates). However, implied terms are often about standards of conduct. For example, say a contract contains the express right to put the employee on 'other duties'. It is possible for that right to be exercised in such a harsh or unreasonable way that it amounts to a breach of an implied term (particularly that of trust and confidence).

The importance of trust and confidence

Mutual trust and confidence

Breaching the implied term of mutual trust and confidence has given rise to many successful constructive dismissal cases (see Chapter 10). Failure to redress a grievance is one example.

In *Goold v McConnell*, an employer was said to be under an implied duty 'reasonably and promptly [to] afford a reasonable opportunity to ... employees to obtain redress of any grievance they may have'. In this case, the employer failed to deal with the grievance of two sales people whose methods of work had been changed, reducing their earnings.

The implied obligation of *trust and confidence* is so central to employment that any breach of it entitles the injured party to treat the contract as not just breached but also ended. An injured employer will be able to dismiss without notice (generally, only provided that a proper investigation takes place and a satisfactory procedure is followed – see Chapter 10). A wronged employee will be able to resign and to be treated as 'constructively' dismissed (see Chapter 10).

'That's it, I've had enough'

How does one decide whether a party has terminated a contract?

In many cases, there will be no doubt. The intention of the employer or employee will be quite clear from the natural meaning of the words used in a letter or a conversation. And subsequent behaviour will generally confirm the fact.

But there are situations in which the context and significance of words and/or actions have to be considered more carefully, either by the party to whom they are addressed or by the employment tribunal. Ambiguity of wordings and contradictory messages are often the problem. On other occasions, even combinations of words with a superficially clear meaning merit further evaluation.

For example, in a heated dispute an employee says on leaving, *'That's it, I've had enough.'* If the employer takes that utterance literally and proceeds to treat the employee as having resigned, there *may* be difficulty.

Many of the immediate, post-departure measures that an employer takes (P45, collection of company property, denial of access to the computer system) are the same as those that are taken when there is a dismissal. This means that an overly hasty, unverified or unforgiving response to words spoken by an employee in the heat of the moment can end up as amounting to exclusion by the employer and, effectively, a dismissal.

See Chapter 10 for more information about the termination of contracts.

4. Statutory employment rights – pay, hours and holidays

4 Statutory employment rights – pay, hours and holidays

National minimum wage

A worker (not just an employee) has the right to receive the national minimum wage (NMW) unless he or she is:

- an apprentice aged 18 or still in the first year of apprenticeship
- a student or trainee on work placement
- a voluntary worker
- living in the employer's home, working as part of the family and not paying for subsistence (such as an au pair).

The hourly rates of the NMW are normally adjusted annually and are currently set at:

	Until September 2011	From October 2011
Aged 21+	£5.93	£6.08
Aged 18-20 and those aged 21 or over who are in the first six months of a job under an accredited training scheme	£4.92	£4.98
Aged 16-17	£3.64	£3.68

How is the hourly rate calculated?

To calculate the hourly rate (to determine compliance with the NMW), an employee's total gross pay is divided by the number of hours worked during the 'pay reference period'.

Gross pay includes commission, bonuses, and gratuities paid through the payroll. It excludes payment for overtime, shift premiums, allowances for unsocial hours, London weighting, stand-by payments and gratuities received directly from customers.

The pay reference period (PRP) is one month, unless the worker is paid weekly or daily, in which case it is the shorter period. If the work done in one PRP is not actually paid until the next PRP (for example, because payment is made monthly in arrears), the pay can be attributed to the earlier PRP to calculate the hourly rate.

The method for calculating the hourly rate depends on the type of work involved:

- *time work* (payment by the number of hours ‘worked’, wherever the location). Admissible hours include those on business travel during normal working time and on stand-by or on-call near the workplace (but not at home) but exclude rest-breaks or absences
- *salaried work* (payment in equal instalments through the year for a set minimum number of hours). Admissible hours are the same as for time work, except that absences attracting normal pay and rest breaks that form part of basic hours are counted
- *output work* (payment according to the amount of work done, for example the number of items produced or sales made, unless this is classified as time work). Payment must be either for hours worked on business travel plus every hour of actual work, or according to a ‘fair piece rate’. A fair piece rate is set at 1.2 times the time taken by an average worker of the employer to earn the NMW. This gives workers who may be below average the opportunity to earn the NMW. The fair piece rate must be notified to the worker in writing
- *unmeasured work* (that is, not ‘time work’, ‘salaried work’ or ‘output work’). This includes work for which there are no specified hours. Admissible hours are those spent on business travel plus either every hour of actual work or those fixed by a ‘daily average agreement’. This is a written agreement made before the start of the pay reference period that it covers, stating the daily average hours the employee is expected to work each day.

Pay records must be kept for 3 years

Records of pay and any daily average agreements must be kept for this period. The worker can make a written request to see personal pay records and to copy them. An employer’s refusal of a request, or failure to respond to one, can lead an employment tribunal to award the worker a sum equal to 80 times the NMW.

How is the minimum rate enforced?

Enforcement of the NMW can be by a worker’s application to a court or tribunal, or by HM Revenue and Customs. An employer may be fined up to £5,000 for non-compliance.

A worker has the right not to be subjected to a detriment by the employer for relying on NMW entitlements. A successful complaint to the employment tribunal that the worker has been victimised for doing so can result in compensation.

Itemised pay statement

Employees have the right to receive an itemised statement that sets out gross earnings, net pay, and fixed and variable deductions. An employee can complain to the employment tribunal if no statement has been provided, or if the statement does not refer to an ‘unnotified deduction’ (a deduction that the employee has not been told about, even if it is otherwise valid). The tribunal may award compensation up to a maximum of the total unnotified deductions in the 13 weeks up to the complaint’s being made.

Deductions from pay

Deductions from a worker’s ‘wages’ (this covers salary) are unlawful unless:

- the deduction is allowed by statute (such as National Insurance, tax and court orders)
- the deduction is provided for in the contract or
- the worker has given written consent for the deduction before the deduction was made.

The same restrictions apply to any requirement or demand for a worker to make payments to the employer from his or her ‘wages’.

The expression ‘wages’ includes salary, holiday pay, Statutory Sick Pay (SSP) and Statutory Maternity Pay (SMP) but excludes compensatory severance payments.

A 'deduction' occurs when a worker receives less than the amount that is 'properly payable' according to the contract or any other legal obligation or commitment. So, for example, an employer's non-payment of remuneration for time that a worker spent taking industrial action, whether 'official' or not (see Chapter 14), would not be a 'deduction' – because, subject to certain exceptions, the worker is not entitled to receive pay for time spent absent from work.

Some types of deduction are excluded from this specific requirement for clear authority, including those to reimburse overpayments (which must, nevertheless, be shown to have been made – otherwise, the employer could be sued in the ordinary courts for the money due).

A worker can complain to the employment tribunal about an unlawful deduction from pay or an unlawful payment demanded by the employer. If a claim is successful, the employer will be ordered to reimburse the employee and will lose the right to recoup the money in the future. The employer may also be required to compensate the employee for any further financial loss suffered because of the unlawful deduction or payment.

In retail, deductions for stock deficiencies or cash shortages are, in any event, limited to 10% (gross) of any single instalment of pay (except for the final one, for which no limit applies).

The deduction of trade union subscriptions from pay by the employer ('check-off') requires the employee's written authorisation before the deduction is made. Otherwise, the deduction is recoverable (from the employer) by complaint to the employment tribunal.

Guarantee payment

An employee is entitled to a guarantee payment for any day on which he or she is temporarily laid off. The payment is based on the 'guaranteed hourly rate'. This is calculated by dividing 'one week's pay' by the contractual number of weekly hours and multiplying the result by the number of hours of work lost on the day in question. The current maximum (from February 2011) guarantee payment is £22.20 per day. The rate is reviewed annually.

The entitlement to guarantee payments is, for a normal five-day working week, limited to five days in any rolling three-month period. Payment may be made only if:

- the employee has had at least one month's continuous employment
- the lay-off is not due to a trade dispute
- the employee has not unreasonably refused to do suitable alternative work
- the entitlement has not been exhausted in the previous three months.

An employee can complain to the employment tribunal that a guarantee payment is due. If this is successful, the tribunal may order the employer to pay the amount due.

There is a possible exemption from the right to a guarantee payment if a collective agreement already makes provision.

The employer's contractual liability

The guarantee payment is an employer's minimum obligation. But, unless an employee's contract clearly allows for lay-off without pay or for short-time working on reduced pay, the employer will be liable to pay the full contractual daily or weekly rate (which will include the statutory guarantee payment). If the employer fails to pay the full contractual rate, it will be in breach of contract and open to claims for unlawful deduction from wages (see above). If the employee resigns and establishes 'constructive' dismissal, the employer will be open to claims for unfair dismissal and/or a statutory redundancy payment (see Chapters 10 and 11).

Other liability for lay-off or short-time working

There are separate statutory provisions giving an employee the right to claim a statutory redundancy payment after a specified period of short-time working and/or lay-off (see Chapter 11). These use a different definition of 'lay-off', based on a full week without work.

Pay for medical suspension

Employees have a right to pay for up to 26 weeks if specified health and safety regulations require them to be suspended from work. This provision does not cover absence for 'ordinary' sickness or injury.

Conditions for payment and for enforcement are similar to those for a guarantee payment. An employment tribunal is able to award up to 26 weeks' pay to a successful complainant.

Statutory sick pay

Statutory Sick Pay (SSP) is payable for a maximum of 28 weeks in any period of incapacity for work or linked periods of incapacity. A period of incapacity for work is an absence from work because of illness of at least four days, whether or not these are working days.

Exceptions to this include employees:

- on short contracts of service
- with earnings below the lower earnings limit for National Insurance Contributions
- who are sick within 57 days of being paid certain State benefits, such as sickness benefits and maternity allowances
- who have done no work under the contract of service
- involved in a trade dispute
- who have received the maximum SSP
- working abroad, outside the European Union
- in legal custody.

Responsibility for direct payment (as ‘incapacity benefit’) is transferred to the Department for Work and Pensions (DWP):

- at the beginning of the incapacity if the employee is excluded as above, or
- after the maximum entitlement to SSP or
- when liability ceases for some other reason, such as when employment ends.

Statutory sick pay (with effect from April 2011)

Normal Weekly Earnings	Weekly SSP
Below £102.00	nil
£102.00 or more	£81.60

The payment rates are reviewed every April.

Reimbursement of the employer

This is by deduction from National Insurance Contributions of the full SSP paid during any month in which it exceeds 13% of gross National Insurance Contributions.

The self-employed, unemployed or non-employed (that is, paying Class 2 or 3 Contributions) are not included in the SSP scheme. They claim benefit directly from the DWP from the beginning of the incapacity.

Equal pay

Legislation requires, in certain circumstances (see below), equality in contractual terms and conditions of employment (including rates of pay and pensions) for men and women. The rules described here are one part of the laws to eliminate discrimination because of sex (which, along with other aspects of equality law, are described in Chapter 8).

Contracts of employment are deemed to contain a sex ‘equality clause’ and occupational pension schemes a ‘sex equality rule’. Each secures equal pay/pensions if a female and a male are both employed:

- ‘*in the same employment*’, that is, in the same ‘establishment’, or in another establishment of the same (or an associated) employer, where common terms and conditions are applied either generally or to relevant employees, and are also employed...
- ‘*on like work*’, which is work of the same or a broadly similar nature and if the differences in frequency, nature and extent are not of practical importance, or...
- ‘*on work rated as equivalent*’ by a job evaluation study under various headings of demands made. If the method of job evaluation has treated men and women differently under any heading and but for this a woman’s job would have been given equal value, the work may be rated as equivalent or...
- ‘*on work of equal value*’, if the demands made on an employee under, for instance, such headings as effort, skill and decision-making are determined by a tribunal to be of equal value to those made upon an employee of the opposite sex, even though the work is not ‘like work’.

Possible defence

The employer will have a defence if it can demonstrate that the variation in the compared employees' terms is due to a material factor:

- that does not involve treating one less favourably because of his or her sex; and
- that nevertheless puts the claimant's sex at a particular disadvantage, which is objectively justified (as being 'a proportionate means of achieving a legitimate aim').

Enforcement by the employment tribunal

Enforcement and remedy are through application to the employment tribunal for a declaration of rights and (except in cases of equal treatment for pensions) for arrears of remuneration or for damages normally covering six years (or, in Scotland, five years). For pensions, the employer is under a duty to provide the pension scheme with the necessary funds to ensure equality.

A claim for equal pay to the employment tribunal must normally be made within six months of the end of employment.

There is also a complaint to the tribunal about any victimisation for pursuing rights of equal pay (see Chapter 8).

Note – The code of practice, Equal Pay, issued by the Equality and Human Rights Commission (see Chapter 8) is both for the guidance of employers and for tribunals to take into account in deciding claims.

Exceptions to the operation of a sex equality clause or rule

Differences in:

- the amounts a man and woman are eligible to receive in pension, if the difference is attributable only to the different entitlement of each under the state pension; and
- the amount of benefits or of the employer's contributions to such benefits that are based on different actuarial factors.

Provisions on the secrecy of pay

Any term in a contract of employment or policy that seeks to prevent or restrict a person from:

- disclosing or seeking to disclose (to anyone) information about his or her terms of employment; or
- seeking disclosure of information from a colleague or former colleague about the colleague's terms

is unenforceable if the information disclosed or sought is or would be a 'relevant pay disclosure', which is one made to find out whether or to what extent there is a connection between pay and the existence of a particular protected characteristic (see Chapter 8).

Working hours

Weekly hours

Under the Working Time Regulations, an employer should ensure that a worker (employee or contract worker) does not work more than an average of 48 hours per week. The average is normally taken over a 'rolling' 17-week period. All employers are required to keep records that are sufficient to show whether the limits on working time are being complied with.

However, an employee may enter into an 'opt-out' agreement to avoid the 48-hour restriction. This is terminable by a minimum notice of seven days, and a maximum of three months.

There is no 48-hour maximum on weekly working time for those whose work is classified as 'unmeasured'. Examples of these workers are executives/managers and family workers, such as au pairs.

Night workers

The hours of night workers should be based on an averaged maximum of eight hours per 24 over the 17-week reference period. This does not apply to people whose jobs involve continuity of care or surveillance, although they are entitled to compensatory rest periods.

All night workers have the right to a free health assessment before starting night work and at regular intervals during it. The purpose is to determine whether the person is fit to do night work.

Younger workers

People aged 15 to 18 are subject to an absolute maximum of eight hours' work a day and 40 hours per week.

Road transport

For all road transport workers there is an absolute maximum of 60 hours per week.

Rest periods

Workers are entitled to one daily rest period of 11 hours in a 24-hour period and one weekly rest period of 24 hours in a seven-day period. In addition, they are entitled to one rest break of 20 minutes during any period of six hours or more. However, different rules apply to young workers and for certain categories of night-worker.

Employers can make some amendments to these obligations if they reach a collective agreement with a trade union or a workforce agreement with the elected representatives of the employees. The agreement can include changing the reference period for calculating the average working week and the provisions on rest periods.

Enforcement of rules on working hours

An employee has the right not to suffer a detriment for relying on rights under the Working Time Regulations. Enforcement of the regulations is either:

- for weekly/daily hours and night work, by the Health and Safety Executive (with the possibility of prosecution and unlimited fines); or
- for rest periods and breaks, by an employee's claim to the employment tribunal. A tribunal can award compensation that reflects any loss sustained by the employee as a result of the employer's breaching the regulations.

