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Breaking New Ground in the United Kingdom: Work Visa and Labour Law Aspects in the Twenty First Century

Baker & McKenzie

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United Kingdom, Great Britain, labor law, employment, immigration, work visas, public policy, legislation

Europe

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Unless otherwise indicated, the law is as stated in April 2006

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General Introduction

The purpose of this booklet is to provide a summary of the laws and procedures applicable to entering the UK for the purposes of working and the main employment law obligations on employers. It is not a definitive statement of all the legal rules, but merely an overview of the main legal principles. The law is correct as at April 2006. Where changes in the law to come into force after this date are already known and/or announced these are mentioned in this booklet.

1 Governing Rules

Sources of Law

UK labour law has two main sources: common law and statute.

Common Law - the Employment Contract

All employees work under a contract of employment, which may be made orally or in writing, and its terms may be express or implied or incorporated from other documents (e.g., employee handbooks or collective agreements). The parties are free to decide which law is to be the governing law of the employment contract. However, if the parties do not specify a governing law, then it is highly likely that the English Courts will infer that English law is the governing law, especially where the contract was made and is to be performed in England.

It should be noted that England/Wales and Scotland have separate legal jurisdictions and, although the contract law of both countries is similar in many respects, there are differences.

Statute Law

Since the early 1970s there has been a substantial growth in statutory employment protection legislation. The UK does not have a civil law code, but instead a series of statutes and regulations which embody various rights of employees and trade unions. The main statutes applicable in employment law are the following:

- Equal Pay Act 1970
- Health and Safety at Work Act 1974
- Sex Discrimination Acts 1975 and 1986
- Race Relations Act 1976
- Employment Protection (Consolidation) Act 1978
- The Employment Acts 1988 and 1989
- Trade Union and Labour Relations (Consolidation) Act 1992
- Trade Union Reform and Employment Rights Act 1993
- Disability Discrimination Act 1995
- Employment Rights Act 1996
- Employment Tribunals Act 1996
- Employment Relations Act 1999

- Employment Relations Act 2004
- Disability Discrimination Act 2005

In some cases the legislation is supported by Codes of Practice drawn up by ACAS ("the Advisory Conciliation & Arbitration Service" – a Government labour agency). These Codes of Practice, although of no direct legal effect, can be taken into account by Courts and Employment Tribunals in deciding whether or not an employer has breached the statutory employment protection obligations.

Employment protection legislation applies to all employees who work inside Great Britain. (It has even been applied where an employer is based in the jurisdiction but the employees are not). It can therefore cover employees who work partly inside the UK and partly outside. It also applies regardless of the stated governing law of the employment contract, or the nationalities of either the employee or the employer. It is not possible for an employee to contract out of his statutory employment protection rights except in very limited circumstances.

Northern Ireland is a separate legal jurisdiction, although most of its employment protection legislation is very similar to that applicable in England and Wales. However, the rules are contained in different statutory instruments, which usually have different commencement dates from those in the UK.

Collective Agreements

Unlike in many EU and US jurisdictions, collective agreements are not normally legally enforceable as between employers and trade unions. They will only be enforceable if the parties expressly make that intention clear in the body of the written collective agreement. However, if the terms of a collective agreement are expressly or impliedly incorporated into an employee's contract of employment, then those terms are legally enforceable as between the employer and the employee. These terms may survive later termination of the collective agreement. Not all the parts of a collective agreement will be appropriate for incorporation into individual contracts of employment.

Court Framework

There are two court systems which co-exist side by side in relation to employment law – Employment Tribunals (i.e., specialist labour courts) and the common law courts (i.e., the High Court or County Court). The Employment Tribunals deal mainly with claims brought under employment protection legislation (e.g., unfair dismissal or redundancy); whereas the common law courts handle the bulk of employment contract claims (e.g., notice pay or commission claims).

However, Employment Tribunals also have jurisdiction to hear claims for damages for a breach of the employment contract (up to a maximum of £25,000) where the claim arises in connection with the termination of employment or is outstanding on termination.

2 Immigration Requirements

Introduction

The right to enter or remain in the UK and to undertake employment is determined by the Immigration Act 1971 and the Statement of Changes in the Immigration Rules HC395 as amended ("the Immigration Rules"). It is first necessary to ascertain whether or not an individual is subject to immigration control.

Persons not subject to immigration control

British citizens, Commonwealth citizens with the right of abode in the UK, and Irish citizens are not subject to immigration control. This means that they do not require an Immigration Officer's permission to enter or remain in the UK and they are free to take up employment; their passports will not be stamped on entry and they are free to return to the UK however long they stay outside the UK. However, a person seeking admission to the UK on the basis that he or she has a right of abode must establish that right by means of a UK passport or a Certificate of Entitlement obtained from a British Embassy, Consulate or High Commission ("British diplomatic post") abroad.

Nationals of European Economic Area ("EEA") countries i.e., nationals of the European Union ("EU") countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the ten new accession countries who joined on the 1 May 2004) plus nationals of Iceland, Liechtenstein and Norway are, in general, free to come to the UK with their dependants to reside and work in the UK without any prior formalities. Swiss nationals also benefit from the same rights although Switzerland is not a member of the EEA. Nationals of Cyprus and Malta were granted the right to take up employment straightaway across the EU. Nationals from the remainder of the ten new accession countries (i.e. the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia & Slovenia) have also been granted an immediate right to work in the UK, unlike in many of the other EU member states where this right is being introduced over a number of years. However, although nationals from the new accession countries are free to live and work in the U.K., they are required to register the details of their employment within one month of taking up a new job. This requirement does not apply to nationals from Cyprus and Malta. The requirement to register continues until they have been employed in the UK for one year.

Under the Immigration Rules, the family members of an EEA national (who are not themselves EEA nationals) are required to obtain an "EEA Family Permit" to accompany or join an EEA national who is exercising his or her right to reside in the UK. These are issued free of charge by British diplomatic posts and are valid for multiple entries to the UK for a 6-month period. Family members, who will be remaining in the UK on a longer-term basis with their EEA national sponsor, should apply for a residence document from the Home Office, which will be valid for 5 years.

Persons subject to immigration control

All other overseas nationals including Commonwealth citizens without the right of abode, and UK passport holders who are not British citizens, i.e. British Overseas Citizens, are subject to full immigration control. This means that they must obtain permission from an immigration officer at the port of entry to enter or remain in the UK. Their passports will normally be stamped to indicate how long they can remain in the UK and what conditions attach to such permission.

Citizens of certain countries are termed "visa nationals" and must obtain entry clearance before travelling to the UK for any purpose, even as visitors. Other nationals only require entry clearance if they wish to travel to the UK for a particular purpose or if they plan to enter the UK for longer than 6 months. Entry clearance is the process by which a person applies, at a British diplomatic post in their country of residence, for prior permission to enter the UK. In general UK entry clearance consists of a visa for "visa nationals" or an entry certificate for non-visa nationals.

A standard format for evidencing the grant of leave to enter and remain has been introduced across the EU and, in the UK, is known as a United Kingdom Residence Permit ("UKRP"). This is now required by any person, including a non-visa national, who is not a national of a European Economic Area country and is travelling to the UK for longer than six months. It is hoped that the common format across the EU will make it easier to check documents from other EU countries, and hopefully reduce document and identity fraud.

There are two kinds of leave to remain in the UK that may be granted to persons subject to immigration control. Limited leave means that there are conditions on the person's stay in the UK. Someone given such leave will have an endorsement in their passport stating what these conditions are, e.g. an indication of how long he or she is allowed to stay, whether there is a restriction or prohibition on employment, or a requirement to register with the police upon arrival. Indefinite leave means that someone can remain in the UK for an indefinite period, i.e. the person has settled status. Persons with settled status have no restrictions on the employment they may take in the UK.

Employment: The general rule

The general rule is that any person who is subject to immigration control cannot take up employment in the UK without a valid UK work permit. There are exceptions to this rule for certain foreign nationals who obtain prior UK entry clearance from a British diplomatic post abroad for permit free employment. As the name suggests, a work permit is not required by persons entering under these categories, including:

- Commonwealth citizens entering the UK for a working holiday
- Persons employed by an overseas firm which has no branch, subsidiary or other representative in the UK ("Sole representatives")
- Persons entering under the Highly Skilled Migrant Programme
- Commonwealth citizens with recent UK ancestry

There are also permit free categories for au pairs, seasonal workers, representatives of overseas newspapers, news agencies and broadcasting organisations, private servants in diplomatic households, overseas government employees, ministers of religion and airport operational ground staff.

A foreign national who takes up employment in the UK without authorisation, in breach of the Immigration Rules, is liable to removal and if caught may find it difficult to obtain authorisation to re-enter the UK in the future, even as a visitor. UK employers have, since January 1997, faced sanctions under the Asylum and Immigration Act 1996 for employing people who did not have the right to work. Section 8 of the Asylum and Immigration Act provided a defence for UK employers who made an offer of employment conditional upon the production of one of a list of specified documents. The list included an EEA passport or other passport containing an appropriate endorsement that evidenced the foreign national's right to work in the UK. Provided that such a document was produced, and appeared to be genuine,

the UK employer would be protected from prosecution if a copy of that document was made and retained on the foreign national's personnel file. Section 8 has now been replaced by Section 15 of the Immigration, Asylum & Nationality Act 2006. This maintains the same documentary requirements, but moves the sanctions for non-compliance from the criminal to the civil arena. Section 15 allows for the imposition of a civil penalty of up to £2,000 per offence that may be imposed on the directors and managers, as well as the employer. It is hoped that this will allow the Immigration Service to enforce the rules more easily.

In order to avoid breaching UK race relations legislation, UK employers are advised to impose the requirements under Section 15 equally and to request the same documentation from all new employees, not only those who look or sound "foreign.

Permit Free Employment

Working holidaymakers

This category allows young Commonwealth citizens to travel to the U.K. for an extended holiday. The rules regarding working holidaymakers were relaxed in June 2003 to allow those entering under this category to work full-time throughout the full two year period. However, without any warning, the rules were tightened up again in May 2004. Working holidaymakers are now limited to working part-time throughout the two year period or full-time for only one year.

Individuals in this category will have to meet the following requirements:

- they must be Commonwealth citizens;
- they must be aged between 17 and 30 years old (inclusive);
- they must intend to leave at the end of the holiday and have the means to pay for an onward journey;
- they must be single, or married to a person who is accompanying them and who also meets the requirements for entry under this category with a view to spending a working holiday in the UK;
- they must intend to take employment incidental to their holiday and not engage in business or provide services as a professional sportsperson (the prohibition on pursuing a career in the UK has been revoked);
- they must not have dependant children aged five or over, or who will reach the age of five before the applicant completes the working holiday, or have any other commitments which would require them to earn a regular income.

The applicant and his or her dependants must obtain entry clearance from a British diplomatic post abroad prior to arrival in the UK. The Immigration Rules also state that people who have previously spent time in the UK under this category, will not be able to seek leave to enter as a Working Holidaymaker again after the initial two years period has elapsed (even if most or all of this period was spent outside of the UK).

Representatives of overseas firms which have no branch, subsidiary or other representative in the UK ("Sole Representatives")

This is more commonly referred to as the "sole representative" category. Intending entrants in this category must meet a number of requirements. However the two main requirements are:

- they must seek entry as a senior employee with full authority to take operational decisions;

- they must intend to establish and operate a registered branch or wholly owned subsidiary of their overseas employer (thereby excluding any other legal entity or type of activity).

Entry clearance must be obtained prior to the employee travelling to the UK, a process that can take between 1 to 4 weeks. Entrants in this category will be admitted to the UK for an initial period of two years. A three year extension of the initial period will be granted if the sole representative is able to provide the following additional information to the Home Office:

- evidence of the existence of the registered branch or wholly-owned subsidiary of their overseas employer; and
- evidence that their overseas employer still has its headquarters and principal place of business outside the UK

Highly Skilled Migrant Programme

The Highly Skilled Migrant Programme ("HSMP") was introduced in January 2002. The Programme is designed to allow individuals with exceptional personal skills and experience to seek entry into the UK to work without having a prior offer of employment. It aims to provide an individual migration route for highly skilled persons who have the skills and experience required by the UK to compete in the global economy. This category operates as a points based scheme: in order to qualify, applicants must show that they score a minimum of 65 points in four specific areas, including educational background, work experience, past earnings from work and achievement in chosen field. Applicants who are qualified doctors can also obtain additional points.

The HSMP application requires more documentary evidence than most of the other categories. The applicant must back up each point claimed with appropriate documentary evidence. For instance, in order to obtain points for graduate level employment, letters of reference must be provided from each former employer. The main benefit of this category is that the applicant can enter for employment and/or self-employment. HSMP applications must be submitted to the Home Office for consideration and can take several weeks to process. Upon approval of the HSMP application, entry clearance must be obtained prior to arrival in the UK. HSMP applicants are usually granted entry for a 24 month period initially. A three year extension can be obtained if the applicant can show that they have been able to support themselves without seeking public assistance. After completing five years under this category the person would be entitled to apply for permanent residency.

Commonwealth citizens with UK ancestry

Upon proof that one grandparent (paternal or maternal) was born in the UK or Channel Islands, a Commonwealth citizen who wishes to take or seek employment in the UK will be granted an entry clearance for that purpose and does not require a work permit. On entry such a person will be admitted for an initial period of two years followed, on application, by a further three year period. After completing five years under this category the person would be entitled to apply for permanent residency.