Holidays

The Working Time Regulations also deal with minimum holiday entitlement. Workers are entitled to a minimum of 28 days' (or 5.6 weeks') paid annual holiday, which can include bank/public holidays. In the year that the worker joined the employer, the entitlement accrues at the rate of one-twelfth per month. Entitlement for part-time workers who work less than five days per week is calculated pro rata. The Regulations do not generally provide for holidays to be carried over into the next holiday year. And payment in lieu of holidays is generally only allowed on termination of employment.

Of course, the contract of employment can improve on the minimum entitlement. Also, different rules (on carrying over, say) can be applied to the amount of holiday above the minimum.

We missed our flight!

An employer may warn an employee that overstaying leave will be regarded as misconduct that may result in dismissal. But if the employee does not return on time and is then dismissed, he or she can still complain of unfair dismissal (see Chapter 10). To succeed at the employment tribunal, the employer would have to show it acted reasonably.

Notification of leave

Most employers have their own rules for notification of holidays. The regulations also provide a formula: an employee must give advance notification of a period that is at least twice the length of the intended holiday. So, if the employee wants to take two weeks' leave then four weeks' notice must be given. If the employer wants to refuse the employee permission to take a period of leave, the notice required to the employee is the length of the period of leave requested (for example, two weeks in advance of a requested fortnight's leave).

Entitlement accrued during absence

People on maternity leave or extended sickness absence will accrue holiday entitlement during these absences and can choose to take paid leave either during the absence (for example, when entitlement to sick pay has expired) or afterwards. This principle is derived from decisions of the European Court of Justice on the interpretation of the Working Time Directive. In particular, the possibility of employees' postponing leave until their return creates a potential conflict with the United Kingdom's own prohibition on carrying over leave (see above).

Note: the government is currently consulting on proposals to change the UK's law to be consistent with ECJ rulings.

Enforcement of holiday entitlement

An employee can submit a claim to the employment tribunal if leave has been denied, or if leave has been taken but the employee has not received the appropriate payment for it.

Overpayments on holiday pay

If the employee takes more leave than the annual entitlement, the employer may recover the equivalent amount by a deduction from wages or salary only if a prior agreement so permits (see above).

5. Statutory employment rights – family matters

5 Statutory employment rights – family matters

Time off for ante-natal care

A pregnant employee is entitled to paid time off for ante-natal care. The care must be prescribed by a doctor, midwife or health visitor. After the first visit, the employer can ask for documentary evidence of pregnancy and details of appointments.

If an employment tribunal finds that this time off has been unreasonably refused by the employer, it can award pay for the time off concerned.

Suspension on maternity grounds

Under designated health and safety legislation, an employee is entitled to be transferred (on the same terms and conditions of employment) from a job that might affect her health if:

- she is pregnant
- she has recently given birth, and/or
- she is breastfeeding.

If no suitable work is available, she must be suspended on pay for whatever period is medically certified.

Maternity leave

Qualification and scope

No employee may work for the two weeks immediately after the date of childbirth.

An employee is entitled to a maternity leave period (MLP) of a maximum of 52 weeks. This consists of 26 weeks' 'ordinary maternity leave' (OML) and 26 weeks' 'additional maternity leave' (AML).

To qualify for this entitlement, the employee must notify her employer, by the 15th week before her expected week of childbirth, that she is pregnant, the expected week of childbirth and when she wants the leave to start.

The employee can choose to start her leave at any time during the eleven weeks before the expected week of confinement (although leave starts automatically if the employee is absent for a reason to do with pregnancy during the four weeks before the expected week of childbirth).

The employee may change the starting date of her leave, provided that she tells her employer at least 28 days in advance of that starting date, unless this is not reasonably practicable. If requested, she must provide a medical certificate that shows the expected date of childbirth.

Once the employee has notified the employer of the starting date of her leave, the employer must respond within 28 days telling the employee the date on which she is expected to return to work if she takes her full 52-week entitlement to maternity leave.

The contract of employment continues during both OML and AML and all the employee's contractual benefits, apart from pay, are maintained during the whole of her MLP. The MLP also counts as pensionable service.

Contact during maternity leave

Both the employer and employee may contact each other to discuss matters to do with work or maternity, provided that the amount or type of contact is reasonable. An employee may do up to ten 'keeping in touch' days, doing agreed work, for an agreed rate of pay, without bringing her maternity leave to an end. The leave period is extended by the number of days worked.

Return to work after maternity leave

The same notice of return requirements apply both to OML and to AML.

If the employee wishes to return before the end of either OML or AML, she must give her employer at least eight weeks' notice of the date on which she wants to return. If she fails to do so, the employer can postpone her return for up to eight weeks after her request was made, as long as this does not delay her return beyond the end of the full 52-week MLP.

The employee does not have to give any notice to return on the expiry of either the 26-week OML or the 52-week MLP.

After OML, the employee has the right to return to the job she was in before her leave started, with all the rights she had. However, after AML, she may only return to the same job if it is reasonably practicable – otherwise, a suitable alternative job must be offered.

The employee may ask to return to work part-time after maternity leave (see also flexible working below). This is not within the scope of her statutory right to return (see above) and, in that sense, the employer can refuse the request. However, if the employer does so without a business justification, the woman may bring a claim for indirect sex discrimination (see Chapter 8).

If the employer refuses to allow a woman to return to work after maternity leave, she will be regarded as dismissed and the dismissal will be automatically unfair. This could lead the woman to make a claim to the employment tribunal and to an award of compensation.

If a woman is found to have suffered a detriment because of pregnancy or maternity leave, an employment tribunal can award her unlimited compensation.

A person taken on as a temporary replacement for a woman on maternity leave can be fairly dismissed as long as the replacement is informed on engagement that the employment will terminate on the return of the other employee from maternity leave.

Statutory maternity pay

To qualify for statutory maternity pay, a woman:

- must have at least 26 weeks' continuous service (irrespective of the number of hours worked) at the start of the 15th week before the expected confinement (the 'qualifying week') and
- must have average weekly gross earnings in the eight weeks up to and including the qualifying week that are at least equal to the National Insurance lower earnings limit (£102.00 from April 2011) and
- still be pregnant at the 11th week before the expected confinement.

The amount of statutory maternity pay is normally 90% of average weekly earnings for each of the first 6 weeks of maternity leave, followed by 33 weeks at the flat rate (£128.73 from April 2011) or 90% of average earnings if that is less. The total of 39 weeks is known as the Maternity Pay Period.

Any pay rise applying to a woman after the start of the period used to calculate statutory maternity pay and before the end of the maternity leave period is taken into account when calculating the amount of statutory maternity pay due.

If the employee is absent for a pregnancy-related reason on or after the beginning of the fourth week before the expected week of confinement, the maternity pay period starts automatically.

Employers are reimbursed for statutory maternity pay. They may deduct 92% of the gross payment of statutory maternity pay from their monthly National Insurance contributions. Small employers (those whose annual National Insurance contributions are £45,000 or less) recover 95%.

Paternity leave

Statutory paternity leave is divided into ordinary paternity leave (OPL) and additional paternity leave (APL).

Qualification

The conditions for OPL and APL are largely the same. An employee must:

- have, or expect to have, responsibility for the child's upbringing and
- be the biological father of the child, or the mother's husband or partner
- have worked continuously for the employer for 26 weeks leading into the 15th week before the baby is due and
- for APL only, remain in continuous employment with that employer until the week before the first week of APL.

Ordinary paternity leave

Under OPL, an employee is entitled to two weeks' paternity leave. The leave can be taken as two consecutive weeks or as one week. If only one week is taken, the entitlement to the second week is lost.

The leave must be taken within 56 days of the actual birth of the child, or, if the child is born early, within the period from the actual birth up to 56 days after the originally expected week of birth.

Only one period of OPL may be taken, irrespective of whether more than one child is born as a result of the same pregnancy.

The employee must tell the employer of his intention to take OPL by the 15th week before the baby is expected, and must also tell the employer:

- the week the baby is due
- whether he wishes to take one or two weeks' leave
- when he wants the leave to start.

The employer can ask the employee to provide a self-certificate as evidence of entitlement to paternity leave. HMRC has a 'model' self-certificate for this purpose.

The employee can change his mind about when he wants OPL to start, provided that he tells the employer at least 28 days in advance of the day he wants leave to start (unless this is not reasonably practicable).

The employee's contract of employment remains in existence during OPL, except for terms about wages or salary.

The employee is entitled to return to the same job after OPL.

The employee is protected from suffering a detriment or unfair dismissal for reasons to do with taking, or seeking to take, OPL. If the employee believes he has been treated unfairly, he can complain to the employment tribunal, irrespective of his length of service.

Additional paternity leave

Employed fathers can take up to 26 weeks' APL, once the mother has returned to work from maternity leave (although there may be a gap), commencing no earlier than 20 weeks and ending no later than 12 months after the child's birth.

To take APL, the employee must, at least 8 weeks before the start of leave:

- give the employer written notice of the date the baby was due, the actual date of birth and the chosen starting and ending dates of the APL;

- sign a declaration that he is taking leave to care for the child, expects to have responsibility for it and is its father or the husband or partner of its mother.

The child's mother must also provide the employer of the father/husband/partner with a signed declaration confirming certain of these details and specifying the date on which she intends to return to work.

Within 28 days of receiving the notice of leaving, the employer:

- can request the employee to provide a copy of the child's birth certificate and the details of the mother's employer. If the employee fails to comply with the request, the right to APL is lost; and
- must respond to the notice of leaving, confirming the employee's entitlement and the timing of APL.

There is provision for the employee to cancel APL or to vary the starting and ending dates (for example, because the mother has changed her date of return from maternity leave) by written notice to the employer at least 6 weeks before the date to be cancelled/varied or 6 weeks before the new date (whichever is the earlier). If the employee does not comply with this timescale and it is not reasonably practicable for the employer to accommodate the change(s), the employee may be required to take the originally notified APL.

During APL, the contract of employment continues in all respects except for the entitlement to remuneration.

At the end of APL, the employee has the right to return to the job he held when it started, its terms and conditions being maintained as if he had not been absent.

Note: Because of the rules on additional statutory paternity pay (see below), any leave taken after the mother's maternity pay period expires will be unpaid.

Statutory paternity pay

During OPL, statutory paternity pay (SPP) is payable for up to the maximum two weeks' leave at the same rate as applies to statutory maternity pay after the first six weeks (£128.73 from April 2011).

Additional statutory paternity pay (ASPP) is only available if:

- The employee has satisfied the same criteria for eligibility as applied to APL (see above);
- the mother has returned to work from maternity leave with at least 2 weeks of her entitlement to SMP (see above) remaining; and
- the employee's earnings for the 8 weeks ending with the 15th week before the EWC have been at least at the lower earnings limit (£102 per week from April 2011).

Given the link with APL (see above), ASPP cannot be paid before a date falling 20 weeks after the birth of the child. So, as the mother's maternity pay period is for a maximum of 39 weeks (see above), the normal maximum period for ASPP is 19 weeks.

The weekly rate of ASPP is the lower of £128.73 and 90% of the employee's normal weekly earnings.

The means of the employer's reimbursement of paternity pay is the same as for statutory maternity pay.

Adoption leave

Qualification and scope

An employee who has been matched with a child for adoption is an 'adopter'. An adopter is entitled to 26 weeks' ordinary adoption leave (OAL), followed by 26 weeks' additional adoption leave (AAL) – a total of 52 weeks' leave, called the Adoption Leave Period (ALP).

To qualify for adoption leave, an employee must be newly-matched with a child for adoption by an approved adoption agency and have worked continuously for the employer for 26 weeks leading into the week in which the match with a child for adoption is notified.

Adoption leave is not available when a child is not newly-matched for adoption, for example when a step parent or foster parent is adopting a partner's child.

The adopter is required to inform the employer of the intention to take leave within seven days of notification of having been matched with a child for adoption, unless this is not reasonably practicable. The adopter must tell the employer when the child is expected to be placed and when adoption leave is to start.

The employer can ask for evidence of entitlement to adoption leave. In this case, the adopter must provide a 'matching certificate' from the adoption agency. The adopter must then give the employer 28 days' notice of the date the adoption leave is to start.

The employer has 28 days to respond in writing to an employee's notification of leave. The employer must state when the employee is expected to return to work, assuming the full entitlement to leave is taken.

An adopter can change the date on which adoption leave and Statutory Adoption Pay are to start, giving at least 28 days' notice, unless this is not reasonably practicable.

All contractual benefits, apart from pay, are maintained during the ALP.

Contact during adoption leave

Both the employer and employee may contact each other to discuss matters to do with work or adoption, provided that the amount or type of contact is reasonable. An employee may do up to ten 'keeping in touch' days, doing agreed work, for an agreed rate of pay, without bringing the adoption leave to an end. The leave period is extended by the number of days worked.

Return to work after adoption leave

An employee who wishes to return before the end of either OAL or AAL must give the employer at least eight weeks' notice of the date of return. If the employee fails to do so, the employer can postpone the return for up to eight weeks after the request was made, as long as this does not delay the employee's return beyond the end of the full 52-week ALP.

The employee does not have to give any notice to return on the expiry of either the 26 weeks' ordinary leave or the 52 weeks' full leave.

If the employer refuses to allow an employee to return to work after adoption leave, the employee will be regarded as dismissed and the dismissal will be automatically unfair. This could lead the employee to make a claim to the employment tribunal, which may award compensation.

If an employee is found to have suffered a detriment because of adoption or adoption leave, an employment tribunal can award unlimited compensation.

Statutory adoption pay

Employees whose weekly average gross earnings are at least equal to the National Insurance lower earnings limit (£102.00 from April 2011) are entitled to statutory adoption pay for a continuous period of 39 weeks (provided that the adoption is not disrupted) at the rate of £128.73 (from April 2011) or at 90% of average earnings if that is less.

Paternity leave on adoption

Ordinary leave

An employee is entitled to take two consecutive weeks' ordinary paternity leave within 56 days of the child's (or children's) placement.

Additional leave

An employee might also be able to take additional paternity leave (see above). The provisions governing the conditions that qualify a person to take such leave on adoption, the notice of intention to take leave, self-certification, the preservation of the contract, the right to return to the same job and protection from detriment and dismissal match those for additional paternity leave.

Statutory paternity pay on adoption

The provisions for paternity pay on adoption are materially the same as those for statutory paternity pay.

Flexible working

Parents of children aged under 17, or of disabled children aged under 18, and carers of an adult who lives at the same address as the employee, or who is the spouse or partner of the employee or a relative of the employee, have the right to apply to work flexibly. Employers have a statutory duty to consider their applications seriously.

To be able to make a request for flexible working, the employee must:

- have worked for the employer continuously for at least 26 weeks on the date the application is made
- in the case of a parent, make the application before the child's 17th birthday, or 18th birthday in the case of a disabled child
- have, or expect to have, responsibility for the child's upbringing or for providing care
- be making the application in order to care for the child or for the other person for whom the employee is the carer
- not have made another application to work flexibly under this right in the past 12 months.

What changes can employees ask for?

They can request:

- a change in their hours of work
- a change to the times when they are required to work
- to work from home.

If a request is accepted, it will lead to a permanent change in the employee's terms and conditions of employment.

An employee who wishes to make an application to work flexibly must do so in writing. The application must state that it is a request for flexible working; the flexible working pattern that is applied for and the date on which the employee proposes it should start; how the employee meets the criteria for the relationship with the child or the other person for whom the employee is caring; and the effect of the change on the business and how this effect could be dealt with.

Within 28 days of the application's being made, the employer must meet the employee to discuss it. The employee may, on request, be accompanied by a fellow employee at this meeting. If the proposed working pattern cannot be accommodated, other options can be considered.

Within 14 days of the meeting, the employer must write to the employee, either to agree on the new working pattern and a starting date for it, or to provide clear business grounds why the application cannot be accepted. The letter must set out the procedure for an appeal.

Appeal

The employer should hold a meeting to discuss any appeal by the employee within 14 days of receiving the submission of an appeal. The employee may, on request, be accompanied by a fellow employee at the appeal meeting.

The employer should notify the employee of its decision on the appeal within 14 days of the meeting. If the appeal is upheld, the employer's letter should state the contract variation that has been agreed on and the starting date. If the employer dismisses the appeal, the letter should state the reasons for the decision and give sufficient explanation of why the decision was made.

These timescales can be extended by agreement between the employer and employee.

A meeting may be postponed for up to seven days if the employee's chosen work colleague is not available.

Can an employer refuse an application for flexible working?

It can only be refused for one, or more, of the following reasons:

- the burden of additional costs
- the detrimental effect on the ability to meet customers' demands
- the inability to reorganise work among the current staff
- the detrimental impact on quality or performance
- an inability to recruit
- insufficiency of work during the periods when the employee proposes to work
- planned structural changes.

Referral to the employment tribunal

An employee may refer a request if:

- the employer has not followed the procedure
- the decision was based on incorrect information
- the reason given for the refusal is not one that is specified.

The maximum compensation that the tribunal can award is 8 weeks' pay.

An employee has the right not to suffer a detriment, or to be dismissed, for seeking to exercise the right to request flexible working or for accompanying or seeking to accompany someone who wishes to exercise the right.

Note: The government is currently consulting on the extension of the right to request flexible working to all employees, whether or not they are parents.

Parental leave

An employee with one year's service is entitled to take a total of 13 weeks' (or, for a disabled child, 18 weeks') unpaid parental leave for any purpose connected with the care of each child for whom the employee has parental responsibility. The right is to 13 (or 18) weeks' leave in total, with all employers.

The leave must be taken before:

- a natural child's fifth birthday, if the child is not disabled
- in the case of an adopted child who is not disabled, the fifth anniversary of the adoption, or the child's eighteenth birthday, whichever is earlier
- a natural or adopted child's eighteenth birthday, if the child is disabled.

Provisions of parental leave

Unless there is a separate collective agreement with a trade union or a workforce agreement with employees' representatives, the following provisions apply:

- the employee must have one year's service with the employer
- the employee must give the employer at least 21 days' notice of the intention to take parental leave and tell the employer the dates on which the leave is to start and finish
- the employee can take a maximum of four weeks' parental leave for any particular child in a particular year
- a period of leave that lasts less than a week counts as a week
- the employer has the right to postpone leave for up to six months on business grounds (except when leave is immediately after the birth of the child).

Referral to the employment tribunal

An employee who is refused the right to take parental leave, or whose employer postpones the leave unreasonably, may make a claim to the employment tribunal leading to an award of compensation.

An employee has the right not to suffer detrimental treatment by the employer for exercising the right to take parental leave.

Time off for dependants

A 'dependant' is a spouse, child, parent or person living in the employee's household as one of the family and, for the first three situations below, also a person for whom the employee is the primary carer.

An employee is entitled to reasonable unpaid time off work:

- to assist a dependant who is ill, injured or assaulted, or who gives birth
- to arrange care for an ill or injured dependant
- because of unexpected problems with a dependant's care arrangement
- in consequence of a dependant's death
- to deal with an unexpected incident, during school hours, affecting a child.

The right is only available if the employee tells the employer, as soon as possible, the reason for the absence and, if practicable, how long it is expected to last.

Referral to the employment tribunal

An employee who is refused time off may complain to the employment tribunal, with a possible award of compensation.

An employee has the right not to suffer detrimental treatment by the employer for exercising the right to take time off.

6. Trade union membership, duties and activities

6 Trade union membership, duties and activities

Time off

For officials

An official of a recognised independent trade union has the right to reasonable time off, with pay, for industrial relations duties and training. These must be concerned with matters that are the subject of negotiation with the employer or with other functions that the employer has recognised as appropriate for the union.

For accredited learning representatives

Accredited learning representatives of a recognised independent union are entitled to reasonable time off with pay to carry out their duties (analysing training needs, advising members on learning, arranging training for members, consulting the employer and associated preparation) and to ensure that they are adequately trained for these functions.

For members

A member of a recognised independent union has the right to reasonable time off for union activities (not industrial action). There is no statutory right to pay for this time off.

Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice 'Time Off for Trade Union Duties and Activities' clarifies these rights. 'Duties' are defined and those items listed as 'activities' cannot be claimed as union duties that attract a mandatory payment.

Inducements

A worker has the right not to be induced by the employer:

- not to be a member of an independent trade union
- not to take part in the activities of an independent trade union
- not to make use of a trade union's services
- to be a member of a trade union or

- if he or she is a member of a recognised union (or one seeking recognition), to adopt terms of employment that will not be determined by a collective agreement negotiated by that union.

An employee (or worker) can complain to the employment tribunal that the employer has attempted such inducement. A successful complaint attracts an award of £3,300 (from February 2011).

Victimisation

A worker has the general right to apply to the employment tribunal claiming that an employer has taken action short of dismissal (such as withholding opportunities for transfer, training and promotion) against her or him as an individual:

- to prevent, deter or penalise the worker for membership of an independent trade union
- to prevent, deter or penalise the worker for participation in the activities of an independent trade union or for making use of its services at an appropriate time
- to compel the worker to join a union
- to penalise the worker for involvement in union recognition or de-recognition (see Chapter 14)
- because of the worker's failure to accept an inducement (see above)
- because the worker features on a prohibited 'blacklist' (see Chapter 3).

The remedy is a complaint to the employment tribunal for a declaration and compensation (an amount that the tribunal considers just and equitable reparation for the loss).

The employer and/or worker can join a third party (person or trade union) who, they claim, induced the alleged victimisation by actual or threatened industrial action. The tribunal may order that third party to pay part or all of any award.

7. Miscellaneous statutory rights

7 Miscellaneous statutory rights

Health and safety

Time off

Safety representatives nominated by trade unions or elected by employees are entitled to reasonable paid time off to perform functions and undergo appropriate training.

Victimisation

An employee has the right to complain to an employment tribunal of detrimental treatment by the employer arising from the following actions by the employee:

- undertaking activities in connection with reducing risks to health and safety (having been designated by the employer to undertake such activities)
- performing functions as an acknowledged safety representative or member of a safety committee
- taking part in consultation with the employer on safety matters or in an election of employee representatives in accordance with specific regulations
- bringing to the employer's attention, by reasonable means, matters believed to be harmful to health and safety (if either there is no safety representative or committee, or it is not practicable to contact them)
- leaving or refusing to return to a place of work in circumstances of serious and imminent danger
- taking steps to protect himself or herself or others from serious and imminent danger.

In most of the above, proposed action by the employee of the type described is also protected.

The remedy is a complaint to the employment tribunal for a declaration and compensation (an amount that the tribunal considers just and equitable reparation for the loss).

Employees' representatives

Time off

An employee who is an employees' representative for the purposes of consultation (see Chapter 12) or a candidate for such a post has the right to reasonable time off with pay to undertake relevant functions.

Enforcement is by a claim to the employment tribunal, which will award a successful claimant the amount of pay for the time off denied or not paid for.

Victimisation

The employee has the right not to be subjected to any detrimental treatment by his or her employer on the grounds that, as an employees' representative or as a candidate in an election for that post, he or she performed, or proposed to perform, relevant functions or activities.

Enforcement is by a claim to the employment tribunal, which may award compensation having regard to the nature of the breach and the employee's resultant loss.

Trustees of occupational pension schemes

Time off

An employee who is a trustee of an occupational pension scheme has the right to reasonable time off with pay to perform appropriate duties or undergo relevant training.

Victimisation

An employee has the right not to be subjected to any detrimental treatment on the grounds that he or she performed or proposed to perform any relevant functions as a trustee of an occupational pension scheme in that employment.

Sunday working

'Protected' and opted-out shop workers and betting workers have the right not to be subjected to any detrimental treatment for refusing to work on Sundays. All shop workers and betting workers have the right not to be treated detrimentally for opting out or proposing to do so. The remedy is a complaint to the employment tribunal for a declaration and compensation.

Time off for public duties

The right is to reasonable time off to undertake public duties. There is no statutory right to pay for this time off. Public duties include duties as a Justice of the Peace, or as a member of:

- a local authority
- a statutory tribunal
- a police authority
- an independent monitoring board for a prison or prison visiting committee
- a relevant health or education body
- the Environment Agency
- Scottish Water or a Water Customer Consultation Panel.

'Reasonable' time off depends on the circumstances.

Jury service

An employee has the right not to be subjected to any detrimental treatment on the grounds that he or she has been summoned to attend jury service or is or has been absent from work for that purpose.

However, the employer's failure to pay the employee for such absence will not be detrimental treatment unless the contract provides for payment.

Time off when under notice of redundancy

A redundant employee with two years' continuous service is entitled to reasonable time off during the period of notice to look for work or arrange for training. The employer must pay the employee, at the appropriate rate, to a maximum of two-fifths of a week's pay.

The employment tribunal can award two-fifths of a week's pay if it finds an employer has unreasonably refused the employee time off.

Requests for time to train

If their employers employ at least 250 people, employees with at least 26 weeks' service have the right to request time off from normal duties to undertake training that will enhance their knowledge and skills and the performance of the business.

The employer will be under a duty to consider the request according to a procedure that is very similar to that used for requests for flexible working (see Chapter 5). The request may be denied if there are good business reasons for doing so or if the employer believes that the training will not enhance the business.

Disclosure in the public interest

An employee may apply to the employment tribunal for compensation if subjected to a detriment by the employer as a result of making a 'protected disclosure' of information about an alleged wrongdoing ('whistleblowing').

The information being disclosed must be about one of the following prescribed subjects:

- a criminal offence
- a failure to comply with a legal obligation
- a miscarriage of justice
- endangering the health and safety of an individual
- damage to the environment
- concealment of any of the above.

To qualify for protection, the employee's disclosure must:

- almost invariably be made in 'good faith'
- normally be made to the employer or, in the reasonable belief that one of the listed subjects is involved *and* that the content of the disclosure is true, to a prescribed regulatory body or a legal adviser. If a worker's employment is with people appointed by a Minister of the Crown, disclosure must be to a Minister of the Crown.

A grievance about the employer's alleged failure to comply with contractual (legal) obligations to the employee is capable of being treated as a 'protected disclosure' by the employee.

Data protection

In general terms, data should be processed in accordance with the Data Protection Act. *The Employment Practices Data Protection Code – 2005 provides guidance.*

Most employers process data, which means that they must be registered with the Information Commissioner as doing so. A failure to register gives rise to a criminal offence. Records held manually and by computer are both covered by the Act.

Employees' access to their personal data

Employees are entitled to see what data are held on them, provided that their requests are made in writing. Access to the data must normally be given within 40 days of the request. If the data identify a third person, the employee does not have an automatic right to see those data. Either the consent of the third party must first be obtained, or identifying features must be removed.

References

There is no general legal duty to provide a reference about an employee or ex-employee. Employers should, however, be mindful of any potential claim for victimisation, during employment or post-employment, under the various laws against discrimination (see Chapter 8).

When a reference is provided, there is a legal duty of care, both to the person it is about and to the person it is being sent to. This requirement can be met if the reference is factual and fair.

Being accompanied at disciplinary and grievance hearings

A worker has the right, on request, to be accompanied at any grievance or disciplinary hearing by a work colleague or trade union representative.

A grievance hearing is a meeting to discuss a failure by an employer to perform a duty to a worker.

A disciplinary hearing is one which could result in a formal warning, some other action or the confirmation of a warning or other action (that is, an appeal).

The hearing should be rescheduled (maximum five-day postponement) if the chosen companion cannot attend.

What the companion is allowed to do

The companion (who must be allowed paid time off work) is permitted:

- to put the worker's case
- to sum up that case
- to respond on the worker's behalf to any view expressed at the hearing but not to answer questions on behalf of the worker.

What if the employer refuses to allow the worker to be accompanied?

The remedy is a complaint to the employment tribunal and an award of up to two weeks' pay. Also, a worker may seek compensation from the employment tribunal if subjected to a detriment for exercising the right to be accompanied or for acting as the companion of another worker.

The ACAS Code of Practice on disciplinary and grievance procedures

This provides practical guidance and sets out the principles for handling matters of discipline and grievance. The employment tribunal will take the code into account when considering relevant cases. It can adjust any award by up to 25% for unreasonable failure to comply with the code. So, if the tribunal feels that an employer has unreasonably failed to follow the guidance in the code, it can increase an award. If it feels an employee has failed to follow the guidance, it can reduce any award by up to 25%.

Medical reports

For employment or insurance reasons an employer may obtain a report from a medical practitioner who is responsible for the clinical care of an employee. Before the employer can get the report, the employee must be told that the employer is to apply for the medical information and the employee must give consent.

The employee must also be told his or her rights to do with the report. These are:

- to withhold consent to the application for the report or the disclosure of its contents
- to see the report before it is given to the employer
- to ask for a copy of the report within six months of its supply
- to amend any part of the report that he or she considers inaccurate or misleading.

A medical practitioner may refuse to allow a person to see a report if doing so would cause serious physical or mental harm, or would reveal the identity of someone who has supplied information for the report.

An employee who refuses consent for a medical report could be made subject to disciplinary action and/or the withdrawal of sick pay. Further, any decision by the employer about the employee's suitability for continued employment or for a particular type of work will have to be taken on the basis of other information available.

Note: For pre-employment requests for medical information, see Chapters 3 and 8.

8. Equality, diversity and non-discrimination

8 Equality, diversity and non-discrimination

Laws promoting diversity

Legislation protects people in work from being subjected to 'prohibited conduct' to do with a 'protected characteristic'.

Generally, the intention of the alleged perpetrator is irrelevant to whether or not prohibited conduct has occurred.

Protected characteristics

These are:

Sex – being male or female

Sexual Orientation – whether towards others of the same sex, the opposite sex or both sexes

Marriage or civil partnership (but not being single)

Gender reassignment/transsexuality – the person is undergoing, has undergone or is proposing to undergo whole or part of a process to reassign sex by changing physiological or other attributes of sex (Note: the process does not have to be a 'medical' one)

Race – including colour, nationality, and ethnic or national origins

Religion or belief – any religion or 'religious or philosophical belief' or the lack of one

Disability – a physical or mental impairment that has a substantial and long-term (having lasted or being likely to last for 12 months or the rest of life) adverse effect on the ability to carry out normal day-to-day activities. Also note:

- the effect of impairment must be judged without regard to medical treatment or other corrective aids or measures
- a progressive condition that is likely ultimately to have the required effect is treated as a disability even though it has not yet reached that stage

- recurring conditions that have the required effect are treated as continuing to have that effect during periods of remission
- severe involuntary disfigurements, blindness, partial sightedness, cancer, HIV and multiple sclerosis are automatically treated as disabilities
- a disability that has now ceased can still be the subject of protection

Age – being either of a particular age or within a particular range of ages

Pregnancy and maternity – the protected period between the start of pregnancy and, for an employee, the expiry of the AML (see Chapter 5) or, if earlier, the return to work after pregnancy or, for a non-employee, the expiry of 2 weeks after the end of pregnancy

General forms of prohibited conduct

The legislation describes various types of conduct (an act or omission) by reference to a protected characteristic (see above) which, when occurring in the context of work (see below), will be unlawful. The forms of prohibited behaviour or conduct are:

Direct discrimination

Because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Note:

- *The wording of the definition allows it to cover situations in which B does not have the protected characteristic but A's treatment of B is either (i) because A perceives B to have it or (ii) because B associates with others who do have it (except, in the latter case, spouses or civil partners)*
- *If the protected characteristic is age, there is a defence of justification (the conduct in question is a 'proportionate means of achieving a legitimate aim')*
- *If the protected characteristic is disability and B is not disabled, there is no direct discrimination simply because A treats disabled people more favourably*

Combined/dual direct discrimination

Because of a combination of two protected characteristics, A treats B less favourably than A treats or would treat others who do not share either of those characteristics.