Work Permit Employment

UK work permits (except for employers based in the Isle of Man, Jersey or the Channel Islands) are issued by Work Permits (UK) (formerly known as the Overseas Labour Service) which is now part of the Home Office's Immigration & Nationality Directorate ("IND"). The rules of the UK Work Permit Scheme are not contained in the Immigration Rules, but are found in administrative guidelines issued by the IND. The Scheme is divided into four categories:

- Business & Commercial ("Main Scheme")
- Sports & Entertainments
- Training & Work Experience Scheme ("TWES")
- Sectors Based Scheme ("SBS")

As the Sports & Entertainments Scheme will of interest to a more limited number of employers, for the purposes of this brief guide we will focus upon the other categories.

Applications for work permits must be made by a UK-based employer, established in accordance with UK legislation, with an existing presence in the UK. The emphasis was changed slightly in October 2000 as companies previously had to show that they were "established and trading" in the UK. An overseas national cannot submit a work permit application without a sponsoring UK employer. The overseas national should normally be outside of the UK when the application is submitted to the Work Permits (UK). The prospective employee may not take up employment until the work permit has been issued, and their passport has been endorsed on arrival in the UK to indicate that they have entered the UK as a work permit holder. An application fee (currently £153) is now payable to Work Permits (UK) for each application filed on behalf of an overseas national with the exception of applications filed for nationals of Bulgaria, Moldova, Romania and Turkey.

The work permit allows a named foreign national to carry out a specific job for a particular UK employer. The UK employer must notify Work Permits (UK) of any change in the work permit holder's terms and conditions of employment. Work permits are not transferable; if the foreign employee wishes to change from one UK employer to another, the new UK employer must apply for a fresh work permit on behalf of the prospective employee.

Business & Commercial ("the Main Scheme")

Work permits under this category can only be obtained for jobs that require high-level or specialist skills. This covers the following general categories of employment:

- highly qualified management and executive staff with relevant experience;
- highly qualified technicians with specialist experience; and
- others if, in the opinion of the Secretary of State for Education and Employment, their employment is in the national interest.

Work Permits (UK) must be satisfied that all the following conditions have been met:

- a genuine vacancy exists;
- the individual will be an employee of the UK employer
- where the individual will be working at a client's address, the employer is responsible for the post and is providing a service and not just personnel;
- the pay and conditions of employment are equal to those normally given to a resident worker doing the same work;

- the employment complies with all UK legislation and any requirements for registration or licencing;
- the potential employee does not have a significant shareholding or beneficial interest in the UK-based company or connected business;
- the skills, qualifications and experience needed to do the job meet specific requirements (see below);
- the person is suitably qualified or experienced to do the job on offer (see below) and whether there is a need for them to do the job on offer; and
- there is no suitable labour in the UK and EEA available to fill the vacancy and the employer has made adequate efforts to fill the vacancy from suitable resident labour, in the UK and other EEA countries (see below).

To satisfy Work Permits (UK) that there are no "suitable" candidates within the resident EEA labour force, it is necessary for the employer to consider whether the vacancy can be filled by the promotion or transfer of an existing worker. In addition, the employer must normally demonstrate that the company has advertised the vacancy in an appropriate national newspaper or relevant trade publication, to trawl for suitable alternative candidates within the UK and EAA labour market. The employer must wait for four weeks after publication of the advertisement before submitting a work permit application to Work Permit (UK), and the application must be supported by documentation to show why any other applicants were considered unsuitable for the advertised position.

The advertising requirement will be waived where the overseas national has worked for a foreign parent or associated company of the UK employer for at least six months. In such cases the employee can be sent to the UK as an "intra-company transferee". In such circumstances, it must be shown that the post needs an established employee who has company knowledge and experience that is essential for the employment in question. The advertising procedure will also be waived if the position is a board level post, or where the proposed relocation will lead to new inward investment from abroad or where the occupation is recognised by Work Permits (UK) as being in acute short supply.

To qualify for a permit the job specification should require the individual to have a UK degree or equivalent; or a Higher National Diploma ("HND") level qualification in a relevant subject; or an HND which is not relevant to the post on offer provided the applicant has one year of relevant full-time experience. Alternatively, the post should require a person who has at least three years of experience using specialist skills acquired through doing the type of job for which the permit is sought. This previous work should be at NVQ level 3 or above.

Training or Work Experience Scheme ("TWES")

Applications for TWES permits must be made by an established UK employer. Applications should generally be submitted whilst the proposed employee is abroad, but it is possible to switch from student status to that of a TWES permit holder. The employee may not however commence their training or work experience until the application has been approved and their passport has been endorsed by the Immigration Service or, in the case of in-country applications, the Home Office. The individual should be employed in a supernumerary capacity (i.e. the post must be additional to the employer's normal staffing requirements). The training or work experience should be for a minimum of 30 hours per week.

The TWES categories do not lead to settlement. TWES permit holders no longer have to sign a declaration at the time of application confirming that they are aware they will not be allowed to transfer from the TWES Scheme to ordinary employment, and that they intend to return abroad at the end of the approved period. However, these conditions still apply to their stay in the UK. A person who has held a TWES permit for 12 months will not normally be eligible to return for further work permit employment until they have spent 12 months abroad. Similarly, a person who has held a TWES permit for over 12 months, will not be permitted to return for work permit employment for 24 months. Career development applications for more experienced employees from international companies will be handled under the Main Scheme (see above), rather than under TWES Scheme.

The TWES scheme is currently divided into two limbs each with separate criteria:

Training for a Professional or Specialist Qualification

The training must lead to a recognised professional or specialist qualification that requires an entry-level qualification of at least National Vocational Qualification ("NVQ") level 3 or equivalent. Normally the person should already have an academic or vocational qualification at NVQ level 3 or equivalent, and should have appropriate qualifications where this is necessary to do the training. The employer should be competent to provide the training, which will normally involve them being registered or approved by an appropriate professional body. The training should be completed in the shortest possible time and the trainee should be engaged on the same salary and conditions of employment as a "resident worker". Where a qualification takes a number of years to obtain, approval will normally be given for the average time it takes to complete the training up to a period of 5 years. Normally a maximum of two sittings (or possible sittings) of an examination will be allowed.

Work Experience

The work experience should be at NVQ level 3 or equivalent. The overseas national is still required to show that they have previous relevant experience or the appropriate academic or vocational qualifications to benefit from the work experience. This means they must already have academic or vocational qualifications at NVQ level 3 or equivalent, or have 12 months previous relevant experience at this level. If work experience is being provided to a student studying at a college or university overseas for a degree level qualification or higher, the work experience should be relevant to the qualification being studied and the student is expected to be at least one academic year into their course of study.

The work experience programme should not exceed 12 months. If the work is likely to take longer, this should be indicated in the initial application. An extension beyond 12 months will only be approved where there are exceptional circumstances, and a longer period up to a maximum of 24 months in total can be justified. The employee's pay and conditions should be in line with those given to a resident worker doing the same work experience.

Sectors Based Scheme ("SBS")

This low skilled work permit category was introduced in May 2003, but is now being phased out gradually. The Sectors Based Scheme ("SBS") used to operate in two industry sectors that were identified as suffering from a shortage of unskilled labour; the food manufacturing (fish processing, meat processing and mushroom processing) and hospitality (hotel and catering) sectors. However, the scheme is now being phased out and the hospitality sector has now been withdrawn. The SBS Scheme is run on a quota based system.

The scheme operates in the same way as the existing work permit arrangements. Permits will be available where an employer can show that they have been unable to recruit resident workers in certain posts listed under the Scheme. Under the SBS arrangements all posts for which a work permit is sought must be advertised through a Job Centre and EURES (the European Employment Service). The post on offer must be full-time (at least 30 hours per week). Unlike the other work permit categories, the skill set required must be below NVQ level 3, and the overseas national must be aged between 18-30.

The prospective employee must remain outside of the UK throughout the application process. Entry clearance must be obtained by all overseas nationals who have been issued with a work permit under the SBS Scheme, with the exception of nationals from the ten EU accession countries. SBS permits are issued for a maximum period of 12 months. There is no limit on the number of times an individual can obtain an SBS permit, but they will not be eligible to re-enter the UK on another SBS permit until they have been outside of the UK for at least two months.

After the Work Permit has been issued

Work Permits (UK) sends the work permit to the employer's legal representative or to the employer, to be forwarded to the employee overseas. If the employee is a "visa national" or if they hold a permit issued under the SBS Scheme, or if the permit is for longer than 6 months, they must also obtain UK entry clearance from a British diplomatic post abroad before travelling to the UK. Entry clearance is obtained by presenting the original work permit, their passport and other documentation within six months after issue of the work permit.

On arrival at a port of entry in the UK, a person in possession of a work permit will normally be given leave to enter for the period indicated on the permit. If they have already obtained entry clearance, the period of leave will be stated on their visa/entry certificate, and a date stamp will be placed on this to confirm their actual date of entry. They will only be refused entry if there is good reason for doing so – e.g., where false representations were made, or where it is discovered material facts were not disclosed when obtaining the permit. Obtaining the necessary endorsement in the work permit holder's passport on arrival in the UK activates the work permit, and allows the holder to take up employment in the UK.

Supplementary employment

Employers should also note that an individual who holds a work permit under the Main Scheme or the Sports & Entertainment Scheme, and is still employed by the employer named on the permit, can in general take up supplementary employment with another employer without requiring a new work permit. The supplementary employment should be outside of their normal working hours and of a similar nature to the work for which the individual's work permit was issued. Supplementary employment must not however be entered into through a recruitment agency or similar business. In addition, the permit holder is not allowed to enter into self-employment or to set up a business.

Family members and other dependants

The Immigration Rules allow the spouse and any children under 18 of an overseas national who has entered for permit free or work permit employment to accompany them to the UK (except for permits issued under the SBS Scheme). Dependants may take up employment in the UK without obtaining a work permit, and may also attend state-funded schools in the UK. There are also concessions outside the Immigration Rules, which allow other dependants (e.g. dependant children aged over 18) to enter the UK. Work permits holders are also able to bring over any domestic staff that have been in their employment for at least one year.

The spouses of entrants under these categories must satisfy the following conditions in order to enter as dependant spouses:

- they must have obtained entry clearance as a dependant from a British diplomatic post abroad;
- they must be married to the entrant;
- they must intend to live with the entrant as man and wife during their stay;
- there must be adequate accommodation for the parties; and
- they must be able to maintain themselves without recourse to public funds.

The children of entrants under the above categories are subject to the following rules if they wish to enter as dependants:

- they must, to enter and remain in the UK as dependants, enter with both parents or enter the UK in order to be re-united with parents already there;
- entry with one parent is permitted if they are to join the other parent who is already in the UK;
- in exceptional circumstances (for example, following the death of a parent, the divorce/separation of the parents, or for other "serious and compelling reasons") entry with only one parent will be allowed.

The dependants will be admitted to the UK for the same period as their sponsor, but with no restriction on employment. Employers should also note that the dependants of overseas nationals who have entered under some other categories are also free to take up employment, including students (see below).

Indefinite leave to remain

Any overseas national entering for the purposes of permit free or work permit employment will be granted limited leave to remain in the UK. After completing five years of continuous residence with limited leave (the requirement was previously 4 years), most of the employment categories allow the overseas national to obtain indefinite leave, and so become "settled" for the purposes of UK immigration law. The endorsement in their passport would then be changed accordingly. The overseas national would then have no restriction upon their right to live and work in the UK. The main excluded categories are working holidaymakers, students and TWES & SBS work permit holders.

Restricted right to employment for students

All overseas students studying in the UK are now deemed to have permission to work subject to certain conditions. Students can work 20 hours per week during term time and full time during the vacation period. Prospective students who have not yet been accepted for a particular course are admitted initially for six months with a "prohibition" on employment. If they obtain a place on a course of study within the six month period, they must submit an application to the Home Office so that their leave to remain may be extended and they are able to take on full student status.

The spouse and children under eighteen of a student are granted leave to enter for the same period as the student if they can be maintained and accommodated without recourse to public funds. The spouse of a student will be permitted to work without any restriction provided the student has been granted leave to enter and remain in that capacity for 12 months or more. The student and spouse must both be cohabiting in the UK and intend to leave the UK at the end of any period of leave granted to the student. The Immigration Rules now allows both male and female spouses to qualify for entry as dependants of students.

Visitors (and "Business Visitors")

The final category that any employer must be aware of is the visitor category. Except for a "visa national", a visitor need not apply for prior entry clearance to enter the UK. Anyone who enters the UK as a visitor is expressly barred from taking employment and to do so is a criminal offence. However, although employment is not permitted, this category does allow a person to enter for limited business activities.

The Immigration Rules state that a person can enter for business purposes provided they are, "a person living and working outside the United Kingdom who comes to the UK to transact business (such as attending meetings and briefings, fact finding, negotiating or making contracts with UK businesses to buy or sell goods or services)". It also states that the applicant must not "intend to produce goods or provide services within the UK, including the selling of goods or services direct to members of the public". The Home Office has produced a leaflet expanding on the persons who qualify for this category under the Immigration Rules. For example, a guest speaker at a conference may fall under the business visitor category, whereas a Project Manager would not.

The maximum period of stay in the UK as a business visitor remains six months in any twelve month period. If any "productive work" is to be undertaken during a stay in the UK, a work permit will be required notwithstanding the length of the proposed stay in the UK.

3 Terms Of Employment

Form of Employment Agreement

The contract of employment can be either written, oral, express or implied. In practice, most employees in the UK have a written contract of employment. This may either be contained in an exchange of letters or in formal documentation. The latter is usually more appropriate for senior employees.

Although there is no legal obligation upon employers to give written contracts of employment, they are nonetheless required by S.1 Employment Rights Act 1996 to give employees written particulars of their main terms and conditions of employment.

In practice, employers sometimes treat these written particulars as the employment contract itself. The written particulars which employees should be given include the following:

- The name of the employer and employee.
- The dates when employment began and when the period of continuous employment is treated as having commenced.
- Job title.
- The scale and rate of remuneration, and the method of its calculation.
- The intervals at which remuneration is paid (e.g., weekly or monthly).
- Terms and conditions relating to hours of work (including overtime pay, start and finish times, etc.).
- Terms and conditions relating to public holidays, annual vacation entitlement, sickness absence and sick pay.
- Terms and conditions relating to pension schemes (including whether or not there is a contracting out certificate in force relating to participation in the state pension scheme, known as "SERPS").
- Grievance procedure.
- Disciplinary rules and procedures (including appeal procedures).
- Notice of termination to be given by either the employer or employee.
- The period for which the employment is expected to continue (if not intended to be permanent) or, if it is for a fixed term, the date of expiry of the contract.
- Place of work. Where an employee works in various places, the address of the employer must be given and details of the employee's job mobility requirement.
- Details of any relevant collective agreements which directly affect the terms and conditions of employment (including the parties to such collective agreements).
- The following details regarding any assignment outside the UK: length of the assignment, remuneration package (including any special expatriate element and details of the currency in which payment is to be made), and any terms and conditions to be applicable on return to work in the UK.

Employers are required to give employees the statutory written particulars of their terms and conditions of employment within 2 months of the commencement of employment although, in practice, the document is usually given to the employee much sooner. In any event, any changes in any of the written particulars must be notified to employees within 4 weeks of the change having taken place.

In practice, most employment contracts also cover other aspects of terms and conditions of employment, including terms and conditions relating to other fringe benefits of employment (e.g., company car, medical insurance, confidentiality and restrictions on competing activities following termination of employment).

It is possible for employees to be engaged on a fixed term basis, (normally either senior executives or project hire staff) but by far the most common practice is for employees to be hired on an on-going basis with the employment terminable at any time by a specified period of notice to be given by either employer or employee. If an employment contract is neither expressed to be for a fixed term, nor specifies that it is terminable on notice, then the Courts will normally imply that employment is terminable on "reasonable notice". This is a common law concept, and the extent of

this notice will vary depending on all the circumstances - in particular, the seniority of the employee, his length of service and custom and practice both in the company and industry.

There is no specified format for the terms and conditions of employment to be given to the employee; although, in practice, the more senior the employee, the more formal and exhaustive his contract is likely to be. In some cases the document will cross-refer to certain provisions in a staff handbook or collective agreement.

Language Requirements

There is no formal requirement that the contract of employment must be written in English, although this is almost always the case.

Standard Employment Agreement

Most employment contracts in the UK are of an indefinite duration terminable by due notice, and not for a fixed term. The latter type of contract is more usual for directors and senior executives.

The parties may agree that the initial period of the contract is on a probationary basis. During such probationary period the employee may not be entitled to certain employment benefits (e.g., membership of the pension scheme), and the notice of termination by either party will normally be shorter. However, it is up to the parties to agree to what extent the terms and conditions of employment will be different during the probationary period. It is unusual for senior executives to be employed on a probationary basis. The duration of such a probationary period is fixed by the parties and is normally between three and six months, although the contract can provide for its extension (at the employer's discretion) if more time is needed to evaluate the suitability of the employee for the position.

Unlike in some EU countries, there is no legal distinction between blue collar workers, white collar workers and senior directors. The basic principles of both the common law and statutory employment protection legislation apply to all employees, regardless of status. However, where an employment contract is deficient in specifying in some of its terms (e.g., the notice period), then the employee's status will play a major role when the Court determines what terms should be implied into the contract to fill the gap. The Courts will not imply terms into the contract where the matter has already been clearly dealt with by its express terms. This therefore creates an incentive for both the employer and employee to ensure that all the relevant terms of the contract are clearly set down in writing.

The other way in which there may be a distinction between the employment contracts of senior executives and other levels of employees, is the range of benefits to which they will be entitled as a matter of their individual contracts. For example, executives would normally be entitled to more non-cash benefits than junior employees and blue collar workers – e.g., typically, an executive pension scheme, company car, participation in the profit share scheme and share options.

4 Working Conditions

Working Hours

Until 1998, other than in certain specified industries, there were no statutory restrictions on the working hours of adult employees. This position has changed, however, since implementation of the EU Working Time Directive in the UK (see below). In practice, blue collar workers often have a basic working week of 39 hours, and white collar workers normally have a basic working week of 35 or 37.5 hours. However the current trend is towards reducing the basic working week of blue collar workers to 37 hours.

The employment contracts of senior employees will normally require them to work such hours as are necessary for the efficient discharge of their duties with no overtime pay being due for additional hours worked. In comparison, blue collar and more junior employees will normally be entitled to overtime pay for additional hours worked. This overtime pay usually carries an additional premium above the basic hourly rate, typically 1.5 x hourly rate for overtime worked during Monday to Friday, and 2 x hourly rate for weekend working.

The Working Time Regulation 1998

The UK has detailed Regulations governing working time. The Working Time Regulations 1998 cover all workers apart from a limited number of specifically excluded categories.

The Regulations provide:

- An average maximum working week of 48 hours. This is calculated by taking average hours over a 17 week period, but can be averaged over a period of 26 week for certain categories of workers and up to 52 weeks by a collective or workforce agreement. Workers can opt out of the 48-hour maximum by individual written agreement and can revoke their consent on notice.
- The normal hours of night workers should not exceed an average of 8 hours working time for each 24 hours over the course of a fixed reference period. Night workers are defined as those who work at least 3 hours daily working time during the hours of 11 p.m. to 6 a.m. (in the absence of a relevant agreement defining it otherwise) as a normal course. The averaging period is 17 weeks but this may be extended by agreement. Night workers are entitled to free health assessment before performing night work and at regular intervals afterwards. Particularly stringent rules apply to night work involving special hazards or heavy physical or mental strain. Night workers who do such work for any length of time during their working hours are subject to an 8 hour limit on actual working time in any 24 hour period.
- Workers are entitled to a minimum daily rest period of 11 hours consecutive rest in any 24 hours, a daily rest break of a minimum of 20 minutes and a weekly rest period of not less than 24 hours in each 7 day period. The Regulations established a complex scheme by which workers may agree with employees to disapply certain, but not all, rights by means of different types of agreement; individual, collective or workforce.

Exclusions

Certain provisions do not apply to workers whose working time is unmeasured. The scope of this exclusion has been extended, though it is still uncertain as to what extent it may be relied upon.

The Regulations operate in conjunction with a guidance note published by the Department of Trade and Industry, which whilst having no legal force of its own, indicates the approach to be considered by courts and tribunals.

Salary

Payment

The employment contract should specify the salary due to the employee, the intervals at which it is paid and, where appropriate, how it is calculated. In addition, it should state how it is paid (e.g., cash, cheque or direct bank credit). It should also specify how overtime pay is calculated.

Where there is an applicable collective agreement, these matters will normally be covered by it.

At present, it is customary in the UK for wages to be reviewed annually.

Statutory Restrictions

National Minimum Wage

Generally, it is for the parties to agree the appropriate levels of salary. However, the National Minimum Wage Act 1998, sets down statutory national minimum wages.

The National Minimum Wage is currently £5.05 per hour for workers aged 22 or more, £4.25 per hour for 18 to 21 year olds and £3.00 per hour for 16 and 17 year olds. It rises periodically, generally in October of each year.

The Act provides that the rates will change periodically, but they are not, as yet, subject to automatic annual review.

The Act covers all workers in the UK over school leaving age. It does not cover certain categories of workers, which include those aged under 18, workers on long term postings abroad, the genuinely self-employed, family members who participate in a family business and certain voluntary workers.

The hourly national minimum wage is calculated by considering the total pay reference period, calculating gross pay for the reference payment (adding and deducting certain specified sums) and dividing total gross pay, as adjusted, by hours worked in the pay reference period. The figure should equal or exceed the National Minimum Wage.

The provisions are complex: the employer and worker must first identify the type of work undertaken. There are four types identified in the Act:

- Time work (which may be piecework) and is paid for according to set or varying hours or periods of time.
- Salaried hours work, which is paid for under a contract for a set basic number of minimum hours per year.
- Output work, which is paid for according to the number of pieces of work a worker completes.
- Unmeasured work, which is work which does not fall under the above three categories but includes work where there are specified tasks to be performed but no specified hours.

Employers must keep records to show sums paid to workers and all relevant deductions. These records must be kept for three years following the end of any pay reference period.

Employees who are unfairly dismissed by employers seeking to avoid paying the National Minimum Wage can bring unfair dismissal claims in an Employment Tribunal. All workers can enforce payment of at least the National Minimum Wage by complaint to an Employment Tribunal or to the County Court for breach of contract.

The National Minimum Wage Act also creates six criminal offences each carrying a maximum fine of (currently) £5000. These relate to non payment of the National Minimum Wage, failure to keep or falsification of National Minimum Wage records and none co-operation with an enforcement officer.

Employers must also observe the provisions of the Equal Pay Act 1970 which requires that men and women undertaking "like work" or work of "equal value", to be paid the same salary.

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations provide that part-time workers must not be treated less favourably than full-time employees with regard to salary, training or other benefits. In certain circumstances, however, an employer may be able to justify disparate treatment.

Deductions

Where an employer makes deductions from an employee's salary, it is required to give an itemised pay statement detailing all such deductions made (e.g., for tax, social security and contributions to employee benefit plans, etc.). In addition, under the Employment Rights Act 1996, (formerly the Wages Act 1986), an employer is prohibited from making deductions from employees' wages without their prior written consent, or the contract of employment expressly providing for such deductions to be made.

Benefits in Kind

In recent years, there has been an increase in the provision of benefits in kind, particularly to more senior employees. These take various forms and vary according to the size of the employer. Typical benefits in kind include: company cars and free petrol, medical and disability insurance, life assurance, occupational pensions. However, most of these benefits are subject to tax and national insurance contributions and the employer has to report details of such benefits in kind to the Inland Revenue each year. The Inland Revenue give company cars a deemed taxable value.

Bonuses and Commissions

Many employees are paid a part of their remuneration by way of bonuses or commissions. The bonus may either be a discretionary yearly bonus based on the overall profits of the company, or it may be part of a formal bonus scheme entitling the employee to a contractual bonus based on the attainment (either by him and/or the Company) of certain specified objectives. In the case of senior executives, this may be based on a profit-share scheme. Since bonuses and commissions form part of remuneration, they are subject to tax and national insurance in the normal way.

Holidays

Weekly Days Off

Most employees work 5 days a week, with Saturdays and Sundays off. However, in some sectors (e.g., retailing, hotels and catering) the basic working week may be 5.5 or 6 days. For those industries which operate continuous production processes, employees may be engaged on a rotating shift system, in which event their weekly days off will vary from week to week. As a general rule, employees cannot be forced to work on Sundays – although there are some exceptions. In accordance with the Working Time Regulations employees are entitled to a minimum weekly rest period of not less than 24 hours in a 7 day period.

Official Holidays

Most employees in the UK are entitled to paid leave on Public and Bank holidays. The current Public and Bank holidays are: 1 January, Easter Friday and Easter Monday, the first Monday in May, Spring Bank holiday (usually the last Monday in May), August Bank holiday (usually the Monday nearest 31 August), 25 and 26 December. Entitlement to pay for such public holidays will be governed by the employment contract.

Annual Holiday Entitlement

The Working Time Regulations 1998 introduced for the first time in the UK a statutory minimum holiday entitlement. This entitlement is to four weeks' paid holiday.

Workers may not opt out of this provision, although they can take less leave if they so choose. Leave entitlement may not be replaced by a payment in lieu, other than upon termination of employment.

Currently, paid Public and Bank holidays count towards the minimum entitlement, however there are government plans to reverse this policy under powers likely to be granted under the Work and Families Bill. Part-time workers have a right to pro-rata leave.

Employees may under their contracts of employment be entitled to more holiday than the statutory minimum. Contracts of employment usually describe the conditions upon which such holidays may be taken. The inter-relation between contractual and statutory minimum holidays can be complex.

Statutory minimum leave may only be taken within the same leave year. However, employers and workers can likely agree additional contractual paid leave which they can agree to carry forward to take account of any leave in excess of the statutory minimum entitlement due but untaken in respect of any particular year.

Parental Leave

The Employment Relations Act 1999 and Maternity and Parental Leave etc. Regulations 1999 create a right to parental leave and implement the EC Directive on Parental Leave.

The right is available only after completion of one year's continuous service with an employer. The right is to thirteen weeks leave in respect of each child and is in addition to ordinary and additional maternity leave.