Note:

- *Not yet brought into force by secondary legislation*
- *The protected characteristics of marriage/civil partnership and pregnancy/maternity are not covered*
- *The wording means that discrimination by perception or through association (see above) is within scope*

Indirect discrimination

There are three necessary elements:

- A applies a 'provision, criterion or practice' which puts or would put those with whom B shares a protected characteristic at a particular disadvantage compared with those with whom B does not share it
- it puts or would put B at that disadvantage and
- A cannot justify it as a proportionate means of achieving a legitimate aim

Note – the protected characteristic of pregnancy and maternity (see above) is not specifically within the scope of indirect discrimination, although the protected characteristic of sex is and would cover most situations anyway.

Harassment

There are three forms:

- A engages in unwanted conduct to do with sex, sexual orientation, gender reassignment, race, religion or belief, disability or age and the conduct has the purpose or effect of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- A engages in unwanted conduct of a sexual nature and the conduct has the same effect or purpose.
- A or another engages in unwanted conduct to do with sex or gender reassignment or of a sexual nature that has the same effect or purpose and then, because B rejects that conduct, A treats B less favourably than would otherwise have been the case.

Note:

- In all three forms of harassment, the effect of the conduct must be judged with reference to B's perception, to the other circumstances, and to whether it is reasonable for the conduct to have that effect.
- An employer can also be directly liable for failing to take reasonable steps to prevent an employee from being subjected to harassment by one or more third parties (anybody not employed by the employer) when the employer is aware that the employee has been subject to such harassment on at least two previous occasions (not necessarily by the same third party).

Victimisation

A subjects B to a detriment because B has done or because A believes B has done or may do one of the following acts:

- Bringing legal proceedings about a protected characteristic
- Giving evidence or information in connection with such proceedings
- Making an allegation that someone has broken the law on equality (including equal pay – see Chapter 4)

Note – there is no need for a comparator here.

Instructing, causing or inducing discrimination or other prohibited conduct

A instructs, causes, induces or attempts to cause or induce B to undertake prohibited conduct affecting C.

Aiding discrimination or other prohibited conduct

A knowingly helps B to discriminate or undertake prohibited conduct (unless A reasonably relies on a statement by B that the conduct for which help is given is not unlawful)

Work-based situations in which discrimination will normally be unlawful

'Employment'

Prohibited conduct (particularly discrimination and victimisation) will generally be unlawful, so an employee, worker (operating under a contract to do work personally – see Chapter 2) or job applicant will be allowed to take action against the employer if such conduct exists in:

- the operation of the arrangements for selection
- a refusal or deliberate omission to offer employment
- the terms of employment offered
- the terms in employment operated/applied
- access to opportunities for promotion, transfer or training; or to benefits, facilities or services or
- dismissal or other detriment.

Note:

- direct discrimination that occurs in selection, recruitment, promotion/transfer/training or dismissal will not be unlawful if having a particular protected characteristic is an 'occupational requirement' for a job and the exercise of that requirement is justified as being a proportionate means of achieving a legitimate aim.
- acts of discrimination or harassment that occur after employment has ended are unlawful if they arise out of and are closely connected with the previous employment.

'Contract (or 'agency') workers'

Those hired out by their employer to a host business for which they do work are protected against harassment by the host. They are also protected against discrimination and victimisation by the host:

- in the terms on which the host allows the workers to do the work
- in not allowing the worker to do or to continue doing the work
- in access to opportunities for receiving a benefit, facility or service
- in any other detriment

Issues and exemptions linked to particular protected characteristics

Sex

Exemptions are:

- discrimination, based on reasonable reliance on reputable actuarial or other data, in an annuity, life insurance policy, accident insurance policy or similar thing involving the assessment of risk
- discrimination on matters covered separately by the equal pay provisions (see below and Chapter 4) and
- discrimination that is necessary to comply with statutory provisions to protect women against risks specific to them, such as pregnancy and maternity.

Potential discrimination in promotion

It is unlawful for an employer to discriminate against an employee ‘in the way he affords her access to opportunities for promotion...’ The possibility of discrimination in internal promotion is much greater if there is no formal selection procedure in place, and promotion is based on managerial discretion.

If promotion is refused because the employer believes a woman would not ‘fit in’ with the male-dominated culture of senior managers, a tribunal may infer that discrimination has tainted the promotion process.

A woman absent on maternity leave who is not informed of possible opportunities for promotion also has a potential claim. In *VISA International Service Association v Paul*, a failure to alert a pregnant woman on maternity leave to a job for which she would have been likely to consider herself suitable subjected her to a detriment because of her pregnancy. It was also a breach of the implied term of trust and confidence (see Chapter 3) entitling her to resign and claim constructive dismissal (see Chapter 10).

Marriage/civil partnership

- As indicated earlier, combined/dual discrimination involving this protected characteristic cannot be claimed.
- Exempted is discrimination, based on reasonable reliance on reputable actuarial or other data, in an annuity, life insurance policy, accident insurance policy or similar thing involving the assessment of risk.

Gender reassignment

- Specific protection against discrimination if, on B’s absence because of gender reassignment (perhaps for a medical procedure or counselling), A treats B less favourably than A would if B’s absence:
 - were because of sickness or injury; or
 - were for some other reason and it was not reasonable for B to be treated less favourably.
- Exempted is discrimination, based on reasonable reliance on reputable actuarial or other data, in an annuity, life insurance policy, accident insurance policy or similar thing involving the assessment of risk.

Religion or belief

Your belief/my belief

To be a ‘protected characteristic’, a ‘belief’ does not have to be religious. It must be:

- genuinely held
- a belief, not an opinion or viewpoint
- a belief about a weighty and substantial aspect of human life and behaviour
- able to attain a certain cogency, seriousness, cohesion and importance
- worthy of respect in a democratic society; not incompatible with human dignity; and not in conflict with the fundamental rights of others.

In *Grainger plc and others v Nicholson*, it was held that a claimant’s belief that mankind is heading towards catastrophic climate change and that people should live their lives in a way that would reduce or avoid that catastrophe fell within the limits of what might constitute a philosophical belief and qualify for protection.

Exemption for anything necessarily done pursuant to a requirement of legislation or to a requirement or condition imposed under legislation

Disability

■ If B is not disabled, there is no direct discrimination (see above) simply because A treats disabled people more favourably

■ Discrimination arising from disability

There is an additional type of prohibited conduct where A treats B unfavourably because of something 'arising in consequence of' B's disability and A cannot justify the treatment (as a proportionate means of achieving a legitimate aim).

Note:

➤ *Under the wording, there is no need for a comparator of any type – so unfavourable/detrimental treatment (such as a warning or dismissal) of B for absence in consequence of a disability will be discrimination by A (unless it can be justified)*

➤ *There can be no discrimination here unless A knows or ought reasonably to know of B's disability*

■ 'Reasonable adjustments'

An employer has a duty, applying to all work-related situations (see above), to make reasonable adjustments if:

- a 'provision, criterion or practice',
- a physical feature of premises or
- the absence of an auxiliary aid

places a disabled person at a substantial disadvantage to a person who is not disabled.

The duty does not arise unless the employer knows or ought reasonably to know that there is a person with a specific disability.

The duty is to take such steps as are reasonable to avoid the disadvantage or, in the third case, to provide the auxiliary aid.

Steps might be alterations to premises, re-allocation of duties, altering hours, permitting absence during working hours, providing or modifying equipment, changing testing or assessment procedures, or making a reader or interpreter available.

Factors determining whether an employer should make an adjustment include its effectiveness, practicability and cost.

Note:

➤ *if premises are occupied by the employer under a tenancy that prohibits or restricts an alteration by the employer that would be a reasonable adjustment, the tenancy is deemed altered to stipulate:*

- *that the employer is entitled to make the alteration with written consent and is obliged to apply in writing for that consent and*
- *that the landlord will not withhold consent unreasonably (but may make it subject to reasonable conditions).*
- *if the employer does not apply for the landlord's consent, that anything in the tenancy preventing alteration will be disregarded in deciding whether the employer has complied with the duty on reasonable adjustments.*

➤ *if premises are occupied by the employer subject to a mortgage, charge or covenant that requires the consent of another to make an alteration that would be a reasonable adjustment, the absence of that consent will be a defence to breach of the duty provided that the employer has requested consent.*

Compliance with the duty to make reasonable adjustments may entail giving a suitably-qualified, disabled person priority over a better-qualified, non-disabled person (in essence, a form of 'positive discrimination').

Failure to comply with the duty on reasonable adjustments is unlawful discrimination.

■ Pre-offer enquiries about health

A must not ask about the health of B, a job applicant, before offering work to B or including B on a shortlist for selection, unless it is necessary:

- to establish whether B will be able to undergo an assessment or whether A will be subject to a duty to make reasonable adjustments (see above) for B to undergo an assessment;
- to establish whether B will be able to perform a function 'intrinsic to' the work concerned;
- to monitor diversity in job applicants;
- to take positive action;
- (if the work requires people with a particular disability), to establish whether B has that disability.

Contravention is enforceable by the EHRC (see below).

Also, if A acts in reliance on the information given about B's health, there will be a presumption of direct discrimination (see above) in any such claim brought by B. So, provided that B is a disabled person, the burden of proof will be on A to show that B was not rejected because of that.

Note: This provision does not, as such, prohibit an offer of employment subject to the receipt of a satisfactory medical reference or the completion of a satisfactory medical examination (see Chapter 3). However, if a disability were revealed by such a reference or examination, any rejection, withdrawal of the offer or (if employment had commenced) termination in reliance on that information would usually be direct discrimination.

- Exempted from disability discrimination generally is anything necessarily done pursuant to a requirement of legislation or to a requirement or condition imposed under legislation

Age

- As mentioned earlier, for direct discrimination, there is, uniquely amongst all the protected characteristics, a defence of justification ('proportionate means of achieving a legitimate aim')
- Exempted from age discrimination generally:
 - the quantification of benefits (such as paid holidays) by reference to a period of service of up to 5 years. Thereafter, any continuing lower benefit must be justified as fulfilling a 'business need'
 - the provision of enhanced redundancy payments, provided that the employer uses the statutory redundancy payment as the initial basis of calculation
 - anything necessarily done pursuant to a requirement of legislation
 - the provision of life assurance until normal retirement age to employees taking early retirement on grounds of ill-health, or facilities or arrangements for the care of children of a particular age group
 - the operation of certain age-based rules, criteria or decisions on pensions

Pregnancy/maternity

- As indicated earlier, neither combined/dual discrimination nor indirect discrimination involving this protected characteristic can be claimed.
- There is a specific additional protection against discrimination by A against B if:

- in the protected period of B's pregnancy (see earlier), A treats her unfavourably because of the pregnancy or illness resulting from it; or
- A treats her unfavourably because she is on compulsory maternity leave (see Chapter 5)

Note that:

- because of the wording, there is no need for a male or non-pregnant comparator and there is no scope for an associative pregnancy/maternity discrimination claim (which would have to be brought under the general direct discrimination definition – see above)
 - if pregnancy or maternity-related treatment occurred outside the times specified, a claim would have to be brought under the general direct discrimination definition – see above
- Exempted from pregnancy/maternity discrimination generally:
 - discrimination, based on reasonable reliance on reputable actuarial or other data, in an annuity, life insurance policy, accident insurance policy or similar thing involving the assessment of risk
 - discrimination that is necessary to comply with statutory provisions to protect women against risks specific to them, such as pregnancy and maternity
 - removing during maternity leave any benefit of non-contractual pay (except any bonus for times when the woman is on compulsory maternity leave and any bonus for performance during a time she was at work)

Liability for unlawful acts (for any protected characteristic)

An employer will be (vicariously) liable for prohibited conduct by its employees or agents, unless it is able successfully to rely on the defence of having taken reasonably practicable steps to prevent the unlawful act (for example, by issuing policies on, or providing training in, diversity).

The 'guilty' employees or agents can be personally liable, whether or not the employer has relied on its defence and whether or not any such reliance has been successful. There is no requirement here (as there is generally is when discrimination is aided – see above) that the employee or agent acted knowingly. However, the employee or agent can still escape liability if it is shown that the prohibited conduct was undertaken in reasonable reliance on a statement by the employer that the act concerned was not unlawful.

Promotion, guidance and enforcement (for any protected characteristic)

Positive action

Protection against possible discrimination claims for employers who take proportionate measures to increase job applications from those with a specific protected characteristic that is under-represented or to address through training and advice disadvantages experienced by a specific group.

Public sector equality duty

Requirement for a public authority to have due regard to the need to eliminate prohibited conduct, advance equality of opportunity and foster good relations between different groups.

In advancing equality of opportunity, a public authority should have particular regard to removing or minimising disadvantages that are connected to a particular protected characteristic and to taking steps to meet the unique needs of those with a particular protected characteristic.

Enforcement is only by way of judicial review through interested people or the Equality and Human Rights Commission (see below).

Code of Practice

See the 'Employment' code of practice, issued by the Equality and Human Rights Commission. Its provisions can be taken into account by an employment tribunal (see below).

The Equality and Human Rights Commission

The Commission performs other enforcement and education functions. It has the powers to investigate, to obtain information, to issue notices of unlawful acts (perhaps with an action plan), to apply for an injunction against persistent offenders, to provide legal assistance and to apply for a declaration of rights.

Application to the employment tribunal

Enforcement is by application to the employment tribunal within three months of the act complained of, but a tribunal may admit an 'out of time' case, if it considers it 'just and equitable' to do so. ACAS conciliation is always available. The tribunal has three possible remedies:

- a declaration: a statement of the rights of the claimant and in what respect the employer or any employee has acted unlawfully
- compensation: an uncapped amount for any financial losses (including future loss) and for injury to feelings
- recommendations: to benefit the employee and lessen the effect of the discrimination.

Injured feelings

An employment tribunal can award compensation for 'injury to feelings' in discrimination cases. The so-called 'Vento guidelines' were first established in 2002 and have since been updated to take account of inflation. There are three bands:

- £18,000 - £30,000 for the most serious cases, such as a lengthy campaign of harassment. An award over £30,000 would be exceptional
- £6,000 - £18,000 for serious cases that do not merit the highest band
- £500 - £6,000 for less serious cases, such as an isolated act of discrimination. The guidelines say awards of less than £500 should be avoided.

In determining fair and reasonable compensation, tribunals are advised to have regard to the 'overall magnitude of the sum total of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage'.

Discrimination against part-time workers

A part-time worker is one with hours of work that are less than those of a full-time worker employed by the same employer, doing the same work and having the same type of contract. (So, strictly, someone who works 35 hours a week rather than the full 37.5 normally required would be a part-timer.)