The leave must be taken before the child's fifth birthday, or within five years after the placement for adoption began, up to the child's eighteenth birthday. Leave may be taken at any time up to the age of eighteen in respect of a child who is entitled to a disability living allowance.

The regulations set out a "Model Scheme" which will apply unless the employer and employees have agreed to substitute an alternative scheme.

The Model Scheme provides that parental leave must be taken in multiples of one week, a maximum of four weeks' leave per child may be taken in any year and that an employee must give at least twenty-one days advance notice of leave.

An employer is entitled to postpone parental leave for up to six months (other than on the birth or adoption of a child) if the operation of the employer's business would be unduly disrupted.

Paternity Leave

An employee who has or expects to have responsibility for a child's upbringing, is the biological father of the child or the mother's husband or partner and has worked for their employer for 26 weeks ending with the 15th week before the child is born is entitled to paternity leave and pay (currently £106 or 90% of average weekly earnings if this is less than £106). Eligible employees can take either one or two consecutive weeks' leave. Leave must be completed within 56 days of the birth of the child. The leave (and pay) is also available to an adoptive parent.

Other Leave

From 15 December 1999, employees have a right to Time Off for Dependants. Employees may take a reasonable amount of time off during working hours in order to take action which is necessary to help or care for a dependant in an emergency. A dependant is defined as a spouse, child, parent, or another person who lives in the same household as the employee otherwise than by reason of being his employee, tenant, lodger or boarder.

Company Rules and Statutory Resolution Procedures

Following the coming into force of the Employment Act 2002 (Dispute Resolution) Regulations 2004, which implemented in full the procedures that had been set out in Schedule 2 to the Employment Act 2002, every employer in the UK, regardless of size, must comply with minimum statutory resolution procedures, consisting of grievance procedures and dismissal and disciplinary procedures.

In addition, the Advisory, Conciliation and Arbitration Service (ACAS) publishes a Code of Practice on Disciplinary Rules and Procedures, which was revised in 2004 to take into account the introduction of the statutory resolution procedures.

Failure by any person to observe the provisions of the ACAS Code will not itself give rise to proceedings in respect of that person, however an Employment Tribunal must have regard to the Code if it appears relevant to any question arising in proceedings.

Most employers publicise health and safety or other rules in different ways – e.g., in an employee handbook or on notice boards, or in work manuals.

Statutory Resolution Procedures

Dismissal and Disciplinary Procedure

This procedure applies when an employer is contemplating dismissing an employee or taking "relevant disciplinary action". "Relevant disciplinary action" excludes suspension on full pay and the issuing of warnings. Under the regulations, the standard procedure requires a three step process:

- An employer must set the problem out in writing and provide it to the party in question;
- A meeting must be held to discuss the problem, following which the employer must give its decision; and
- Should the employee request it, an appeal should be arranged.

In serious cases of gross misconduct, where it is reasonable for the employer to dismiss instantly without any investigation, a shorter, modified procedure may be followed, which omits the need for a meeting. This involves:

- An employer setting out the alleged misconduct which led to the dismissal in writing; and
- Should the employee request it, the right to appeal.

Employers should use the modified procedure with caution as doing so when the standard procedure should have been used will result in a subsequent dismissal being automatically unfair.

Employers should avoid fostering any kind of belief that following the statutory procedure will give them free rein to dismiss employees without sanction. Case law principles, which have established doctrines such as that it will be unfair to dismiss an employee for a first offence, unless the incident was serious enough to constitute gross misconduct, will continue to have relevance and should not be ignored.

Grievance Procedure

A grievance is defined as "a complaint by an employee about action which the employer has taken or is contemplating taking in relation to him". A grievance does not relate to action or contemplated action relating to a fellow employee or third party or other perceived injustices, misconduct or malpractice.

There are two separate grievance procedures. The standard grievance procedure will be used in the majority of cases and the three step process for this is as follows:

- The employee must notify the employer of his grievance, in writing, via a "stage one grievance letter";
- A meeting should be held to discuss the grievance, following which the employer must inform the employee of the decision and the employee's right of appeal if he is dissatisfied; and
- Should the employee request it, an appeal meeting should be held.

Where the employee has already left employment, the parties may agree, in writing, to use the modified procedure, which will simply comprise the employee's stage one grievance letter, followed by the employer's written response.

Every worker has the legal right to be accompanied by a fellow worker or trade union representative at meetings under a grievance (or dismissal and disciplinary) procedure, although that person may not answer questions at such a meeting on behalf of the worker.

An Employment Tribunal will reject any claim by an employee where he has not first entered into a grievance procedure with his employer.

Failure to Comply

The main consequences for failure to comply with the statutory resolution procedures are as follows:

- A dismissal carried out without following a statutory dismissal and disciplinary procedure will be automatically unfair; or
- If a grievance procedure is not completed through the fault of the employer or employee and the matter in question proceeds to an Employment Tribunal, the Tribunal must increase or reduce the award, as appropriate, by 10-50%.

Sick Pay

All employers are required to give employees whose earnings exceed a certain amount Statutory Sick Pay ("SSP"), the weekly rate of which will vary depending on the normal weekly salary of the employee. This is normally less than most employees' weekly earnings. SSP rates are usually increased annually each April in line with inflation.

There are complex rules governing employees' entitlement to SSP. The main rules are as follows:

- the employee has a maximum entitlement of SSP of up to 28 weeks in any period of incapacity of work;
- employees are not entitled to be paid for the first three days of any period of absence (unless it is a case of reoccurring absence within a specified timescale);
- SSP is only payable for whole days of sickness.

In practice, most employers have sick pay arrangements which are, in part, more generous than the SSP scheme – e.g., by giving full pay for a specified number of days per annum. Entitlement to company sick pay is normally conditional upon the employee obtaining appropriate medical certificates and keeping his employer informed of his expected absence and the reasons for it. Where SSP and company sick pay are payable for the same day of absence, the employee will only receive the higher of the two, not both payments. Where employees earn less than the statutory amount per week, they are not entitled to SSP, but can receive State Sickness Benefit directly from the Department of Health and Social Security.

Maternity Benefits

Time Off for Ante Natal Care

Employees are entitled to reasonable paid time off for ante natal care. Employers can demand evidence of the ante natal appointment for the second and subsequent visits. There is no period of qualifying service which employees must attain before qualifying for this right.

Maternity Pay

All employers are required to pay Statutory Maternity Pay ("SMP") to their employees on maternity leave for a maximum of 26 weeks. For an employee with 26+ weeks continuous employment with the same or an associated employer as at the 15th week before the expected week of childbirth (the "EWC"), the first six weeks of SMP will be at a higher rate of 90% of her average weekly earnings. Thereafter, for the following 12 weeks, SMP is at the lower rate. Following the Employment Equality (Sex Discrimination) Regulations 2005, a women is entitled to the benefit of any relevant pay increase whilst on maternity leave.

An employee with less than 26 weeks continuous employment may be able to claim Maternity allowance direct from the Department of Social Security.

Employers will receive a rebate of approximately 92% of SMP paid by them under the legislation with those eligible for small employer relief able to claim back 100%.

Draft Work and Families Bill

The draft Work and Families Bill, set to be introduced through a series of regulations later in 2006, will have a significant impact on maternity benefits. Draft Maternity and Parental Leave (Amendment) Regulations 2006 extend the period of Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay from twenty six weeks to thirty nine weeks by April 2007 with plans to extend it later to fifty two weeks.

The draft regulations also provide for:

- additional maternity leave for all working mothers regardless of length of service;
- the facilitation of arrangements for employers and employees to keep in contact during the leave period and the requirement for an employee to give 8 weeks notice if intending to return to work before the end of the maternity leave period;
- allowing the mother to transfer maternity leave and pay to the father (or a partner with parental responsibilities);

Maternity Leave

All employees are now entitled to statutory maternity leave of 26 weeks (known as ordinary maternity leave), regardless of length of service. During this period salary is replaced by SMP (if the employee is entitled to it), but all non-cash benefits must be maintained (including the employer's pension contributions, company car, life insurance, medical or disability insurance etc.). There are certain procedures required for employees to exercise this right, e.g., giving 28 days' written notice of intention to take maternity leave. The maternity leave cannot start earlier than the 11th week before the EWC.

Employees who have 26 weeks or more continuous employment with the same or an associated employer at the 14th week before the EWC are entitled to an extended period of maternity leave (known as Additional Maternity Leave). This begins at the end of ordinary maternity leave and continues for a further 26 weeks. Additional maternity leave is unpaid.

If an employee exercises her right to take ordinary maternity leave of 26 weeks she is entitled to return to her old job at the end of that period. If she is entitled to it, and takes, additional maternity leave, her entitlement is to return to the same type of job which she enjoyed before maternity leave, with no loss of benefits, pension, or seniority rights. If it is not reasonably practicable for the woman to be offered the same type of job back on the same terms and conditions of employment which she enjoyed previously, then the employer must offer her another suitable alternative job on terms and conditions not substantially less favourable.

A failure to allow an employee to return from maternity leave in accordance with her statutory rights, will be an automatically unfair dismissal unless the employer can show that it was not reasonably practicable to offer her an alternative job. It can also constitute unlawful sex discrimination.

Where an employer has a maternity policy, this will normally specify the employee's position during maternity leave and deal with questions such as what happens to various

benefits (e.g., pension, medical insurance, company cars etc.) during maternity leave. As a minimum, all non-cash benefits must be maintained during ordinary maternity leave. Some UK employers continue benefits them throughout ordinary and additional maternity leave. There might be claims of sex discrimination where women on maternity leave are treated differently from men on other periods of prolonged absence (e.g., due to sickness) in respect of the maintenance of non-cash benefits. The law in this area is still to be clarified.

Dismissal on Grounds of Pregnancy/Childbirth

Dismissal on these grounds is likely to constitute unlawful sex discrimination. In addition, a dismissal connected with pregnancy or confinement or for taking or requesting parental leave or time off for dependants is likely to be automatically unfair.

Employees are also protected against any other detriment (short of dismissal) for availing themselves of those rights.

Social Security Contributions

Employers are required to make deductions from employees' salary for income tax under PAYE. These returns are normally made monthly by employers. Both employers and employees have to pay national insurance (i.e. social security) contributions on the cash remuneration paid to the employee. Employers are required to deduct NI contributions on company cars and fuel benefit. From 6 April 2003, the NI contribution from employers is 12.8% of employees' total remuneration above £96 per week; and the employee's contribution is 11% of weekly earnings between £94.01 to £630 and 1% over £630. Neither employer nor employee pays NI contributions if the employee's weekly pay is less than £94. Where the employer operates an occupational pension scheme which is contracted out of the State pension scheme, the parties' contribution rates are lower. These various thresholds are reviewed annually, normally with effect from April.

Confidentiality and Post-Employment Restraints

Confidentiality

In all employment contracts, employees have an implied common law obligation of fidelity and good faith. This includes the obligation not to disclose or misuse the employer's trade secrets or other confidential information of the business.

The implied term of fidelity has only limited application once the employee has left employment. During employment it covers all trade secrets and information of a confidential or commercially sensitive nature. After an employee has left, however, it only covers trade secrets or confidential information akin to a trade secret. For example, customer lists and customer requirements have been held not to be confidential information akin to a trade secret, and therefore not protected by the implied term of fidelity after an employee has left. However, each case will turn on its own facts.

For this reason, employers are strongly advised to have express clauses protecting confidential information and trade secrets. These are normally contained in the employment contract or in a special confidentiality agreement. The Courts have stated that they will normally respect such express confidentiality obligations provided that they only protect such information which can properly be classified as being of a confidential nature.

To this extent, employers are advised to indicate in the contract specifically which types of information will be regarded as confidential. In the final analysis, however,

the Courts will decide whether information is sufficiently confidential to be protected. Whilst they will take account of the express terms of the contract, these will not be conclusive. The Courts will take into account the nature of the information in question, whether the employer treats it as confidential in practice, the range of people who know about the information, and whether it can easily be separated from non-confidential information.

If an employee breaches his obligations of confidentiality, the employer will normally seek an injunction restraining such acts and, where appropriate, damages.

Post-Termination Restraints

As a general rule, the Courts will not enforce a post-termination restraint unless it is both reasonable and necessary to protect the legitimate business interests of the employer in question. If it does not meet this test, a post-termination restraint will be void on grounds of public policy.

The Courts have recognised legitimate business interests as an employer's confidential information and trade secrets, customer contacts/goodwill, employee expertise and (in special cases) exclusive suppliers. Where the sole purpose of a restraint is, however, to prevent competition, it will not be enforceable. For this reason, any restraints which are placed on employees have to be linked to one of the above legitimate business interests.

As the Courts will not imply any post-termination restraint (except in relation to confidentiality) it is necessary for them to be expressed in an employment contract or a special confidentiality agreement. Depending on the circumstances of the business and the status/job of the employee in question, the restraint clauses can cover noncompetition, the solicitation of customers (which may also include dealing with those customers) and the enticement away of employees.

The drafting of post-termination restrains is crucial since the Courts construe them in a literal way. If any part of the restraint clause is too widely drafted, the entire clause will be void. The only exception to this rule is where the offending part can be deleted leaving the remainder of the clause intact, i.e., the remainder of the clause must still make sense and provide no more than a reasonable restriction.