Part-time workers have the right not to be treated less favourably than a 'comparable' full-time worker, unless the employer can justify that treatment. This covers terms and conditions of employment (usually 'pro rata' equality is required) or any other detriment.

Employees have the right to request from the employer a written explanation if they believe they are being treated less favourably than a comparable full-time employee. The employer must respond within 21 days. Deliberate and unreasonable failure to reply, or evasive or equivocal answers, can lead to the inference of discrimination.

The remedy is a complaint of discrimination to the employment tribunal, which may make a declaration and/or an award of compensation. There is also protection against victimisation for relying on these rights.

Discrimination against fixed-term employees

A 'fixed-term contract' is one that terminates on the expiry of a period, on the completion of a particular task or on the occurrence or non-occurrence of a specified event. A contract with one of these features remains a 'fixed-term contract' even if it contains a provision for earlier termination by the giving of notice. Some legislation refers to the same range of contracts as 'limited-term contracts' (see Chapter 3).

Employees on fixed-term contracts ('fixed-term employees') should not be treated less favourably than comparable, 'permanent' employees on the grounds that they are fixed-term employees, unless this is objectively justified.

Treatment of fixed-term employees

Fixed-term employees can compare themselves with employees of the same employer who are not on fixed-term contracts and who do the same

or broadly similar work. If there is no comparable 'permanent' employee in the establishment, a comparison can be made with a similar permanent employee working for the employer in a different establishment.

Treatment may be assessed against either:

- any one of the fixed-term employee's terms and conditions of employment, which should be not less favourable than the comparable 'permanent' employee's, or
- the fixed-term employee's overall package of terms and conditions of employment, which should not be less favourable.

What if fixed-term employees feel they are being treated unfairly?

Employees have the right to request from the employer a written explanation if they believe they are being treated less favourably than a comparable 'permanent' employee. The employer must respond within 21 days. Deliberate and unreasonable failure to reply, or evasive or equivocal answers, can lead to the inference of discrimination.

Limitation on successive contracts

The use of successive fixed-term contracts is limited to four years' service, unless the use of further fixed-term contracts is justified on objective grounds. So, if there is no such justification, a fixed-term contract renewed after the four-year period of service will be treated as a contract for an indefinite period.

Waiver clauses

Any clause that still exists in a fixed-term contract that purports to deny or waive the right to claim unfair dismissal and/or to claim a statutory redundancy payment on the expiry of that contract without renewal (a dismissal – see Chapter 10) is now invalid.

Access to permanent work

Fixed-term employees should be given information on permanent vacancies in the organisation.

Referral to the employment tribunal

The remedy is a complaint of discrimination to the employment tribunal for a declaration and/or compensation. There is also protection against victimisation for relying on rights.

Discrimination against convicted offenders

After a period of good behaviour, a conviction is 'spent' – that is, treated as if it had never occurred. Rehabilitation periods for those aged 18 or over when found guilty include:

- | | |
|--|-----------------|
| ■ Prison or young offenders' institution (YOI) sentence of between 6 months and 2½ years | 10 years |
| ■ Prison or YOI sentence of 6 months or less | 7 years |
| ■ Fine, probation order or community service order | 5 years |
| ■ Conditional discharge or binding over period if longer | 1 year or order |
| ■ Absolute discharge | 6 months. |

Job applicants cannot be required to disclose spent convictions. These should not be used as grounds for discrimination in recruitment, during employment or as reason for dismissal.

However, there is no specific protection or remedy for breach of this principle, except when someone with at least one year's service is dismissed and can claim unfair dismissal (see Chapter 10). Otherwise, the only possible redress is action for defamation, a declaration or an injunction.

Exceptions

Among the jobs in which spent convictions must be disclosed are medical practitioner, vet, nurse, lawyer, accountant, police officer, traffic warden, teacher, social worker and youth worker; but not security worker.

9. Changes to the employment relationship

9 Changes to the employment relationship

Changing the identity of the employer – Transfer of Undertakings (TUPE)

Under legislation, generally known as TUPE, employees' rights are safeguarded when there is a 'relevant transfer' of a business or undertaking, or part of it, to a new employer. A 'relevant transfer' is either:

- the transfer (by sale or otherwise) of all or part of a business or undertaking if that 'economic entity retains its identity' and/or
- a 'service provision change' (covering contracting-out, change of contractors after re-tendering, and contracting-in), where the service is provided by an 'organised grouping of employees'.

Transfers by acquisition of shares are excluded, because there is no change in the legal personality of the organisation employing people.

But the passing of an 'economic entity' (for example, a division, department or function) between two subsidiaries in the same 'group' will generally come within TUPE.

Automatic continuation of employment contracts

An employee can exercise the right to object to being transferred, in which case the contract of employment often comes to an end (see below). If there is no objection, then the contract of employment of someone employed at the time of a transfer does not terminate. It automatically continues as if it had been made with the new employer ('transferee'). The new employer takes over the liabilities of the old employer ('transferor'), with the exception of criminal liabilities.

This effect is excluded, along with the specific provisions on dismissal, if the transferor is the subject of bankruptcy or similar insolvency proceedings that have commenced with a view to the liquidation of assets (therefore, not all insolvency situations).

The 'automatic continuation' effect applies to an employee who was dismissed before the transfer but for a transfer-related reason that is unfair (see Chapter 10). In that case the liability for the unfair dismissal passes to the new employer.

Employee liability information for the new employer

Before a transfer, the transferor and transferee must each inform (and if measures are envisaged for their own employees, consult) representatives of its own employees affected by the forthcoming transfer.

Also, the transferor must supply the transferee with 'employee liability information' in writing at least 14 days before the transfer or, otherwise, as soon as reasonably practicable.

The employee liability information must cover:

- the identity and age of transferring employees
- information covered by their statements of employment particulars
- details of any applicable collective agreements
- disciplinary and grievance cases in the preceding two years
- legal actions in the preceding two years and ones that are reasonably expected.

The information must be accurate to a specified date no more than 14 days before it is communicated. Subsequent changes must be notified by the transferor. The information may be provided in instalments and/or through a third party.

Note: As it is required by law, the disclosure of these details under TUPE does not, in itself, result in a breach of the laws on data protection (see Chapter 7).

What if employee liability information is not supplied?

A transferee's remedy for the transferor's failure to provide the information is a complaint to the employment tribunal, which can award compensation (normally a minimum of £500 for each employee affected by such non-compliance).

The effect of objecting to a transfer

In a TUPE situation, if an employee objects to transferring to the new employer, the contract of employment does not transfer and, unless the transferor chooses to continue employment through redeployment, the effect is to terminate the contract.

Generally, that termination of employment will not amount to a dismissal and the employee will not be entitled to any severance pay or compensation. However, there could be legal liability if the employee's objection to transferring were caused by the transferee's proposal or intention to make detrimental changes to terms and conditions.

Pension scheme arrangements

Transferring employees who were offered an occupational pension scheme by the old employer must be offered any one of the following types of scheme by the new employer:

- defined benefit (if the transferee chooses this option, the scheme must comply with minimum standards)
- defined contribution ('money purchase') or
- stakeholder.

Transferee employers choosing to offer a defined contribution or stakeholder scheme must match the employees' contributions to a maximum of 6% of earnings.

Changes to terms and conditions of transferred employees

Changes made for a transfer-related reason are void unless they are a) by agreement and b) for an 'economic, technical or organisational reason entailing changes in the workforce'.

Changing terms on transfer

A change in a contractual term that is ‘transfer-related’ is likely to be void. This can also apply to the introduction of restrictive covenants after a transfer. In one case (*Credit Suisse First Boston (Europe) Limited v Lister*), after a TUPE transfer and as part of a deal to retain the employee, the new employer inserted a non-compete clause into the contract. The employee challenged the clause, which was held to be ‘transfer-related’ and so void, even though the employer had given the employee a ‘consideration’ of £65,000.

Less stringent requirements apply on changing the terms of the employees of an insolvent undertaking, if the changes have the purpose of ensuring survival and safeguarding opportunities for employment.

Note: The government’s code of practice on the avoidance of a two-tier workforce (that is, people working alongside one another on different terms and conditions of service) was withdrawn and replaced by a set of voluntary principles in December 2010. The code’s provisions will not apply to employment in a new contracting arrangement after a re-tendering exercise. However, under a current contracting arrangement, they may be removed (by re-negotiation) only for new recruits.

Changing the content of the contract: terms and conditions

How a change can be made

Broadly, there are three possible approaches.

- Mutual agreement between employer and employee:
 - on an ad hoc basis, when the need arises; or
 - through a ‘standing’ clause in the contract, allowing a party to amend content.

This is based on the principle that, just as the contract is established by agreement, so it can be varied in the same way (subject to limitation under TUPE – see above) without there being a breach of contract.

- Unilateral implementation:
 - under contractual authority (effectively, the same as above – therefore, there would be no breach of contract); or
 - without contractual authority – a clear breach of contract.
- Termination of the current contract with due notice and the offer of its immediate replacement with a new contract containing the revised term(s). Here, although the specific change might not have been agreed, there will be no breach of contract – because the first contract is brought to an end in accordance with its own terms (the notice clause). But, technically, the ending of the first contract does amount to a dismissal, which could have certain consequences (see below).

Other legal requirements

If the change involves both a breach of contract and the loss of a financial amount (for example, a reduction in pay), the employee will have the right to sue for any lost amount(s) falling due for payment while the contract continues in being. The employee’s action might be either for damages in the County or High Courts or for one or more unlawful deductions from ‘wages’ in the employment tribunal (see Chapter 4).

A breach of contract will, if sufficiently serious, also entitle the employee to resign and to treat him or herself as ‘constructively’ dismissed (see Chapter 10).

Dismissals resulting from a change – possible defence

Any dismissal involved in the change, whether ‘constructive’ or by termination effected directly by the employer, may be fair if the reason for the change is sufficiently important for the business (‘some other substantial reason’) and there has been prior consultation with the employee in an attempt to obtain agreement to the change. However, in the absence of either of these elements, it will be unfair and will allow the employee to receive compensation for financial loss, even if the employee accepted an offer of continued employment under a new contract.

Changes that might affect 20 or more employees

If the change is intended to affect 20 or more employees at a single establishment, there will also be the requirement for the employer to consult with employees' representatives about proposed dismissals for redundancy (see Chapter 12). The definitions of 'redundancy' and 'proposed dismissal' under this law are sufficiently wide to include almost any wide-scale change to contracts of employment.

10. Terminating the contract

10 Terminating the contract

Notice

The statutory minimum notice due, on dismissal, to an employee with at least one month's continuous service is:

- one week's notice if he or she has been employed for less than two years
- one week's notice for each year of continuous employment between two years and eleven years and
- twelve weeks' notice for twelve or more years' continuous employment.

The statutory minimum notice due from an employee (on resignation) is one week.

If the contractual notice is greater than the applicable statutory minimum, the contractual notice prevails.

Common misconception (2)

'...an employee's notice of resignation can be refused'

It cannot, just as an employee cannot reject the employer's notice of dismissal. Of course, you can try to persuade employees to stay. Alternatively, you can relieve them of the obligation to work out their notice and pay them off. Or, if your concern is about their joining a competitor, you can rely on any enforceable contractual provisions restraining post-termination activity or about 'garden leave'.

If an employee gives notice of resignation while facing a charge of serious misconduct, an employer is fully entitled to continue with the disciplinary process during the period of notice – only a resignation with instant effect can stop that.

If notice is worked, the employee is entitled to all contractual payments and benefits. And if the contractual notice required from the employer does not exceed the applicable statutory minimum by more than six days, the employee has the statutory right to full pay for any day in the period of notice

when he or she is absent through sickness, pregnancy, maternity/paternity/adoption leave or a lack of work and would not otherwise be entitled to full pay (for example, if sick, when the employee's entitlement to sick pay has expired).

Exactly when is 'notice' of termination given?

Regardless of the required contractual or statutory length, 'notice' is a very particular, if often basic, thing. It contains a specific date, or the information necessary to calculate the specific date, on which the contract of employment will terminate.

A mere intimation of possible dismissal or confirmation of a decision to dismiss at some unspecified time in the future (even if the broad period during which the dismissal will probably occur is stated) will not amount to the giving of proper 'notice'. This has implications for an employer's liability to provide pay in lieu of notice when the contract is later terminated.

Common misconception (3)

'...notice given can be cancelled'

The cancellation of notice is only legally possible if the party to whom the notice was given agrees to it being annulled. Otherwise, the notice stands and the termination will take effect.

Of course, there may be various practical or economic considerations that persuade the party receiving notice to agree quite readily to its cancellation. And there may be disadvantages imposed by legislation on someone who declines to stay in employment (for example, see the provisions on redundancy payments and suitable alternative employment in Chapter 11).

Wrongful dismissal

Wrongful dismissal is a dismissal that is simply in breach of the terms of the contract (it is not a subject that is really covered by employment legislation).

Dismissal without any notice (summary dismissal) or without full notice is wrongful, unless the employee's conduct amounts to repudiation (for example, gross misconduct/negligence), or if the contract permits it (through a pay in lieu of notice, PILON, clause) as an alternative to working notice.

If the dismissal is wrongful, the employer can pay in lieu of all or part of the employee's notice entitlement (in effect, damages for breach of contract), but:

- the employer will be unable to enforce provisions restraining the ex-employee's post-termination activity; and
- the dismissal can still be unfair under legislation (see below).

The employee's remedy for wrongful dismissal is an action to recover financial loss (through an award of damages), either in the employment tribunal (maximum award £25,000) or civil court (no limit).

A dismissal with notice is not normally a breach of contract (but the dismissal can still be unfair – see below).

A pay in lieu of notice (PILON) clause: key features, questions and consequences

- It is exercisable at the employer's discretion.
- Is pay for the whole or part of the period of notice due to the employee?
- Does 'pay' mean just salary or does it also include the value of any benefits?
- Because it makes termination without full notice lawful, the employer can still rely on post-termination restrictions on employee.
- It makes the payment liable to income tax (whereas a payment of compensation in lieu under £30,000 may not be).

Written reasons for dismissal

A dismissed employee with one year's service can request a written statement of the reasons for dismissal to be supplied by the employer within 14 days of the request. This is admissible before an employment tribunal.

An employee dismissed while pregnant or after childbirth, so that her maternity leave period ends, must be provided with written reasons, regardless of her length of service and without request.

The employment tribunal will award two weeks' pay (no statutory maximum on a week's pay is applied) for an unreasonable refusal to supply a statement, or the inadequacy of a statement supplied and may make a declaration of the true reason(s) for dismissal.

Unfair dismissal – General régime

Unless dismissal is found to be for an 'automatically unfair reason' (see below), an employee must have been 'continuously employed' for one year at the 'date of dismissal' in order to have protection.

Note: The length of the qualifying period is currently subject to review and might soon be increased to two years.

Avoiding the 'one year's service' requirement: dos and don'ts

There are good reasons for giving all employees the same standard of treatment regardless of their length of service. And rushing to beat the 'one year' deadline has its risks. Equally, however, there is little point in an employer allowing a situation to arise which will cost time and money unnecessarily. So, where applicable:

- make a date of termination fall at least one week before the first anniversary of commencement
- provided that the dismissal is not for gross misconduct, terminate immediately with pay in lieu of notice (rather than terminating with actual, working notice)

- phrase letters carefully. For example, make sure that the date of termination is not stated, or represented as, the date on which notice would have expired if it had been given
- ensure that no right of appeal against dismissal is described in a way that preserves, or might preserve, employment until the appeal is determined.