The Courts look at all aspects of the post-termination restraint, including its duration, geographical restrictions, limitations on the description/nature of customers and products/services, etc. Each aspect has to be reasonable bearing in mind the nature of the employee's job, and his status, and the risk of damage to the employer's business. Such post-termination restraint clauses must therefore be customised to individual employees in relation to their particular jobs. As a general rule, the more senior the employee the more likely it is that such a restraint will be enforceable, particularly where he is a Director or is involved in the innovative or development side of the company's business. Normally, restraints in excess of one year are unlikely to be enforced, although there is a higher chance of success with non-solicitation of customer restraints where longer periods have occasionally been upheld.

The Courts will not enforce post-termination restraints where the contract has come to an end by reason of the employer's breach of it, e.g., by failure to give the notice due under the contract, a "wrongful dismissal". The effect of this can be mitigated where the contract expressly provides for the employer to end the contract by making a payment in lieu of such notice. (This will mean, however, that all of such payment will be entirely subject to tax which can be a disincentive to including such a provision).

Unlike many EU countries, there is no obligation in the UK for the employer to pay employees for the duration of the post-termination restraints, and any such payment will not be conclusive on the issue of reasonableness.

In relation to the restraints dealing with the solicitation of customers, it is important that these are drafted only to apply to those customers with whom the employee in question has had personal dealings or for whom he has been responsible in his own sales territory.

If an employee contravenes a post-termination restraint, the employer's normal remedy is to apply for an interlocutory injunction pending full trial. This normally resolves the issue since, in most cases, the case will not come on for trial until after the period of restraint has expired. The application for an interlocutory injunction does not preclude an employer from suing for damages in appropriate cases. However, the grant of an interlocutory injunction is a matter for the discretion of the Court and, in practice, the judge will take account of which party will be hurt most if the injunction is/is not granted.

"Gardening Leave"

This covers the situation where an employee is required not to attend work during his period of notice but to stay at home "on call". Salary and all contractual benefits remain payable in the normal way. It is often used to keep an employee away from a competitor for the duration of his notice period. In addition, the employer will not normally want him to be on the premises and so have access to confidential information and customers whilst working out his notice. The advantages for an employer to put an employee on "gardening leave" are obviously much greater where the employee has a long notice period.

If, whilst on gardening leave, an employee joins a competitor, or provides services to any third party, the employer can obtain an injunction to restrain such activity. However, the Courts will only grant an injunction where the actions by the employee on "gardening leave" are likely to cause real damage to his employer and the period of restraint is reasonable (i.e., up to 6 months). Therefore, if he joins a non-competing business an injunction will not be granted.

5 Transfer of Business

The United Kingdom originally implemented the EU Acquired Rights Directors through the Transfer of Undertakings (Protection of Employment) Regulations 1981, which were designed to dovetail into existing employment law rules. With effect from 6 April 2006, these Regulations will be replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006, which make some substantive changes while also clarifying the current law. The Regulations apply only to transfers of a business or an identifiable as severable part of a business or undertaking. They do not apply to a transfer of shares.

Substantive case law has established that the business transfer for the purposes of the Regulations can occur in a wide variety of situations, e.g. sales of business, transfers of leases, surrender or assignment of licenses or franchises and contracting out or outsourcing of functions (e.g, catering, security, maintenance, cleaning and distribution functions). The English tribunals have adopted a "multi factor" test when distinguishing between pure asset transfers and business transfers.

An ECJ decision has indicated that where there is no transfer of tangible or intangible assets, with no taking over by a purchaser/new contractor of a major part of the workforce assigned to the business/contract, there will not be a relevant transfer for the purposes of the EU Acquired Rights Directive. The ECJ's decision has been limited in scope in the UK particularly if it can be shown that there is a conspiracy to avoid the Regulations. Essentially, the test is to weigh up all factors to establish whether the whole or majority of an undertaking is being transferred and whether it retains its identity after the transfer.

The House of Lords have held that insofar as the Regulations do not fully comply with the purpose of the Acquired Rights Directive, then it is the duty of the UK courts and tribunals to interpret the Regulations in such a way as would give a purposive construction to the directive.

The 2006 Regulations have broader scope than the previous legislation, since they contain new provisions aiming to bring a wider range of service provision changes within their scope. Such service provision changes would include contracting out, contracting in, or changing a contractor.

Automatic Transfer of Employment

Regulation 4 of the 2006 Regulations now contains the key elements for the automatic transfer principles enshrined in Article 3 of the EU Directive. It provides that a business transfer does not constitute a dismissal, but operates to transfer, automatically, the employee's contracts of employment to the transferee along with the business. The Regulations further provide for the automatic transfer to the transferee of all rights, duties, liabilities and powers connected with such employment contracts. In addition, anything done or omitted to be done by the transferor before the business transfer in connection to those employees transferring under the Regulation is treated as having been done by the transferee. Collective agreements and recognition rights of trade unions are also automatically transferred. In other words, the transferee "stands in the shoes" of the transferor. However, there are three important qualifications to this principle.

First, the Regulations' automatic transfers principle only applies to the employment contracts of those employees still employed by the transferor and assigned to the business to be transferred "immediately before the transfer". However, the House of Lords has held that this should be read as subject to a qualification to the effect that if an employee is dismissed prior to a business transfer other than for an "economic, technical or organisational reason containing changes in the workforce" (see below), liability to such employees would still transfer to the purchaser notwithstanding the fact that he had ceased to be employed by the vendor prior to the moment of transfer. In reaching this decision, the House of Lords gave purposive construction to the Regulations. Employers in the UK cannot therefore avoid protection against dismissal given by the EU Directive by dismissing employees ahead of the business transfer.

Secondly, the automatic transfer principle does not at present apply to rights, powers, duties or liabilities connected with an occupational pension scheme, other than those which do not relate to benefits for old age, invalidity or survivorship. ECJ case law on the ambit of this exclusion is complex and, at present, unresolved. However, under the Pensions Act 2004 (which has been in force since 6 April 2005), employees who were members of a transferor's occupational pension scheme before a relevant transfer are entitled to benefit from a scheme provided by the transferee employer. There is no need for the transferee to match the exact scheme provided by the transferor.

Thirdly, employees have the right to refuse to transfer into the employment of the transferee along with the rest of the business. However, if they do so their employment

with the transferor is treated as having come to an end automatically by operation of law, and, as a consequence, they may not be entitled to any severance compensation, unless the employee can link the objection to a constructive dismissal claim. The Regulations provide for the preservation of any existing recognition of trade unions, provided that the business transferred retains its identity after the transfer.

Dismissals in Connection with a Business Transfer

The Regulations contain two special rules in relation to dismissal connected with a business transfer. First, employees cannot resign and claim constructive dismissal solely because the identity of their employer has changed. They may only do so if that change of identity is a significant one which is to their detriment as individuals. Note, however, that the 2006 Regulations introduce a new provision allowing an employee to resign and to treat the contract as terminated in the event that the proposed transfer involves a substantial change in working conditions to the material detriment of that employee.

Secondly, any dismissal connected with a business transfer is automatically unfair unless the employer can show that it was for an economic, technical or organisational ("ETO") reason entailing changes to the workforce. It is important to note that the English courts have construed this provision in narrow terms – an economic reason must be to do with the running of the business in question. A desire to sell the business at a better price does not constitute a "economic reason". "Entailing changes in the workforce" means changes in a number of employees required or the functions they undertake. Genuine redundancies can therefore fall within the scope of this defence rule. The 2006 Regulations help to codify the circumstances in which dismissal connected with a relevant transfer will be deemed unfair, and do so by referring to the ETO reason test.

A dismissal in the context of simply seeking to harmonise terms and conditions of employment post transfer would not constitute a "change in the workforce" and would be automatically unfair. Indeed, Recent Court of Appeal decisions confirmed that any attempts to change terms and conditions of employment post transfer, even where employers agree to such changes, will be void where the reason for the change is the transfer of the business itself, i.e., typically, a desire to harmonise terms and conditions across and newly combined workforce.

The 2006 Regulations aim to relax the rules on variation by permitting changes to employment contracts in limited circumstances. Where the sole or principle reason for a variation is connected with the transfer but is also a ETO reason, the variation will be permitted where it is agreed by the parties. These changes may prove to be of limited use, since such variations rarely amount to an ETO, as they rarely "entail changes in the workforce". Note also that the desire to achieve harmonisation of terms and conditions is by reason of the transfer itself and will therefore not be permitted under the 2006 Regulations.

Information and Consultation with Worker Representatives

The Regulations require both the transferor and transferee to give the "appropriate employee representatives", in respect of any employee effected by the business transfer, the following information in writing:

- The fact of the transfer and when it is to take place;
- The reasons for the transfer;
- The legal, economic and social implications of the business transfer for the affected employees;

- Any measures which the employer envisages it will take in respect of its affected employees in connection with a transfer (and if there are no measures envisaged, that fact);
- Where the employer is the transferor, the measures which the transferee intends to take in respect of transferring employees (and if there are no measures envisaged, that fact).
- The transferee has a separate obligation to give details of any measures which the employer envisages it will take in respect of its affected employees in connection with the transfer (and if there are no measures envisaged, that fact);
- Where the employer is a transferor, the measures which the transferee intends to take in respect of transferring employees (and if there are no measures envisaged, that fact). The transferee has a separate obligation to give details of any of its measures in respect of the transferring employees to the transferor, to enable the latter to pass that information on to employee representatives.

"Appropriate employee representatives" are representatives from recognised trade unions (in respect of those employees within the collective bargaining unit) or, if no trade union is recognised, elected employee representatives of the affected employees. An elected employee representative can either be taken from an appropriate existing staff committee or elected for the specific purpose of the business transfer. Where there are neither trade union representatives nor existing employee representatives, employers should facilitate the holding of an election for representatives of the affected employees, which may involve proposing an election procedure. The Regulations provide statutory guidance for the election procedure. Appropriate employer representatives have the right to liaise with their constituents and to be provided with appropriate assistance and facilities to enable them to carry out their functions.

There is no timescale for such information to be given to the appropriate employee representative, except that it must be given "long enough before the transfer to enable consultations to take place". It is also clear that there is no legal obligation to consult with, rather than simply inform, appropriate employee representatives unless "measures" envisaged by the employer. Where consultation is relevant, however, this must be "with a view to reaching an agreement" on the applicable measures.

The penalty for failure to comply with these requirements is currently an award of compensation of up to 13 weeks' actual pay per employee affected. This cannot be offset against other sums. Under the 2006 Regulations, the transferor and transferee are jointly and severally liable for any failure to comply.

Under the 2006 Regulations, a transferor is now also required to provide certain specified "employee liability information" to the transferee. This information includes the age and identity of the employee, particulars of employment, and certain other facts, and must be provided in respect of any person employed by the transferor who is assigned to the transferring business. The remedy for breach is a minimum compensation of £500 per employee in respect of whom the transferor has failed to comply. In practice, a transferor is usually obliged to provide this information by virtue of the contractual agreement with the transferee.

6 Sex Discrimination

Equal Treatment

Scope of Legislation

The Sex Discrimination Acts of 1975 and 1986 ("SDA"), [as recently amended by the Employment Equality (Sex Discrimination) Regulations 2005], prohibit discrimination on grounds of sex or marital status in respect of the following matters:

- arrangements for the recruitment of new employees;
- the terms upon which employment is offered;
- the refusal or failure to offer employment;
- the way employees are afforded access to opportunities for promotion, transfer or training;
- the way employees are afforded access to other benefits, facilities or services;
- refusing or deliberate failure to offer access to promotion, training, transfer, benefits, facilities or services;
- dismissal;
- any other detriment, including sexual harassment.

An employer is liable for acts of sex discrimination by its employees unless the employer can prove that he took reasonably practicable steps to prevent it. Both direct and indirect discrimination are prohibited by the SDA in respect of all the above acts and omissions.

Harassment is unlawful discrimination under the SDA if it results in an employee being treated less favourably than others on the grounds of sex. In addition, sexual harassment of an employee by a fellow employee is an act of misconduct which may justify dismissal of the offending employee.

Conduct will only be unlawful harassment or unlawful sexual harassment if, having regard to all the circumstances, that harassment can reasonably be considered as having the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The SDA makes it unlawful for any person to instruct, pressure or assist someone to discriminate on the grounds of sex. It also bans discriminatory advertising by employers or others, although an action on this basis can be brought only by the Equal Opportunities Commission ("EOC").

The SDA covers discrimination against individuals on the grounds of gender reassignment, i.e., transsexuals. The SDA does not cover discrimination on the grounds of sexual orientation, i.e., discrimination against homosexuals. Sexual orientation discrimination is covered separately by the Employment Equality (Sexual Orientation) Regulations 2003 (see below).

Employees are protected against dismissal or other detrimental action on the grounds that they have brought a claim, or assisted in a claim, under the sex discrimination legislation.

Exclusions

The SDA excludes from its scope discrimination in relation to job appointments, training, promotion, transfers, and access to services, benefits or facilities etc., where being a man or woman is a genuine occupational qualification for the job in question. This is to reflect that there are limits for certain types of jobs, e.g., where the job needs to be held by one sex to preserve decency or privacy; where the job requires a person of particular sex to give authenticity, (e.g., an actress); where the job is in a hospital

or prison and the essential character of the job is such that it must be done by one particular sex (e.g., a prison warden); or where the job is one of two to be done by a married couple.