'Dismissal'

Frustration can be frustrating

A contract of employment can be 'frustrated' when an unforeseen event makes the performance of the contract impossible or very different from what had originally been intended. When frustration occurs, the contract ends automatically, without a dismissal. A prison sentence will not necessarily frustrate the contract. A significant factor is the length of the sentence. Where the contract provides for long-term sickness absence, a prison sentence of equivalent length may not be regarded as amounting to frustration. The difficulty is knowing when the point of frustration has been reached. If it has not, but the employer acts as if it has, a dismissal will result. And, it will often be unfair. So, generally, frustration is best left as a legal argument to be deployed in litigation.

Dismissal occurs if:

- the employer terminates the contract, with or without notice; or
- a limited-term contract (one whose duration is set by reference to a period of time, the completion of a task or the occurrence or non-occurrence of an event) terminates without renewal; or
- the employer's conduct is a significant breach or repudiation of the employment contract, giving the employee the right to resign without notice and the employee, whether with or without notice, does resign ('constructive' dismissal).

To establish ‘constructive’ dismissal, does the employee have to resign without notice?

No. The vital thing is that the employee must, because of the employer’s act or omission, have the *right* to resign without giving notice. If that condition is satisfied, the employee may, in principle, give full notice of resignation and remain working until the specified termination date.

Of course, in many situations of this type, that approach is not a practical one and not in the interests of either party.

Also, if an employee did give notice and remain at work through the period of notice, the (ex-) employer may well be able, in any subsequent tribunal proceedings, to draw inferences from the employee’s behaviour. Is it an indication that the conduct stated to have caused the resignation did not occur? Or was it in fact not serious enough to give the employee the right to resign immediately and so to be the basis of a ‘constructive’ dismissal?

Common misconception (4)

‘...A constructive dismissal will always be unfair’

Not so. Strictly, establishing a ‘constructive’ dismissal does no more than confirm that there has been a dismissal – its fairness is a separate matter.

So, while almost all constructive dismissals based on inter-personal behaviour or attitude will end up as unfair, some derived from the breach of express contractual terms can be found to be fair.

For example, an imposed significant reduction of an employee’s pay will be a breach of contract that entitles the employee to resign without notice. But, if the employer had a good business reason for the change and conducted appropriate consultation first, then the resultant constructive dismissal could well be fair.

Fairness of a dismissal

If an ex-employee complains of unfair dismissal, the employer must show that there was, at the time of the decision to dismiss, a (principal) reason for it. To be admissible, that principal reason must be one of the following:

- capability (which can be about performance/skill or about health) or qualifications
- misconduct
- redundancy
- continued employment in that capacity being illegal
- some other substantial reason justifying dismissal.

The employment tribunal must then decide whether, in view of the employer’s size and administrative resources, the dismissal was reasonable in all the circumstances. This involves consideration of:

- *the quality of the pre-decision* procedure (including notification of, and formal dialogue with, the employee and sharing of information relevant to the situation). This is necessary unless the employer can safely conclude that the circumstances are such as to make such formalities ‘utterly useless’
- *the factual situation or findings*. At the conclusion of the above procedure, were there, given the evidence available, at least reasonable grounds for continuing to consider the employee for dismissal?; and
- *the ultimate choice of the sanction or outcome of dismissal*. Were the factual situation or findings capable of justifying termination, even if *some* reasonable employers might not have dismissed? Were any reasonable alternatives to dismissal properly considered?

The 'band of reasonableness'

Different employers may adopt different approaches but each may nevertheless act fairly. In all cases 'there is a band of reasonableness within which one employer might reasonably take one view: another quite reasonably take a different view' (Lord Denning in *British Leyland v Swift*). If a dismissal falls within the band, and a proper procedure has been followed, the employer will have acted reasonably and the dismissal will be fair.

The tests for assessing whether an employer has acted reasonably in dismissing an employee were set out in *Iceland Frozen Foods Limited v Jones*:

- the starting point is the statutory provision that the employer must have acted reasonably in dismissing the employee
- in applying this statutory provision, the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair
- in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another
- the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair.

How will the tribunal assess the fairness of the reason for dismissal?

Depending on the reason for dismissal, the principal relevant factors that the employment tribunal will consider under 'reasonableness' are:

For Capability

- on grounds of performance/skill
 - warnings
 - hearings/appeals
 - targets for improvement
 - assistance/training
 - alternative employment
 - being accompanied (at least, if the management of performance has a disciplinary aspect)
- on grounds of health (see also disability discrimination in Chapter 8)
 - consultation with the employee
 - medical report/information
 - reasonable adjustments/alternative employment
 - hearing/appeal.

For Conduct (disciplinary matters)

- quality of the investigation
- gravity of the situation (previous warnings or gross misconduct)
- notice of charges and provision of evidence to the employee
- ACAS code of practice
- existence and handling of hearing and appeal (including being accompanied)
- the employee's previous disciplinary record
- precedents set in dealing with other employees.

Determining misconduct

Employment tribunals apply a three-stage test in the case of most misconduct dismissals. The employer must show that:

- he believed the employee was guilty of misconduct
- he had in his mind reasonable grounds upon which to sustain that belief
- at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

This test (the so-called *Burchell* test) arose from a case of dishonesty. But the principles laid down have become the established test for determining whether the reason for an employer's decision to dismiss was sufficient in all types of conduct case when the employer has no direct proof of the employee's misconduct, but only a strong suspicion.

For Redundancy

- adequacy of consultation
- approach to selection
- consideration and availability of alternative employment.

In cases of redundancy, if selection from a group of employees is necessary, the selection criteria must be objective (*Williams v Compair Maxam*). That is, they must not simply reflect the personal opinion of the selector, but should be capable of at least some objective assessment and, preferably, supported by data such as attendance and performance records. Imprecise criteria that can be challenged, such as employees 'best suited for the needs of the business under the new operating conditions' and 'attitude to work', will not do – unless they are then broken down and defined in more detail.

For illegality

Possible reasons include disqualification from driving, expiry or lack of a work permit and breach of health and safety legislation (there must be definite illegality involved, not just a reasonable belief in it)

- discussion with the employee
- consideration of alternative employment that would not be illegal
- hearing/appeal.

For some other substantial reason

For example, the end of a limited-term contract, a change in the contract of employment or pressure to dismiss from a customer, regulatory body or another employee

- discussion/consultation with the employee
- exploration of compromises or alternative opportunities for employment
- hearing/appeal.

Dismissals connected with a TUPE transfer (see Chapter 9)

It is unfair to dismiss an employee for a reason connected with a transfer of an undertaking, whether before or after the transfer, unless:

- there is an economic, technical or organisational reason entailing changes in the workforce (this requires a reduction in numbers or alterations to job content and frequently equates to redundancy); **and**
- the dismissal is handled reasonably.

Liability for a pre-transfer dismissal that does not satisfy these requirements and is, therefore, unfair will often pass to the new employer (the transferee).

Convicted offenders

It is normally unfair to dismiss for a 'spent' conviction (see Chapter 8)

Unfair dismissal - exceptions to the normal requirement for service

The following reasons for dismissal are not subject to the normal requirement for one year's continuous employment.

It is automatically unfair to dismiss an employee:

- for being involved in proceedings to do with the enforcement of the National Minimum Wage (see Chapter 4)
- for refusing to work more than 48 hours a week or during a rest break (see Chapter 4)
- for signing a workforce agreement or opt out agreement; or for being an 'appropriate representative' or candidate in a workforce agreement on Working Time (see Chapter 4)
- for the following reasons, covered in Chapter 6, to do with a trade union:
 - being a member, or participating in the activities or using the services (at an appropriate time) of an independent trade union or
 - not being a member of a trade union or
 - being involved in the recognition or derecognition of a trade union or
 - refusing an employer's offer of inducement

(Note: If a union or other person puts pressure on an employer to dismiss by calling or threatening to call industrial action because of an employee's non-membership of a union, the ex-employee can add the union or other person as a party to unfair dismissal proceedings)

- for the following reasons to do with maternity (see Chapter 5):
 - pregnancy
 - giving birth
 - taking ordinary or additional maternity leave or receiving benefits during ordinary maternity leave
 - being subject to a requirement or recommendation to suspend work on grounds of health and safety
- for reasons to do with taking, or seeking to take, paternity leave, adoption leave, or paternity leave on adoption (see Chapter 5)
- for exercising, or seeking to exercise, the right to request flexible working, or for accompanying, or seeking to accompany, an employee who wishes to exercise this right (see Chapter 5)

- for the following reasons, covered in Chapter 5, to do with parental leave:
 - taking or seeking to take parental leave
 - declining to sign a workforce agreement on parental leave
 - being an appropriate representative or candidate in a workforce agreement on parental leave
- for seeking to take or taking time off to care for dependants (see Chapter 5)
- for exercising **rights under the part-time workers regulations** (see Chapter 8)
- for exercising rights under the fixed-term employees regulations (see Chapter 8)
- for exercising or seeking to exercise the right to be accompanied at a hearing, to have a meeting rescheduled, or to be accompanied by or to seek to accompany another worker (see Chapter 7)
- for exercising rights concerned with health and safety (see Chapter 7)
- who is an employee representative or candidate, for performing, or proposing to perform, relevant functions as such (see Chapter 7)
- who is a trustee of an occupational pension scheme, for performing, or proposing to perform, relevant functions or activities as such (see Chapter 7)
- who is a protected or opted-out shop worker or betting worker, for refusing or threatening to refuse to work on a Sunday or any shop worker for opting-out or proposing to do so (see Chapter 7)
- for being summoned or being absent to attend jury service (see also Chapter 7) unless:
 - the absence was likely to cause substantial injury to the employer's undertaking; and
 - being aware of that, the employee unreasonably failed to apply to be excused from jury service
- for making a protected disclosure ('whistleblowing') in the public interest (see Chapter 7)
- for asserting (to an employment tribunal or employer) an employment protection right available under legislation. It is irrelevant that the employee is not, in fact, qualified for that right or that the right has not been infringed, provided that the claim is made in good faith
- on grounds to do with a 'protected characteristic', because that is an unlawful act under separate rules (see Chapter 8)
- for taking, or having taken, part in official and lawful industrial action in certain circumstances (see Chapter 14)

Remedies for unfair dismissal

On a finding of unfair dismissal, an employment tribunal must consider reinstatement (same employment) and re-engagement (comparable or suitable employment) and must first ask whether the ex-employee wants one of these solutions. Practicability is relevant, but not the engagement of a 'permanent' replacement, unless this was the only sensible way of getting work done.

Unless it is not practicable for the employer to comply, punitive compensation (known as an 'additional award') can be awarded for the employer's refusal to comply with a reinstatement/re-engagement order. This compensation will be between 26 and 52 weeks' pay (maximum of £400 per week with effect from 1st February 2011).

Also, in all cases, the tribunal will award standard unfair dismissal compensation.

Standard compensation for unfair dismissal

This normally takes the form of a two-part award:

Basic award

This is calculated in the same way as a statutory redundancy payment (see Chapter 11) but:

- £5,000 is the minimum for dismissal for:
 - non-membership of a union
 - union membership or activities
 - undertaking activities in connection with reducing risks to health and safety, having been designated by the employer to undertake such activities
 - performing functions as a designated safety representative or member of a safety committee
 - activities to do with being an 'employees' representative' or 'pension trustee'.

Compensatory award

This seeks to reflect the employee's true financial loss, including pensions and estimated future loss. The current maximum is £68,400 (with effect from 1st February 2011). The award is unlimited for health and safety, public interest disclosure and sex, race and disability age/religion/sexual orientation discrimination dismissals.

A tribunal may order a discretionary increase of up to 25% for the failure by an employer to follow the guidance set out in the ACAS Code of Practice 1 on disciplinary and grievance procedures, although the cap on the compensatory award still applies for unfair dismissal.

A tribunal may also order a discretionary reduction of up to 25% for the failure by an employee to follow the ACAS guidance. The limits on the awards are normally reviewed annually, for implementation from February.

The compensatory award can be reduced by the tribunal if:

- the ex-employee has unreasonably failed to seek or take up work elsewhere (breach of the duty to mitigate loss) and/or has been guilty of conduct contributing to the dismissal (this also applies to the basic award); and/or
- the ex-employee could have been fairly dismissed for something discovered soon after dismissal (and before the tribunal hearing); and/or
- the tribunal believes the dismissal would still have occurred if required procedures had been observed and, in those circumstances, the dismissal would have been fair.

A reduction on any of these grounds is considered from the starting point of an employee's full calculated loss before the statutory cap mentioned above is applied.

Interim relief

This is an order by the tribunal for the contract of employment to continue until a decision on the complaint of unfair dismissal has been reached. Ex-employees can apply for this relief if they claim they have been unfairly dismissed for:

- non-membership of a union
- union membership or activities
- undertaking activities in connection with reducing risks to health and safety, having been designated by the employer to undertake such activities
- performing functions as a designated safety representative or member of a safety committee
- for 'employees' representative' or 'pension trustee' reasons.

11. Redundancy payments

11 Redundancy payments

The right is to a lump-sum compensation payment for an employee who fulfils the prescribed conditions and is:

- dismissed because of redundancy or
- laid-off, or kept on short time within the contract, for several weeks.

Conditions for eligibility

- The employee must have continuous service of at least two years.
- There must be a dismissal (unless the specific provisions on lay-off and short-time apply). For this purpose, 'dismissal' has the same definition as that used for unfair dismissal (see Chapter 10).

Dismissal for redundancy

Termination of employment will be 'by reason of redundancy' if:

- the employer has ceased, or intends to cease, to carry on the business, overall or in a particular place where the employee works or is based, or
- the employer's requirement for employees to do 'work of a particular kind' has ceased or diminished, or is expected to cease or diminish, overall or in a particular place where the employee works or is based.

Common misconception (5)

‘...there must be a net reduction in jobs for the redundancy definition to be satisfied’

That is often the case, but it is not necessary. The same number of jobs might be transferred to a new location from a closing one, or even more new jobs might be created at the new location: redundancy would still apply to those employees whose place of work was closing.

Furthermore, the second limb of the redundancy definition refers to the requirement for a particular type of work to have ceased or diminished. Sometimes, at the same location, an employer will make changes in the content of jobs (even though they may retain the same title). And that employer may be content for the people in the ‘old’ jobs to continue in the new or reconfigured ones. But there may then be an argument that the extent of the change in job content is such as to make the latest requirement one for work of a new, different kind. Any termination would then be by reason of redundancy and give rise to eligibility for a statutory payment.

Possible disqualification from entitlement to a redundancy payment

An employee’s entitlement to a redundancy payment is only maintained if the employee does not unreasonably refuse any offer of suitable alternative work that the employer makes before the ending of the contract for the redundant job. For this purpose:

- an offer on the same terms in the same place disqualifies the employee from payment
- an offer on different terms or in a different place raises questions of flexibility, suitability, and the reasonableness of refusal.

There is provision for a trial period of at least four weeks in any new job that is offered. The expiry of the trial period is regarded as acceptance of the new job.

If, during the trial period, the employee terminates the employment for whatever reason, or the employer terminates it for a reason arising out of the change, then the employee is treated for redundancy payment purposes as dismissed from the original job. The employee therefore receives a redundancy payment, unless the new job was suitable and termination unreasonable. However, even then, the dismissal may still be unfair according to the considerations mentioned previously (see Chapter 10).

Common misconception (6)

‘...the conditions governing entitlement to a statutory redundancy payment also apply to access to an additional ‘company’ redundancy payment’

Formally, they do not. When an employment tribunal applies the rules in the redundancy legislation, its decision binds the parties only concerning the statutory payment. The entitlement to an enhanced payment, whether introduced in the contract of employment or in negotiation or consultation under a specific redundancy exercise, does not automatically follow.

That said, if there are no separate detailed rules in place, it will be difficult to resist practical and legal pressure to treat the additional payment component in the same way as the statutory. So, if it is intended to depart from the criteria used for the statutory scheme, it is sensible for an enhanced scheme explicitly to set down its own rules and conditions.

For example, it might provide that refusal of any offer of alternative employment (not just ‘suitable’ alternative employment) disqualifies an employee from the non-statutory payment.

Lay-off and short-time

An employee can claim a redundancy payment if laid off or on short time for four consecutive weeks, or for a broken series of six weeks in any thirteen:

- *lay-off* is no work and no pay of any kind from the employer for the week in question
- *short time* is shortage of work and less than half pay for that week.

Note: the statutory provisions on guarantee payments (see Chapter 4) use a different definition of lay-off, based on individual workless *days*.

The employee must initiate the process by giving the employer, within 4 weeks of latest week of lay-off or short time, written notice of intention to claim a redundancy payment.

Entitlement then depends on whether the employer serves counter-notice within seven days, contesting the claim because there is a reasonable prospect of a sustained resumption of full working. If so, the employment tribunal decides. Payment, in any event, is made only when the employee resigns with notice.

The service requirement of two years applies. This statutory right is only needed if the contract of employment allows the employer to lay the employee off and/or to implement short time. Without this right the employee would be unable to claim a redundancy payment, regardless of the length of the lay-off or short time.

If the contract does not contain lay-off/short-time provisions, an employee experiencing lay-off or short time can resign and assert 'constructive' dismissal by reason of redundancy in order to get a statutory payment (see earlier).

Calculation of a statutory redundancy payment

The calculation is based on a scale, working back from the date of dismissal:

- | | |
|---|---------------|
| ■ for each year of reckonable service from age 41 | 1½ weeks' pay |
| ■ for each year of reckonable service from age 22 to 40 | 1 week's pay |
| ■ for each year of reckonable service below age 22 | ½ week's pay |

A 'week's pay' is calculated according to defined rules.

Applicable limits:

- the maximum service taken into account is 20 years (a 'year' being 12 complete calendar months)
- with effect from 1st February 2011, the maximum 'one week's pay' is £400, so the maximum overall payment is £12,000.

The maximum amount of 'one week's pay' (and therefore of a statutory redundancy payment) is normally reviewed annually.

'Indirect' age discrimination and redundancy payments

Although it is, in part, based on length of service, the statutory redundancy payment scheme is specifically exempted by legislation from any unlawfulness caused by 'indirect' age discrimination (see Chapter 8).

Any scheme for enhanced redundancy payments will also be completely exempt from such unlawfulness provided that it uses the statutory scheme's classification of ages and bases itself on the same sliding scale of 'weeks' pay' entitlement (see above: Calculation of a redundancy payment) before applying a common multiplier or ignoring the maximum on a week's pay.

Any other form of service-based enhanced scheme will need to satisfy the 'objective justification' test under age discrimination law.

Claims for redundancy payments

A claim for a redundancy payment must be made within six months of the termination of the contract (unless a claim for unfair dismissal is made within three months). The employment tribunal can hear a time-barred claim within a further six months, if that is just and equitable in the circumstances.

If the tribunal awards an ex-employee a statutory redundancy payment, it may also award compensation for any financial loss caused by the employer's non-payment.

Consultation on and notification of large-scale redundancies

There is a duty to consult representatives of employees (see Chapter 12).

At the same time as representatives are being consulted, there is also a duty to notify the Department for Business Innovation and Skills (DBIS) on Form HR1 of the proposed number of redundancies. Failure to notify can result in criminal proceedings and a fine not exceeding £5,000 against the company and/or officer.

Unfair dismissal and redundancy

A dismissal for redundancy may be unfair (see Chapter 10) on grounds that:

- the employer has failed to give the employee as much warning or opportunity for one-to-one consultation as is reasonably practicable (unless the employer can reasonably conclude, at the time, that such consultation would be futile); or
- the selection criteria used are unreasonable in themselves or have been applied unreasonably; or
- the employer has failed to consider and, if appropriate, offer the employee any alternative employment that was available.

Common misconception (7)

‘...the employer’s duty to consider and explore with the employee opportunities for alternative employment only extends to work that is suitable’

Unfair dismissal law focuses on what reasonable measures the employer has taken to avoid the dismissal of an employee whose current job is redundant. Unemployment, even temporary, is undesirable, both for the individual and for society.

So, the employer’s duty covers most, if not all opportunities or vacancies that exist within the organisation, regardless of their nature, worth or status. It is the employee’s prerogative to refuse on one or more of these grounds, but not the employer’s right to forego at least discussing them with the employee.

Of course, in the context of entitlement to a statutory redundancy payment, the employee’s refusal of a ‘suitable’ alternative job may have consequences. But that is a different matter, based on a separate set of rules.

Also, a redundancy dismissal will be unfair if the employee is selected for any of the ‘automatically unfair’ reasons referred to in Chapter 10. The normal service qualification for unfair dismissal does not apply to these automatically unfair reasons.

12. Consultation with employees' representatives

12 Consultation with employees' representatives

Redundancy

Basic obligation

An employer must consult with 'appropriate representatives' of employees if it is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

'Establishment'

This is defined as the 'unit' to which the workers at risk of redundancy are 'assigned'.

An 'establishment' can consist of several workplaces at separate physical locations. Conversely, it is possible to have two establishments based at the same site. An establishment can exist even where the affected workers do not have a specific, 'physical' workplace provided by the employer at all (for example, sales representatives).

'Redundant' and 'proposing to dismiss'

The definition of 'redundant' is broader than that used for redundancy payment purposes. It covers any reason 'not related to the individual' – so it extends to proposed changes in terms and conditions and/or working arrangements that do not eliminate posts (reduce the staff) or alter the essential nature of jobs.

And, whatever types of 'redundancy' are involved in an exercise, the question whether an employer is 'proposing to dismiss' employees has to be answered by reference to what might be necessary. For example, an employer might hope, often justifiably, that there will be sufficient volunteers to meet the targeted reduction or that employees will agree to changes in terms and conditions. But, if those hopes are not borne out, the desired results would require the termination of existing contracts of employment (a 'dismissal'). That possibility must be taken into account in counting (for the purpose of the 20+ threshold) the number of employees affected.

Employees' representatives

'Appropriate representatives' are representatives of a recognised trade union or representatives elected by the employees.

If there is a recognised trade union for some or all categories of affected employees, the employer must consult only its representatives about those employees affected by the redundancy and who are covered by trade union recognition.

There is a loosely-prescribed method for electing employees' representatives.

Timescales

Consultation must begin 'in good time' and no less than 30 days or, for 100 or more proposed redundancies, no less than 90 days before the first redundancy dismissal is due to take effect.

Preliminary information that must be provided to the representatives

Initial written notification to appropriate representatives must provide information about the reasons for the proposed redundancies, the numbers and descriptions of the employees affected, the proposed selection procedures, the proposed method of carrying out the dismissals, including the period over which they are to take effect, and the proposed method of calculating any non-statutory redundancy payments.

Scope of consultation

Consultation with representatives must be with a view to reaching agreement and must cover ways of:

- avoiding dismissals
- reducing the number of dismissals
- reducing the effects of dismissals.

The first two subjects for consultation mean that it may also be necessary for the employer to consult about the business or organisational plan that has resulted in the proposal for redundancies.

Fair and complete collective consultation

Fair consultation about redundancy means consultation when the proposals are still at a formative stage. It 'involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consulter thereafter considering those views properly and genuinely' (Lord Glidewell).

The law requires an employer to terminate any contracts of employment or issue notices of dismissal only when the process of collective consultation has been completed. But this does not mean that a full 30, or as the case may be, 90 days' consultation must have occurred. It is possible for the employer and representatives of the staff to agree that collective consultation has been completed before this or, without such consensus, for it to have run its course even though there is no agreement. The obligation is only to commence consultation 30 or 90 days beforehand.

Consequence of non-compliance

Failure to consult gives rise to a complaint to the employment tribunal and to possible protective awards of up to 90 days' pay per employee affected by the failure (whether yet made redundant or not).

The maximum award is the starting point for the tribunal: a lesser amount will only be awarded if there are mitigating circumstances surrounding the employer's non-compliance.

Transfer of Undertakings

Basic duty and timing

The employer's obligations to consult arise before a 'relevant TUPE transfer' of a business or undertaking. For this and the effect of TUPE on individual contracts of employees in a business/undertaking, see Chapter 9.

The duty is initially to provide information, in writing, to appropriate representatives (see above) of ‘affected employees’ long enough before the transfer to allow any necessary consultation to occur.

‘Affected employees’ of the existing organisation (transferor) or the incoming organisation (transferee) are those who may be affected by the transfer or by measures taken in connection with the transfer.

Information to be provided

The required information is:

- reasons for the transfer and its approximate timing
- the legal, economic and social implications of the transfer
- the measures envisaged by the employer or the fact that no measures are envisaged
- in the case of the transferor, the measures that it envisages the transferee will take with the transferred employees. Or, if it envisages that no measures will be taken, that fact.

Possible duty to consult

The duty of those employers who do envisage taking any pre-transfer measures with their own employees is then to consult with representatives with a view to reaching agreement on them.

No minimum timescale for commencing such consultation is set down, unless the measure is ‘redundancy’ and the numbers and timescales bring into play the need to consult representatives of employees about redundancies (see above).

If a transferee envisages making redundancies after the transfer, that measure itself will be subject to consultation with employees’ representatives only once the transferee has become the employer and only if the proposed redundancies in an establishment number at least 20 and will occur within 90 days or less. This is because, falling after the transfer, it is not then regulated by TUPE but (if the numbers are sufficient) by the rules on redundancy consultation mentioned earlier.

Consequence of non-compliance

Failure to inform or, if applicable, to consult gives rise to a complaint to the employment tribunal and possible compensation (of up to 13 weeks’ pay, with no statutory cap) to each employee affected.

The transferee is jointly and severally liable with the transferor for other awards of compensation against the transferor arising from a failure to inform or consult.

However, if the transferor’s breach arises from the transferee’s failure to give the transferor information about the proposed measures, compensation is normally payable by the transferee.

Health and safety

There is an obligation on the employer to consult representatives of employees (or employees individually) on certain health and safety matters.

General workplace information and consultation

The rules apply to undertakings with 50 or more employees in the UK.

The employer’s obligation to consult arises only after a ‘trigger’ request. Should employees make a valid request, employers are under an obligation to establish means for information and consultation to give the employees a better idea of potential changes in their employment.

To be valid, a request must be made in writing by 10% of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500 employees.

Negotiation and voluntary and pre-existing agreements

After the receipt of a request, and subject to the provisions about a pre-existing agreement (see below), the employer has six months (extendable by agreement) in which to negotiate a voluntary agreement with the employees’ representatives.

If a voluntary agreement is reached, it must:

- set out the circumstances in which the employer will inform and consult the employees
- provide either for dealing with the employees' representatives or for the information and consultation to be directly with employees (or both)
- be recorded in writing and dated
- cover all of the employees in the undertaking
- be signed by the employer and approved by the employees.

The regulations provide for the possible retention of any pre-existing agreements endorsed by the workforce. A valid pre-existing agreement must:

- be in writing
- cover all the employees in the undertaking
- set out how the employer will inform and consult the employees
- be approved by the employees.

If the employer already has a pre-existing agreement in place when it receives a valid request, it may ballot the workforce to seek endorsement of the request. If, after a ballot, a minimum of 40% of the employees (constituting a majority of those who actually voted) endorses the request, the pre-existing agreement becomes invalid and negotiation on a voluntary agreement must commence. But, if 40% do not endorse the request, the pre-existing agreement will continue.

Standard, default provisions

If no voluntary agreement is reached by any required negotiation, 'standard' provisions will apply. This will require the establishment of an information and consultation committee, representing all employees in the undertaking, after the election of representatives. The number of representatives is proportional to the number of employees (one representative for every 50 employees up to a maximum of 25 representatives).

The standard provisions require the employer to inform and consult the employees and to provide:

- information on the recent and probable development of the undertaking's activities and economic situation
- information and consultation on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, particularly if there is a threat to employment within the undertaking
- information and consultation, with a view to reaching agreement, on decisions likely to lead to substantial changes in work organisation or in contractual relations between the employer and its employees. These include decisions entailing collective redundancies and business transfers – areas that are covered by separate obligations to consult employees' representatives.

Subsequent requests from employees

If the employees have made a request, or negotiations have been initiated by the employer, no further request may be made for three years after the conclusion of a negotiated agreement or the application of the standard provisions.

Consequence of non-compliance

If an employer has failed to establish arrangements for information and consultation, an employee may complain to the Central Arbitration Committee (CAC). The CAC will deal with any disputes about the operation of such arrangements. Sanctions for employers involve a range of remedies based on orders to perform obligations under the legislation and financial penalties of up to £75,000, depending on the size of the employer and other factors. If the CAC upholds a complaint that bears a financial penalty against an employer, an employee may make an application to the Employment Appeal Tribunal for payment.

Pension matters

The duty to consult on pensions is on a 'relevant employer' with 50 or more employees.

A 'relevant employer' is one operating or participating in an occupational pension scheme (other than a small or public service scheme) or a personal pension scheme with the employer's contributions.

The duty to consult covers a 'listed change' to future arrangements under the applicable scheme.

Listed changes for occupational schemes:

- raising the pension age
- closing the scheme to new members
- stopping future accruals
- ceasing the employer's contributions
- introducing or increasing the members' contributions
- reducing the employer's contributions (money purchase only)
- converting to money purchase (defined benefit only)
- changing the basis of future accrual (defined benefit only).

Listed changes for personal schemes:

- removing or reducing the employer's contributions
- increasing the members' contributions.

If the trustees or managers of a scheme instigate the listed change, they must notify the relevant employer(s) in writing.

Each employer must provide written information to those employees who are 'affected members' and any existing appropriate representatives of such people.

The information for 'affected members' must include:

- a description of the change and its likely effects,
- appropriate background information and
- an indication of timescale.

Existing 'appropriate representatives' are those:

- of a recognised trade union,
- elected or appointed under a negotiated voluntary agreement or 'standard' arrangement under information and consultation regulations,
- under a pre-existing agreement for purposes of the information and consultation regulations, or
- previously elected for purposes of occupational and personal pension scheme regulations.

The subsequent consultation by the employer must be with:

- one or more of the types of existing appropriate representative above and/or (if a pre-existing or negotiated agreement under the information and consultation regulations provides for direct consultation with employees) with the affected members directly; or
- if existing representatives or direct consultation arrangements do not exist or do not cover some or all affected members:
 - ▶ representatives newly elected for purposes of occupational and personal pension schemes regulations; or
 - ▶ if no such representatives are elected for some or all affected members, those affected members directly.

The consultation period

This must be at least 60 days. At its outset, an employer may specify the date for the end of consultation or for the submission of written responses.

If no responses are submitted by a specified end-date, the consultation is complete. If responses are received, the employer must consider them before deciding whether to make the proposed change. For this purpose, if the employer was not the initiator of the proposal for change, it must pass such responses to the initiator.

Enforcement

This is by a complaint to the Pensions Regulator, who can order the payment of a 'civil penalty' of up to £50,000 for a breach (but the Regulator cannot order the reversal of the relevant change).