Remedies

Where an employer has breached the legislation, a claim may be made to an Employment Tribunal up to three months from the date of the discriminatory act (or the last incident in a series of discriminatory acts which can be said to constitute one continuing act). Late claims will be accepted where the Tribunal believes it is just and equitable to do so. There is no minimum qualifying service requirement and no limit on the compensation awardable. The compensation covers not just financial losses caused by the discriminatory act, but also injury to feelings, and, in exceptional cases, aggravated damages. In addition, the Tribunal has the power to make recommendations that the employer take certain steps to eliminate the discriminatory practice in question. If the employer fails to comply with a recommendation, however, the Tribunal can only increase the compensation, as appropriate.

The EOC has powers to carry out formal investigations into alleged discriminatory practices by employers and, if appropriate, issue Non-Discrimination Notices to employers requiring them to cease such practices within a specified period. If the employer fails to comply with the Notice, the EOC can apply to the Court for an injunction requiring it to do so.

Equal Pay

Scope of Legislation

The UK originally implemented its equal pay legislation via the Equal Pay Act 1970. The Act provided that an employee could claim equal pay with a fellow employee of the opposite sex, if that other employee was doing work which was broadly similar to that of the claimant, or the two jobs were treated as equivalent under a job evaluation scheme. However, in effect, this meant that women who undertook jobs which were not broadly similar to any job done by men could not claim equal pay with them even if the jobs were of equal value.

As a result the Government amended the Equal Pay Act to allow claims to be brought on the grounds that the claimant's job is of equal value to that of the comparator of the other sex (Equal Pay (Amendment) Regulations 1983). UK legislation provides that "equal value" is assessed "in terms of the demands made on the woman (for instance, under headings such as effort, skill and decision)….".

The UK's legislation was also drafted to provide that an "equal value" claim could not be brought by a claimant if she could have brought an equal pay claim against a man doing work broadly similar or rated as equivalent to hers. This had initially been interpreted by the Tribunals and Courts as meaning that a woman could not bring an equal value claim if there was a man doing the same or a similar job as hers. However, the House of Lords have held that a complainant can bring an equal pay claim based on "equal value" with anyone they chose.

Although Employment Tribunals decide whether or not two jobs are broadly similar or equally rated under a job evaluation scheme, they do not usually decide whether two jobs are of "equal value", (although they have power to do so). This function is normally entrusted to a panel of experts appointed by ACAS – although Tribunals do have power to reject an ACAS expert's report and call for another one.

The recently introduced Employment Equality (Sex Discrimination) Regulations 2005 are unlikely to make any substantial difference to the application of the Equal Pay Rules in the UK.

Remedies

Once an employee has shown that he (or she) is entitled to equal pay with that of the male or female comparator, the Equal Pay Act operates to incorporate an equality clause into the relevant contract of employment. This has the effect of re-writing the terms of employment in such a way as to uplift all of the terms which were less favourable than those of the male or female comparator to the same level. The tribunal has power to award compensation to a successful claimant for the financial loss suffered by them retrospectively.

Defence for Employer

Under the Equal Pay Act 1970 employers have a defence justifying unequal pay if they can establish a genuine material factor (which is not a difference of sex) explaining that difference e.g., London weighting, length of service, experience, market forces, etc. Where the unequal pay is brought about by indirect discrimination, the employers must show that the material factor was a necessary and appropriate one to achieve a non-sex related business objective.

The legislation also provides a complete defence to an equal pay claim based on "equal value". This applies where the employer can show that the two jobs under consideration have been rated at different values under a non-discriminatory job evaluation scheme. Such a scheme would override the views of the Tribunal or an ACAS expert.

7 Race Discrimination

Scope of Legislation

The Race Relations Act 1976 ("RRA") prohibits discrimination on grounds of colour, race, nationality or ethnic origins in respect of the following matters:

- arrangements for the recruitment of new employees;
- the terms upon which employment is offered;
- the refusal or failure to offer employment;
- the way employees are afforded access to opportunities for promotion, transfer or training;
- the way employees are afforded access to other benefits, facilities or services;
- refusing or deliberate failure to offer access to promotion, training, transfer, benefits, facilities or services;
- dismissal;
- any other detriment.

Racial discrimination by an employee is deemed to have been done by the employer (as well as the employee) unless the employer can prove that he took reasonably practicable steps to prevent it. Both direct and indirect discrimination are prohibited by the RRA in respect of all the above acts and omissions.

Following the Race Relations Act 1976 (Amendment) Regulations 2003, racial harassment which takes place on the grounds of a person's race, or ethnic or national origins, is now an unlawful act in its own right. Racial harassment is distinct from both direct and indirect racial discrimination.

The RRA makes it unlawful for any person to instruct, pressurise or assist someone to discriminate on grounds of race. It also bans discriminatory advertising by employers or others, although an action on this basis can be brought only by the Commission for Racial Equality ("CRE").

The RRA protects employees against dismissal or other detrimental action on the grounds that they have brought a claim, or assisted in a claim, under the RRA.

Exclusions

The RRA excludes from its scope discrimination in relation to job appointments, training, promotion, transfers, and access to services, benefits or facilities where belonging to a particular racial group is a genuine occupational qualification for the job in question. For example, where the job requires a person of particular racial group to give authenticity, i.e., an actor; where the job holder will be a waiter in a particular type of restaurant; where the job holder provides persons of a particular racial group with personal services promoting their welfare and those services can most effectively be provided by a person of that same racial group.

Remedies

Where an employer has breached the RRA, a complaint may be made to an Employment Tribunal up to three months from the date of the discriminatory act (or the last incident in a series of discriminatory acts which can be said to constitute one continuing act). Late claims will be accepted where the Tribunal believes it is just and equitable to do so. There is no service qualification and the Tribunal has the power to award unlimited compensation. The compensation covers not just financial losses caused by the discriminatory act, but also injury to feelings and, in exceptional cases, exemplary damages. In addition, the Tribunal has the power to make recommendations that the employer takes certain steps to eliminate the discriminatory practice in question. If the employer fails to comply with a recommendation, however, the Tribunal can only increase the compensation, as appropriate.

The CRE has powers to carry out formal investigations into alleged discriminatory practices by employers and, if appropriate, to issue Non-Discrimination Notices to employers requiring them to cease such practices within a specified period. If the employer fails to comply with the Notice, the CRE can apply to the Court for an injunction requiring it to do so.

8 Disability Discrimination

Scope of Legislation

The Disability Discrimination Act 1995 ("DDA 1995") as amended by the Disability Discrimination Act 2005 ("DDA 2005") contain the UK's laws on disability discrimination. They are entirely separate in their application, as where the DDA 1995 introduced substantive duties on employers to make a "reasonable adjustment" in respect of existing and prospective disabled workers, the DDA 2005 is largely designed to implement many non-employment related proposals, such as changes affecting public sector responsibilities to the general public, transport, renting of premises, and so on.

An individual will be covered by the DDA 1995 if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Although the DDA 1995 provides an outline structure of what constitutes a "disability", much of the detail is supplemented in Regulations and Codes of Practice. A person will be covered by the DDA 1995 if he suffers less favourable treatment either because he has or *has had* a disability.

Although the DDA 1995 includes mental illness within the definition of disability, certain conditions will be excluded, e.g., kleptomania, pyromania etc. Following the DDA 2005 the meaning of "disability" has been extended for the purposes of the DDA 1995 to cover HIV, cancer and multiple sclerosis so that any persons affected by any of these conditions are protected under the act from the point of diagnosis. The DDA 2005 also amended the DDA 1995 in removing the need for any "mental impairment" to be clinically well recognised to qualify as a disability for the purposes of the act. Prior to the Act, it had already been well established in case law that general "learning difficulties" are covered by the DDA 1995 if they have a substantial and long-term adverse effect on the person concerned's ability to carry out normal day-to-day activities.

The key limitation and scope of the DDA 1995 lies in the fact that the mental or physical impairment must have a substantial and long term effect on the individual's "normal day to day activities". This is exclusively defined as relating to the individual's mobility, manual dexterity, physical co-ordination, continence, ability to lift or carry or move everyday objects, speech, hearing, eyesight, memory or ability to concentrate or learn or understand, or the perception of the risk of physical danger. Such an impairment will only be treated as having a substantial and long term adverse affect if it has been present for at least 12 months, or can be reasonably expected to last for 12 months or more. The DDA 1995 makes provision for recurring impairments, severe disfigurement, disability which is controlled or corrected by medication or special aids and progressive conditions. For an initial period of 3 years registered disabled persons are treated as falling within the scope of the DDA 1995.

Disability discrimination is unlawful in the context of recruitment arrangements (e.g., interviews, selection tests, adverts etc.), opportunities for promotion, training, transfer or access to employment benefits, conditions of employment, dismissal or any other detrimental treatment.

The Disability Discrimination Act 1995 (Amendment) Regulations 2003 make it clear that there can be no justification for direct discrimination, where previously there was a potential defence under this heading. This follows the introduction of a new definition for direct discrimination which states that the appropriate comparator in a direct discrimination case is a non-disabled person who abilities are the same as the abilities of the disabled person. The Regulations also introduced a definition of harassment into the DDA 1995 so that harassment relating to a person's disability is now stated explicitly as being a type of disability discrimination. There is at present no concept of indirect discrimination under the DDA 1995, although employers do have a separate duty to make a "reasonable adjustment" which could, in effect, cover the incidents of indirect discrimination

"Reasonable Adjustment"

Employers are under a duty to make a "reasonable adjustment" in those situations where working arrangements or physical features of particular premises cause a disadvantage to a disabled person. This duty is only triggered when the disabled person is placed at a substantial disadvantage – e.g., by selection arrangements, working conditions or any other physical feature of the particular premises. The duty to make a reasonable

adjustment means that the employer must take reasonable steps in the circumstances of the case to prevent adverse arrangements or features having the effect of placing the disabled person at a substantial disadvantage as compared to persons who are not so disabled. Examples of reasonable adjustments include adjustment of premises; reallocation of work; changing working hours; assigning the disabled person to a different workplace; allowing periods of absence to undergo treatment; giving additional training; modifying or acquiring equipment suitable for the disabled person; modifying instructions and reference manuals; providing a reader or interpreter and providing greater supervision etc. When deciding the reasonableness of the proposed adjustment, regard is taken of a number of factors, including how effective the adjustment would be to improve the detrimental issue in question; the practibility of the adjustment; the effect of disruption on the employer's activities; the financial cost of making the adjustment, including the extent of the employer's financial and other resources and resources available from a third party.

It is unlawful under the DDA 1995 for employees to be victimised for having exercised their rights under the DDA 1995 or having assisted others to do so etc. Aiding and assisting others to commit an unlawful act under the DDA 1995 is also unlawful. Employers will be vicariously liable for the discriminatory acts of their employees or agents under the DDA 1995 even if done without the employer's knowledge or approval. However employers would have a defence to such vicarious liability where they can show they took reasonably practicable steps to prevent the employee concerned from doing the unlawful discriminatory act complained of.

Coverage

The DDA 1995 relates to employment in Great Britain and Northern Ireland. It covers not only directly employed persons, but also contracts with individuals to do work personally. Specific provisions outlaw discrimination against contract workers supplied by an agency. The previous exemption for all businesses with less than 15 employees was revoked by the Disability Discrimination Act 1995 (Amendment) Regulations 2003.

Remedies

Enforcement of individuals' rights under the DDA 1995 is to the Employment Tribunal. There is no service requirement. Claims must be presented within three months of the act complained of, although the Tribunal has power to allow in late claims if it is just and equitable to do so. When a Tribunal finds a claim well founded it can make a declaration to that effect and award compensation. It can also make a recommendation to the employer, that, within a specified period, the employer takes specified steps which have the purpose of obviating or reversing the adverse effects on the complainant in relation to the discriminatory act. There is no limit on the compensation which can be awarded, which can include compensation for injury to feelings and interest. Where an employer fails to comply with an Employment Tribunal's recommendation, the compensation can be increased, as appropriate.

9 Sexual Orientation and Religion or Belief Discrimination

As of 1 December 2003, The Employment Equality (Sexual Orientation) Regulations 2003 made it unlawful for a person to discriminate against another on the grounds of sexual orientation (defined as sexual orientation towards those of the same sex, the opposite sex, or both sexes). The regulations are modelled on the SDA and RRA

and like them make direct and indirect discrimination (including harassment and victimization) unlawful but provide for specific (and limited) "genuine occupational requirement" exceptions.

As of 2 December 2003, The Employment Equality (Religion or Belief) Regulations 2003 made it unlawful for a person to discriminate against another on grounds of religion or belief. Religion or belief is defined as "any religion, religious belief, or similar philosophical belief". The regulations follow closely those of the sexual orientation regulations (above).

Employers should take care to ensure that all employment policies and procedures conform with this law. This right include equal opportunities statements, recruitment policies and procedures, job descriptions, dress codes, leave policies, benefits policies, post-employment policies and procedures, all of which must avoid containing features which disadvantage protected groups.

10 Age Discrimination

Employment Equality (Age) Regulations will come into force in the UK in late 2006 and will make direct and indirect discrimination on the grounds of age unlawful unless any of those can be "objectively and reasonably justified by a legitimate aim … and the means of achieving that aim are appropriate and necessary".