13. The Employment Tribunal: System and process

13 The Employment Tribunal: System and process

Composition

Normally the employment tribunal has three members: the Employment Judge (a qualified lawyer) and two lay members, one with managerial or business experience and one with experience of representing employees. A majority decision is possible.

The Employment Judge may sit alone on certain matters or with the consent of the parties.

Representation

A party may choose not to be represented but to conduct its own case. If representation is desired, it need not be by a lawyer. Legal aid is not available (except in Scotland).

Steps before a hearing:

- the employee or ex-employee (claimant) completes the claim form (Form ET1) and lodges it, normally within three months, with the tribunal
- the tribunal serves a copy on the employer (respondent) and notifies ACAS
- the employer has 28 days to enter a response (Form ET3). If this time limit (or any extended limit agreed by the tribunal) is not complied with, the tribunal will normally issue a 'default judgment', finding in favour of the claimant
- ACAS assigns a conciliation officer to promote a settlement without the need for a hearing.

Settling a claim

There are two legally valid ways of settling a claim – a settlement drawn up after conciliation by ACAS or a compromise agreement.

Conciliation

In conciliation, the ACAS officer has no duty of confidentiality to the parties and cannot advise them on the merits of their cases.

Any settlement reached is recorded on a Form COT3 and signed by both parties or their authorised representatives. In addition to specifying the core agreement, the settlement will usually include a time limit for payment of any agreed sum and may feature obligations on other subjects, such as the provision of a reference and the maintenance of confidentiality.

Compromise agreement

This is reached directly, without the assistance of ACAS, between the employer and the employee. The parties must be advised beforehand by a 'relevant independent adviser' (a qualified lawyer or, with certified competence, a trade union official or advice worker).

To be legally effective, a compromise agreement must be in writing, specify the claim(s) or proceedings it covers, identify the adviser (who must have appropriate insurance cover) and explicitly confirm that these conditions have been met.

Employment disputes that have not yet resulted in a claim to the tribunal can also be conclusively settled either through ACAS conciliation or by a compromise agreement.

Processing a claim

There are four types of hearing: pre-hearing review; case management discussion; full hearing; and a review hearing.

A pre-hearing review can consider preliminary points (see below) and/or the merits of the case. The tribunal may rule that a claim is inadmissible or, if it has no reasonable prospect of success, strike it out. It may also require the claimant to pay a deposit to be allowed to continue (maximum £500).

The powers of the Employment Tribunal

Before the case is fully heard, the tribunal, often at a case management discussion (which is sometimes done by telephone), may direct either or both parties:

- to provide further particulars of the case
- to give relevant documents (or copies) to the other party, and/or
- to exchange written statements of the evidence of each witness who will appear at the full hearing.

Failure to comply with an order can result in the case being struck out and/or the party being fined.

The tribunal can also order the attendance of a witness. Disobedience without excuse can result in the witness being fined.

Preliminary points

In order to give the tribunal jurisdiction to hear the case, the claimant may need to prove (if any of these matters is disputed) that he or she:

- is or was an employee of or worker for that employer
- is protected – not one of the excluded classes (such as Crown employees, police and mariners)
- is qualified to complain (that the time limit has not been exceeded)
- was dismissed – if applicable.

There is often a separate, pre-hearing review to consider one or more of these points. Evidence from witnesses on those points is permitted.

Procedure (for pre-hearing reviews and full hearings)

The party under the burden of proof starts by giving evidence through relevant witnesses (who take the oath or affirm) and supporting documentation. Each witness is open to cross-examination by the other side and to questioning by the tribunal. The same process applies when the other party in turn presents its case.

On completion of the evidence, each party makes a closing statement to the tribunal (the party under the burden of proof goes second).

The employment tribunal may give a decision on the day or later (a reserved decision). It may be unanimous or by a majority. It is always provided in writing, in either full/extended form (which is mandatory in discrimination cases) or in brief/summary form.

Challenging a decision

Review hearing

This may be requested by a party who believes that the employment tribunal itself should reconsider its decision because of:

- an administrative error
- the party's non-receipt of notice of hearing
- the making of the decision despite the justified absence of the party
- the availability of new evidence
- 'the interests of justice'.

Note: The government is currently considering and consulting on certain changes to the tribunal and conciliation systems, with a view to resolving more disputes or apparent disputes without litigation and speeding up the process of adjudicating on those claims that do proceed to hearing.

Appeals

These can be made, on points of law only, to the Employment Appeal Tribunal and upwards to the Court of Appeal (or, in Scotland, the Court of Session) and the Supreme Court.

Referral to the European Court of Justice

This may be possible for a ruling on the scope and interpretation of EU Directives and their effect on UK legislation.

Litigation in the 'ordinary' courts

These are the County Court, the High Court, the Court of Appeal and the Supreme Court. Employment disputes that are based exclusively on the contract of employment (as opposed to rights created by employment legislation) are sometimes heard by these courts as an alternative or sometimes as a practical necessity. For example, an employment tribunal can only hear claims for breach of contract if they are on termination of employment and can only award a maximum of £25,000.

14. Collective labour law

14 Collective labour law

Recognition of trade unions

Recognition of a trade union is about the employer's acceptance of that union's right to participate in 'collective bargaining' on behalf of, and otherwise to represent the interests of, a category of workers.

Whether an employer chooses voluntarily to recognise a trade union or not, a trade union can nonetheless seek statutory recognition for 'collective bargaining'.

What is 'collective bargaining'?

The scope of collective bargaining will often vary according to the way in which the right to undertake it has arisen in the first place.

If recognition has been voluntarily agreed, collective bargaining can, according to the particular agreement, cover any of the matters under the statutory definition. These are:

- terms and conditions of employment
- physical conditions of work
- engagement or non-engagement of any worker
- termination or suspension of employment, or the duties, of any worker
- allocation of work or duties between workers or groups of workers
- disciplinary matters
- a worker's membership or non-membership of a trade union
- facilities for union officials
- the machinery for negotiation and consultation and procedures on the topics above.

When statutory recognition (see below) is awarded, the scope is then either dependent upon the agreement reached ('semi-voluntary') or, if the statutory default model is imposed, it is limited to collective bargaining on:

- pay
- holidays
- hours.

Legal status and effects of collective agreements

A collective agreement between employer(s) and recognised trade union(s) is not, itself, legally binding and enforceable between those parties. However, the incorporation of parts of a collective agreement into the individual employment contracts is the way in which a change agreed between employer and union becomes legally effective. The making of the new agreement on pay or another appropriate subject can vary the terms of employment, whether or not the employee is a member of the union. And, even if the employment contract does not have an express clause incorporating the results of collective bargaining, an employee in the bargaining group is generally treated as being covered by terms agreed between the employer and the union.

Legal significance of recognition

However it comes about, once the recognition of a trade union is established or acknowledged, it brings into being certain rights and responsibilities created by legislation. The major ones concern:

- time off for officials, learning representatives and employees (see Chapter 6)
- consultation on redundancy, measures in connection with a transfer of undertaking and, perhaps, pension changes (see Chapter 12)
- the disclosure of information (see below).

Although these subjects might also be covered by aspects of an initial or subsequent agreement between employer and union, the relevant legislation applies automatically and cannot be excluded by the terms of an agreement or by the failure of an agreement to mention them.

There are other union-related rights that do not depend upon recognition. For example, protection against victimisation (see Chapter 6) and the right to be accompanied at disciplinary and grievance hearings (see Chapter 7).

'Compulsory' statutory recognition

The statutory recognition procedure allows an independent trade union to seek recognition for collective bargaining on behalf of a specified group of workers. This group of workers is known as the 'bargaining unit'.

The union starts the process by making a written request to the employer for recognition. If voluntary agreement cannot be reached between the parties within a specified period, the union may apply to the CAC to decide on recognition.

What is the procedure if the parties cannot agree?

If the parties cannot agree, within a fixed period, on the appropriate bargaining unit for the debate on recognition, the CAC's first task will be to decide that question.

For an application to proceed, at least 10% of the proposed bargaining unit must be members of the union and, in the view of the CAC, a majority of the workers in the unit must be likely to favour recognition.

If the majority of the workers in the bargaining unit are members of the union, the CAC normally awards recognition without a ballot of the workforce. If a ballot is necessary, recognition must be supported by a majority of those who vote and by at least 40% of the workers who constitute the bargaining unit.

If recognition is granted, the parties must then seek to agree on a method of conducting collective bargaining. If the parties cannot reach agreement, they must adopt the CAC's procedure, which requires the employer to negotiate with the union at least on pay (excluding pension rights), hours and holidays. This enforced agreement will be legally binding between the parties.

Should either the employer or the union fail to comply with a bargaining procedure imposed by the CAC, the offended party can apply to a civil court for an order that the other party comply. Breach of such an order is a criminal offence.

If the application for recognition fails?

Should the application to the CAC ultimately fail (after being allowed to proceed), no further application can be made by the union for the same or similar bargaining unit within the next three years.

There is a similar procedure, to be used in defined circumstances by employer and/or worker, for de-recognition of a union.

When TUPE applies

Recognition (whether voluntary or statutory) will pass over to the new employer if the transferred entity remains distinct from the rest of the new employer's business.

Disclosure of information

The employer must disclose certain information to recognised independent trades union(s) for collective bargaining. The union(s) must make, and coordinate, requests in writing and specify their relevance. There are limitations on the employer's obligations. The ACAS Code of Practice '*Disclosure of Information to Trade Unions for Collective Bargaining Purposes*' provides guidance on the disclosure of information. Failure to observe the Code does not itself render anyone liable to proceedings, but relevant provisions of the Code are taken into account in proceedings before the CAC.

The sanction is a complaint to the CAC, which can make 'one-off' awards in individual contracts, based on what the settlement would have been had information been available to the trades union.

Union membership or recognition in commercial contracts

Any term in a commercial contract that specifies the use of only union or non-union labour is void. It is also unlawful to exclude a tender, or to fail to award a contract, or to terminate a contract, on grounds that anyone employed, or likely to be employed, on work connected with the contract is, or is not, a member of a union. The same conditions apply to contracts that specify recognition of and negotiation/consultation with unions or unions' officials.

Industrial action

Industrial action by workers, whether official (supported by one or more trade unions) or not, almost invariably involves, or causes, breaches of contract or other interference with contractual relations. Such breaches or interference may relate to:

- the contracts of employment of those taking the industrial action, and/or
- the contracts of employment of other workers, whether employed by the employer at the heart of the industrial dispute or another caught up in it, and/or
- commercial contracts of the employer at the heart of the dispute or another organisation.

What is the legal position of someone who organises industrial action?

Just as a breach of contract can itself be the subject of a common law legal action by the injured party, so can the civil wrong of inducing or encouraging that breach. In legal terms, that is what the organiser of industrial action (whether a union or an individual) does.

It is often more effective for an employer to seek legal redress from an organiser of industrial action, particularly a trade union, than from the individual workers who participate.

As a result of this, leaving the common law to operate by itself would mean that industrial action would almost always be unlawful and open to legal action, regardless of the circumstances. Legislation has therefore intervened to give organiser(s) of the industrial action protection from legal liability if it is 'in contemplation or furtherance of a trade dispute' and then satisfies further requirements.

Trade dispute

A trade dispute exists when workers are in dispute with their own employer and the dispute is wholly or mainly about matters such as pay, conditions and jobs. This excludes disputes between union(s) and employer when none of that employer's employees is in dispute; disputes between unions or groups of workers; and, usually, disputes about matters overseas.

The other requirements for the statutory immunity of the organiser(s) of industrial action

1 *Ballots.* A trade union loses immunity if its industrial action is not supported by a ballot. Normally, if industrial action covers different places of work, separate ballots must be held for each one. The employer must have received at least seven days' notice of the union's intention to hold a ballot and must have had sight of the ballot paper at least three days in advance of the ballot. After the ballot, the union must notify the employer of the result as soon as practicable. Ballots with a potential constituency in excess of 50 must also have an independent scrutineer.

A supporting Code of Practice, '*Industrial Action Ballots and Notice to Employers*', provides practical guidance.

2 *Notice and commencement of industrial action.* A trade union must also give the employer(s) subject to industrial action at least seven days' written notice of the start of that action. Failure to do so results in loss of immunity.

Industrial action must start within four weeks (or a longer agreed period not exceeding eight weeks) of the date of the ballot.

The supporting Code of Practice referred to in 1 above provides practical guidance.

3 *Secondary action,* such as blacking and sympathetic strikes, has no immunity, unless it occurs in the course of picketing that is lawful under 6 below.

4 *A person who induces,* or threatens to induce, a breach of contract because the employer employs, or has employed, non-union members or fails, or has failed, to discriminate against them has no immunity.

5 *Pressure to impose membership or recognition of a union(s).* Unions or other persons who organise industrial action to put pressure on an employer to act in a way that is contrary to the provisions for union membership or recognition in commercial contracts (see above) have no immunity from legal action. Nor do those who organise or threaten industrial action that interferes with the supply of goods or services on grounds that:

- work done in connection with the supply of goods or services has been or is likely to be done by non-union members or
- the supplier of the goods and services does not recognise or negotiate/consult with unions or union officials.

6 *Picketing.* Lawful picketing is limited to:

- employees at or near their own place of work
- a union's official accompanying a union member whom he or she represents at or near the member's place of work
- an unemployed person at a former place of work in furtherance of a dispute connected with dismissal, resignation or redundancy.

If it is induced by lawful picketing, secondary action will have immunity from liability – for example, if a delivery driver is persuaded to turn back, so inducing a breach of the driver's contract and of the commercial contract(s) for supply and delivery.

A supporting Code of Practice, '*Picketing*', provides practical guidance.

Other aspects of industrial action

Liability of trades unions

Those who suffer, or stand to suffer, loss because of unlawful industrial action (action that does not meet the applicable requirements of 1 to 6 above) can seek a court order (injunction) requiring the union to restrain or delay the action and/or can sue the union for damages.

The union is responsible if its actions are authorised or endorsed by the executive committee, president, general secretary or any official (including a shop steward) or committee. If authorisation or endorsement is by an official or committee, the union can avoid liability if the action is repudiated by the principal executive committee, president or general secretary.

Limits on damages against unions

The upper limits on damages awarded against a union in a single set of legal proceedings for unlawful industrial action are:

if the union has fewer than 5,000 members	£10,000
5,000 - 24,999 members	£50,000
25,000 - 99,999 members	£125,000
100,000 or more members	£250,000

The dismissal of participants in industrial action

A dismissal will be automatically unfair if it is for taking, or having taken, part in official (authorised or endorsed by a trade union – see above) industrial action that is also lawful ('protected' by statutory immunities – see above) when the dismissal occurs in one of the following circumstances:

- during the twelve-week, 'protected period' that starts with the first day on which the action was taken by the employee
- after the twelve-week period, but when the employee's participation in the action stopped before the end of that period
- when the employee's action continued beyond the twelve-week period, but the employer had not followed all reasonable procedural steps to resolve the dispute.

Note:

- *The fairness of a dismissal occurring during participation in official industrial action that is not lawful will not be considered by a tribunal unless some other participants were not dismissed at the time or (although all were originally dismissed at that time) some were re-engaged within a period of three months. However, those dismissed for having previously participated in such action retain the normal protection from unfair dismissal.*
- *Those dismissed at the time of their participation in 'unofficial' industrial action have no right to claim unfair dismissal. However, those dismissed for having previously participated in such action retain the normal protection from unfair dismissal.*

Temporary replacement labour

There are restrictions on the supply of temporary labour to replace those participating in industrial action (see Chapter 2).

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