The Regulations also make unlawful any harassment on the grounds of age which equates to unwanted conduct. There is no defence to a valid harassment claim.

The Regulations will cover:

- Employers;
- Providers of vocational training;
- Trade unions, professional associations and employers' organisations; and
- Trustees and managers of occupational pension schemes.

The usual "genuine occupation requirement" defence will apply where the nature of the employment being carried out means that "possessing a characteristic relating to age is a genuine and determining occupational requirement".

The Regulations remove the current upper age limit for unfair dismissal and statutory redundancy pay. In principle therefore, a worker aged over 65 may be entitled to a redundancy payment if he loses his job by reason of redundancy.

The Regulations also establish a default retirement age of 65 and create a new duty for employers to consider employees' requests to continue working after 65. Any retirement under the age of 65 must be objectively justified. As a result, retirement may amount to a fair, or unfair, dismissal.

Retirement

A retirement dismissal can be a fair dismissal if:

- it takes place in accordance with the new procedural requirements for compulsory requirement.
- it takes it is genuinely a dismissal on grounds of retirement;
- it takes place at or after the national default retirement age of 65 or a lower retirement age which has been set and objectively justified by the employer; and

- it takes place in accordance with the new procedural requirements for compulsory retirement.

On the other hand, a retirement will be unfair where:

- prior to "retiring" the employee, the employer has not informed the employee at all of the right to request to continue working and of the intended retirement date, or the employer has informed the employee less than two weeks before the retirement date;
- the dismissal takes effect while a duty to consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision; or
- once a duty to consider procedure has started, the employer fails to comply with it properly.

The Regulations will include a new procedure designed to encourage employers and employees "to enter into a dialogue on the issue of retirement".

11 Termination of Employment

Introduction

Where an employee has been dismissed, he or she may have various rights of action depending on the circumstances of the dismissal. These rights may relate to one or more of the following issues:

- wrongful dismissal;
- unfair dismissal;
- redundancy pay;
- sex or race discrimination;
- age discrimination (from late 2006);
- discrimination on the grounds of religion or belief;
- discrimination on the grounds of sexual orientation;
- disability discrimination;
- failure to give written reasons for dismissal.

Since UK employment law comprises a mixture of common law (i.e., contract law) and statute law, it is necessary to look separately at employees' entitlement under each of the above categories.

Dismissal Without Notice – i.e., "Wrongful Dismissal"

Unless an employee is engaged on a fixed-term contract, his employment will normally be terminated lawfully by notice. The amount of notice to be given by either the employer or the employee will normally be specified in the contract of employment or the written statement of main particulars of employment (see page 11). Where there is no express (written or oral) agreement as to the length of notice, the Courts will imply a notice period of reasonable duration depending on the status, length of service of the employee and all the other circumstances (see page 12). However, there is a statutory minimum notice period which will override any contractually agreed

notice period, if the latter is shorter. The statutory minimum notice period required to be given by the employee to his employer is one week. The statutory minimum notice period required to be given by the employer to the employee, is one week's notice after he has been employed for at least four weeks, and thereafter one week per complete year of service up to a maximum of 12 weeks' notice after 12 years' service. It should be noted that the statutory minimum can be overridden by longer notice periods either agreed expressly by the parties or implied by the Courts (in the absence of such agreement).

Where an employee's contract of employment has been terminated without due notice, or before the expiry of the fixed term, the employee has a claim for damages for "wrongful dismissal". This claim is normally made in the common law courts, but may be brought in the Employment Tribunal if it is for less than £25,000. The only defences available to employers are either:

- that due notice of termination has, in fact, been given, which will be a question of evidence; or
- that the employer is entitled to dismiss the employee summarily, i.e., without notice, on grounds of gross misconduct or gross negligence. Examples of gross misconduct offences are normally contained in the company's disciplinary rules.

Where an employee is successful in a wrongful dismissal claim, he is entitled to damages based on the net value of his remuneration and benefits which he would have enjoyed had he received his full notice. To the extent that the value of these benefits is less than £30,000, an exemption for income tax and employee national insurance contributions may be available. However, where the salary and benefits loss exceeds £30,000, the excess over £30,000 must be grossed up to take account of the tax the employee has to pay on that excess. When calculating the damages, all benefits in kind (e.g., company car, pension contributions, private medical insurance etc.) are taken into account.

Except in cases of gross misconduct/gross negligence, employment should be terminated with due notice. The contract may provide for termination with "pay in lieu of notice" – i.e., the employer makes the payment of damages to the employee for the value of his lost salary and benefits during his notice period.

Where an employee has been wrongfully dismissed, he may have a common law duty to "mitigate his loss" depending on the terms of the contract. This means that he must take reasonable steps to look for other suitable work. If he is successful in finding other work during the period which would have represented his notice period (or the unexpired portion of the fixed term contract), then he must give credit to his former employer for any earnings he receives during that period. If he fails to take reasonable steps to mitigate his loss, the Court may limit his damages accordingly.

Unfair Dismissal

Only employees with one or more years continuous employment with the same or an associated employer are entitled to be protected against unfair dismissal. The only exceptions to this qualifying service requirement are when the reason for dismissal is related to an "inadmissible reason", or where, as introduced by the Employment Relations Act 2004, the dismissal is related to trade union membership or activities.

Unfair dismissal is a right created by statute, now contained in the Employment Rights Act 1996. The legislation prohibits the contracting-out of such statutory rights. This is except in cases either where an ACAS Conciliation Officer has taken action at the request of the parties to conciliate and effect a binding settlement agreement, (usually on the payment of compensation), or where a "Compromise Agreement" has been

signed by an employer and employee, the form of which complies with certain statutory criteria, and which requires the employee to have taken independent legal advice both on his rights and on the effect on such rights of signing the Agreement. Such an Agreement will also usually be in return for a payment of compensation.

The appropriate procedures applicable to avoid a finding of unfair dismissal will vary depending on the reason for dismissal (see below). Unfair dismissal claims are heard by an Employment Tribunal who will find a dismissal unfair if the employer's decision to dismiss was one which no reasonable employer could have taken. A dismissal which fails to follow the statutory dismissal and disciplinary procedure will be automatically unfair.

If an unfair dismissal claim succeeds, the Tribunal has a choice of remedies.

Firstly, it can order the reinstatement/re-engagement of the employee. Such an order will also cover the employee's lost earnings between the date of dismissal and the date when the order is complied with. However, reinstatement/re-engagement orders are only made in approximately 5% of all successful unfair dismissal claims. The Tribunal is unlikely to make such an order where it is not reasonably practicable for the employer to comply with the order, e.g., where the relationship of trust and confidence between employee and employer has completely broken down, or if the employee has contributed to a material extent towards his own dismissal. If such an order is made, but the employer fails to comply with it (without reasonable cause) the Employment Tribunal will make an Additional Award.

Secondly, where a re-engagement/reinstatement order is not made or where made is not complied with, then a Tribunal will award compensation as follows:

- a Basic Award based on age, salary and length of service, up to a maximum of £8,700 from 1 February 2006.
- a Compensatory Award of up to £8,400, to cover an employee's financial losses caused by his dismissal (e.g., lost salary and benefits). This limit can be increased where a re-engagement/reinstatement order is made but not complied with, (and is payable on top of the Additional Award), to reflect the actual financial losses between the date of dismissal and the date the order should have been complied with, where this produces a higher figure.

Compensation may be reduced on grounds that the employee contributed to his dismissal. In addition, employees are required to take reasonable steps "to mitigate their loss" – i.e., to look for alternative work (see below).

Redundancy Pay

Employees with two or more years' continuous employment with the same (or an associated) employer are entitled to a statutory redundancy payment. This is calculated in almost the same way as the Basic Award for unfair dismissal – i.e., based on a sliding scale based on age, length of service and salary. The current maximum redundancy payment is £8,700.

An employee may forfeit his right to a statutory redundancy payment if he has taken part in a strike after being given due notice of redundancy, or he unreasonably refuses an offer of suitable alternative employment.

Written Reasons for Dismissal

Employees with one or more years continuous employment with the same (or an associated) employer are entitled to require their employers to give them written reasons for dismissal. These written reasons have to be delivered within 14 days of

the request. The reasons must be both sufficiently adequate and accurate. Failure to comply with this requirement renders the employer liable to pay compensation of up to two weeks' pay (gross).

Termination for "Personal" Reasons

Prior to dismissing an employee, an employer must always undertake the statutory dismissal and disciplinary procedure as introduced by the Employment Act 2002 (Dispute Resolution) Regulations 2004. A dismissal might be brought about by anyone of the following reasons:

Misconduct / Poor Performance

For a fair dismissal of an employee on grounds of gross misconduct/gross negligence, an employer should normally be able to point to a specific rule which the employee has contravened. The seriousness of the misconduct/negligence must be sufficiently severe for it to amount to a repudiatory breach of his contract of employment. In such cases, the statutory modified dismissal and disciplinary procedure could be applied. Examples of gross misconduct include: dishonesty, disloyalty, fighting, drunkenness, unauthorised absence, serious breaches of health and safety at work rules.

In all other cases of misconduct/poor performance, it would normally be unfair to dismiss an employee for a first offence and, the application of the standard statutory procedure would be more appropriate.

It should again be noted that a dismissal will be automatically unfair if an employer has not completed the statutory minimum dismissal and disciplinary procedures, even though the qualitative nature of the employee's misconduct/poor performance would otherwise justify dismissal. In such circumstances, however, there may be a reduction of the compensation based on the employee's contributory fault.

Where employees have been dismissed on grounds of misconduct/poor performance (other than circumstances constituting gross misconduct/gross negligence) they will be entitled to receive their notice or pay in lieu of notice.

Sickness

Employment Tribunals are normally sympathetic to employees dismissed on grounds of long term sickness. In practice, employers have to be able to demonstrate that they could no longer be reasonably expected to "carry" the employee or that to do so would cause problems for their business operations. Where the employee is a "key" employee, such a period will be shorter. The procedural steps which an employer should take to effect a fair sickness dismissal are as follows:

- appraise itself of the true medical position of the employee (by sending him to a company nominated doctor, if appropriate);
- ascertain the likelihood of recovery and when the employee will be able to return to work;
- consult with the employee regarding the employer's intentions, any possible alternatives to dismissal, and the likelihood of the employee returning to work and if so when;
- where appropriate, look for alternative work to offer the employee (e.g., if he is capable of undertaking light work).

Where medical reports are sought from the employee's own doctor certain information about his rights under the Access to Medical Records Act 1988 must be given to the employee in advance.

In almost all such cases, an employee will normally be entitled to be dismissed with due notice.

Employers must also ensure that any dismissal on these grounds does not contravene the Disability Discrimination Act 1995 where the employee's illness comprises a "disability" for the purposes of that Act, (see earlier).

Specially Protected Activities – Inadmissible Reasons for Dismissal

Dismissals on certain specific grounds are regarded as inadmissible, and therefore automatically unfair regardless of the employee's length of service. These include where the reason for dismissal is because:

- the employee has asserted a statutory right (e.g., any employment protection right, unlawful deduction of wages, statutory minimum notice, rights of individual trade union members or officers or of employee representatives);
- it is connected with pregnancy or maternity absence;
- the employee is, or proposes to be, a trade union member or elected employee representative;
- the employee has taken, or proposes to take, part in the activities of a trade union at an appropriate time, or the activities of an elected employee representative (these are subject to certain limitations);
- the employee proposes to carry out, or has carried out, the role of a health and safety representative;
- certain actions have been taken by individual employees in connection with health and safety issues, including refusing to work where an employee reasonably believes he or she is at imminent and serious risk etc.;
- redundancy selection on any of the above grounds.
- because he has made a protected disclosure under the Public Interest (Disclosure) Act 1998.

"Whistleblowing"

The Public Interest Disclosure 1998

This Act came into force on 2 July 1999. It offers protection to "whistle blowers", subject to very strict constraints. Protection under the Act extends not only to employees, but all workers.

A worker is protected from being subjected to any detriment on the grounds that he made a protected disclosure and may complain to an Employment Tribunal if this right is infringed.

The Act operates by creating concepts of "qualifying" and "protected" disclosures. A disclosure is protected if:

- it is a qualifying disclosure (this relates to the subject matter of the disclosure); and
- it is made by a worker in accordance with the conditions which depend on the identity of the person to whom this disclosure is made.

A protected disclosure must fit within one of six categories:

- a criminal offence has been committed, is being committed or is likely to be committed;

- failure to comply with a legal obligation;
- miscarriage of justice;
- health and safety risks;
- the environment has been or is likely to be damaged;
- cover ups.

Disclosures will not be otherwise protected under the Act.

The identity of the recipient of the information is crucial to securing protection under the Act. The recipient must be:

- the worker's employer;
- a "responsible person" (as defined);
- a legal advisor;
- a Member of Parliament;
- a prescribed Regulator (appropriate to the subject matter of the disclosure);
- any other person (but only when it is reasonable to do so according to set preconditions);
- more widely (but only where the disclosure is of exceptionally serious matters and certain preconditions are met).

Dismissal for "Economic Reasons"

Under UK employment law, there is no express distinction between "economic" and "personal" reasons for dismissal, although such a distinction may usefully be drawn since the procedures relating to "non-personal" (or "economic") reasons for dismissal are different.

Employers' Obligations to Individual Employees

Notice of termination

Where a reason for dismissal relates to redundancy or a business reorganisation (including a plant closure or introduction of new machinery or shift patterns), the employee will normally be entitled to receive his appropriate notice of termination of employment (or pay in lieu).

Redundancy Pay

Employees with more than two years' continuous employment with the same or an associated employer will be entitled to a statutory redundancy payment, if the "economic" reason for their dismissal fits the statutory definition of redundancy. This definition of "redundancy" covers the following circumstances:

- the closure of the undertaking or a particular place of work;
- a reduction in the employer's needs for employees to carry out work of a particular kind, either in general or at a particular workplace.

It should be noted that not all "economic" dismissals fall within this statutory definition of "redundancy", e.g., the re-arrangement of shift working times or the introduction of new working methods. In these cases such "economic" reasons for dismissal will not entitle the employee to receive a statutory redundancy payment.

Statutory redundancy payments are calculated on a sliding scale based on the employee's age, length of continuous service and salary. They are assessed by attributing to the employee a specified multiplier of a week's gross pay for each complete year of service, as follows:

For each complete year of service when an employee is aged	*Multiplier of a week's pay*
18-21	0.5
22-40	1
41-65	1.5

However, there is a current maximum of £290 for a week's pay (gross) (from 1 February 2006). In addition, only a maximum of 20 years' continuous service can be taken into account. This means that there is a maximum payment of £8,700 (from 1 February 2006).

A statutory redundancy payment is paid without deductions for tax and national insurance.

Some employers operate enhanced redundancy pay schemes to which employees made redundant are entitled to benefit. These schemes usually pay well in excess of the statutory minimum redundancy payment and may have different rules entitling employees to participate. The terms and conditions of such enhanced redundancy pay schemes will vary from employer to employer, and the details will normally be found in contracts of employment, employee handbooks or collective agreements.

If an employee is entitled to a statutory redundancy payment, he must be given a written statement specifying how the payment is calculated.

Time off for job hunting

Employees who are to be dismissed by reason of redundancy and who have two or more years continuous employment are entitled to reasonable time off work to look for other work or to undergo vocational training. However, their entitlement only arises once they have received notice of termination of employment. Employers are required to give such time off as is reasonable, but are only required to pay for such time off up to an aggregate maximum of 2/5th of a week's pay (usually two days' pay).

Unfair dismissal

It is possible for employees to be unfairly dismissed for redundancy or some other "economic" reason. In practice the Employment Tribunals treat other "economic" reasons in a similar way to redundancy, although there are a few exceptions.

As a general rule, Employment Tribunals will not enquire into the employer's grounds for establishing a redundancy programme or business reorganisation, as long as it is broadly satisfied that there are genuine business reasons for making such redundancies or business reorganisation. It is possible for individual employees to challenge their employer's underlying reason for its business decisions, although such challenges rarely succeed. In practice, there are two main grounds upon which a dismissal for an "economic" reason may be unfair:

- the selection of employees to be dismissed, or
- the procedure by which the redundancies were put into effect.

A redundancy selection may be unfair where an employer has an agreed procedure or customary arrangement for selecting employees (e.g., length of service), which it has failed to follow without good reason. A redundancy selection will be automatically unfair if it is based on an inadmissible reason (see above). Even where a company has avoided automatic unfairness, it must still be able to demonstrate that its redundancy selection criteria are fair and have been reasonably applied in the particular circumstances.

Employers should ensure that when putting redundancy or reorganisation programmes into effect, they do not act in a way which is directly or indirectly discriminatory against employees on grounds of their sex, race, religious beliefs, disability, sexual orientation and/or age. For example, in some circumstances, the selection for redundancy of part-time employees ahead of full-time employees may constitute indirect sex discrimination and may contravene the Part-time Workers Regulations 2000.

Employment Tribunals expect employers to give as much advance warning of an impending redundancy as is reasonable in the circumstances, to consult with individual employees and (where appropriate) with trade unions or elected employee representatives, and to offer otherwise redundant employees any suitable available vacancies which are within their capabilities. It should be noted that a failure to comply with any of these three procedural aspects will render a dismissal unfair even though, for example, consultation would have made no difference. (In such circumstances, however, any compensation awarded is likely to be limited).

Obligations to employee representatives/trade unions

Where an employer proposes to make 20 or more employees redundant from an establishment in a period of 90 days or less, it has a statutory obligation to provide appropriate employee representatives with certain specified information and embark upon a consultation process. These two obligations are closely connected, since the consultation process is commenced by the provision of the specified statutory information.

The consultation must take place with "appropriate employee representatives". These are either recognised trade unions (in respect of those employees within the collective bargaining unit) or, if there is no such recognised trade union, elected employee representatives of the affected employees. An elected employee representative can either be taken from an appropriate existing staff committee or elected for the specific purpose of a particular redundancy programme. Where there are neither trade union representatives nor existing employee representatives, employers should facilitate the holding of an election for representatives of the groups of employees from which selection for redundancy will take place. An employer is likely to have to propose the election procedure. Statutory guidance is available under the Trade Union and Labour Relations (Consolidation) Act 1992. Appropriate representatives have the right to liaise with their constituents and to be provided with appropriate assistance and facilities to enable them to carry out their functions.

Recent case law has established that for consultation to be fair, it must be conducted when the proposals are still at a formative stage, the employee representatives must be given adequate information on, and time to, respond and the employer must give conscientious consideration of the response it receives to the consultation exercise.

For this collective consultation process, the term "redundancy" has a wide meaning. It includes any dismissal where the reason is not concerned with the characteristics of individuals, e.g., staff reductions, re-organisations, changing working hours or working

arrangements, introduction of new technology, changing standard terms and conditions, and relocations etc. Obviously dismissals for misconduct, poor performance or sickness are excluded.

Employers are required to commence the consultation process "in good time" and, in any event, in accordance with the specified statutory timescales as follows:

- 90 days before the first redundancy takes effect – where 100 or more employees are to be made redundant at an establishment in 90 days or less;
- 30 days before the first redundancy takes effect – where 20 or more employees are to be made redundant at an establishment in 90 days or less.

The obligation to consult begins with the provision to the appropriate employee representatives of the following information in writing together with a copy of Form HR.1 (being the written notification to the DTI Redundancy Payments Office in Birmingham, see below):

- the reasons for the redundancies;
- the numbers and descriptions of employees whom it is proposed to make redundant, and the total number of such employees employed at the establishment in question;
- the proposed method of selecting employees for redundancy;
- the proposed method of putting the redundancies into effect, including the timescale; and
- where applicable, the proposed method of calculating the amount of any enhanced, i.e., non-statutory, redundancy payments to be made to employees who are selected for redundancy.

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

The consultation process must include consultation about ways of:

- avoiding the dismissals;
- reducing the number of employees to be dismissed; and
- mitigating the consequence of the dismissals.

Such consultations must be undertaken "with a view to reaching agreement" with the appropriate employee representatives.

Employers may be absolved from full compliance with their obligations to inform and consult appropriate employee representatives where there are "special circumstances" justifying such non-compliance, and the employers have tried to comply with their obligations to inform or consult as far as was reasonably practicable in the circumstances. However, this defence is very limited in its application.

Where an employer has failed to comply with its obligations to inform or consult appropriate employee representatives in advance of redundancies, an Employment Tribunal may make a protective award in respect of every employee who has been affected by the failure to inform or consult. The protective award is of up to 90 days' actual pay per employee.

Obligations to the Department of Employment

Employers have an obligation to complete Form HR.1 and send it to the DTI Redundancy Payments Office in Birmingham in advance of collective redundancies (with a copy to any recognised trade unions). The advance notification periods are as follows:

- 90 days' notification – where 100 or more employees in a single establishment are to be made redundant in 90 days or less;
- 30 days' notification – where 20 or more employees are to be made redundant at a single establishment in 90 days or less;

Failure for non-compliance carries a fine of up to £5,000.

There is no requirement to obtain the permission of the DTI in order for the redundancies to be put into effect.

12 Employee Representatives

Union Recognition

The Employment Relations Act 1999 ("ERA 1999") created a new statutory right for trade unions to request recognition for collective bargaining. This was supplemented by the Employment Relations Act 2004 ("ERA 2004"), which made significant amendments to the Trade Union and Labour Relations Consolidation Act 1992 ("TULRCA 1992"). The procedures contained in the ERA 1999 aimed to secure voluntary agreement. If this fails the unions will have a legal mechanism to force their employer to negotiate with them for the first time since former legislation was repealed in 1980. The ERA 1999 lays down a detailed, five stage procedure:

- request for recognition;
- the bargaining unit;
- whether the workers in that bargaining unit want that union to be recognised for them;
- the scope of recognition;
- remedy for non-compliance.

Scope

Employers with fewer than 21 workers (including the workers of their associated employers) are excluded, unless the parties decide otherwise. Collective bargaining covers pay, hours, and holidays.

De-recognition

The ERA 1999 contains detailed procedures in relation to de-recognition of unions on a request by the employer or, in some circumstances, by the workers. The procedures are similar to the recognition procedures, although slightly different procedures apply where the initial recognition was automatic and also where de-recognition is in relation to a union which is not independent.

On 1 October 2005, the government introduced a new code of practice for the conduct of recognition and de-recognition ballots.

Consultation with trade unions over training

The ERA 1999 introduces a new obligation on employers to consult with recognised trade unions over training but this only applies to those unions which have become recognised under the statutory recognition procedure (see above). The employer must invite the trade union to send representatives, to:

- consult about the employer's policy for training workers within the bargaining unit;
- consult about its plans for their training over the next six months; and
- report about the training provided to those workers over the preceding six months.

Where an employer has not complied with this duty, a union can bring a claim to an employment tribunal within three months of the failure. If the claim is well-founded the tribunal will make a declaration to that effect and award up to 2 weeks' pay to each person in the bargaining unit.

Protection to workers in respect of union recognition

The ERA 1999 provides protection to workers against suffering a detriment from their employer, or dismissal or redundancy selection, because they have done any of the following acts:

- acted with a view to obtaining or preventing union recognition or de-recognition
- indicated that they supported or did not support union recognition or de-recognition
- influenced, or sought to influence, the way in which other workers cast their vote in the secret ballot or to vote or not to vote in the ballot
- voted in the ballot
- proposed, or failed to do, or proposed to decline to do any of the above.

Workers complaining of an unlawful detriment have 3 months to lodge their claim with an employment tribunal which can award compensation based on what is just and equitable, taking into account the extent of the infringement and any loss suffered by the worker. However there is a cap on compensation equal to the aggregate of the basic award and maximum compensatory award. The compensation can be reduced on grounds of a worker's failure to mitigate his loss or his contributory fault.

Where the worker has been dismissed or selected for redundancy on any of the protected grounds, his dismissal will be treated as automatically unfair. In this type of case, the qualifying period and upper age limit on unfair dismissal cases will not apply. This protection will apply to both employees and other persons meeting the definition of worker.

Action short of dismissal for union membership and union activities

The ERA 1999 makes various amendments to the existing statutory right of employees not to have action short of dismissal taken against them for the purpose of preventing, deterring of punishing them from being or not being union members, not members of a union or for their union activities. The main changes are:

- Employees will have a claim in respect of any **detriment short of dismissal**, rather than the more restrictive "action short of dismissal".
- This right will apply not only to positive detrimental acts against the employee, but also deliberate failure to act which also constitute a detriment.

This right came into force on 25 October 1999.

The ERA 2004 inserted into TULRCA 1992 a provision to the effect that an employee has the right not to have an "offer" to him by his employer for the sole or main purpose of inducing the worker in any way regarding trade union membership, activities and/or services. There is now caselaw on this provision.

Where an employer currently expressly or impliedly recognises a trade union for the purposes of collective bargaining, then that union, its workplace officials and members will be entitled to certain additional employment protection rights (see below).

Once an employer has expressly or impliedly recognised a trade union for collective bargaining, it can withdraw that recognition without legal recourse although, clearly, with potential employee relations difficulties. In practice, most recognition agreements will contain some provision for notice of termination of the agreement (e.g., three or six months). In many cases, the contents of collective agreements will often cover the facilities available to trade unions or their representatives – e.g., office facilities, time off for union officials, meetings rooms, access to a telephone and office facilities, etc. In addition, these agreements may provide arrangements for time off work for the training of union officials and safety representatives.

Disclosure of Information to Recognised Trade Unions

Employers who recognise trade unions must, at the unions' request, disclose to trade union representatives "all information relating to the undertaking which is in its possession or that of an associated employer". However this information must satisfy the following two conditions:

- it is information without which the trade union would be impeded to a material extent in carrying out its collective bargaining, and
- it would be in accordance with a good industrial relations practice that the information should be disclosed to the union.

There is an ACAS Code of Practice which gives further guidance on these two conditions. However, an employer can refuse to provide such information on a variety of grounds specified in the legislation. These include where information has been communicated to the employer in confidence, or information relating specifically to an individual (who has not consented to its disclosure), or information the disclosure of which would cause substantial injury to the employer's undertaking for reasons other than its effect on collective bargaining.

Where an employer refuses to comply with a trade union's request for the provision of information relating to collective bargaining, then the trade union may present a claim to the Central Arbitration Committee ("CAC") who will then arbitrate on whether such information should be disclosed. If the CAC finds in the trade union's favour, then it will make an order for the disclosure of such information as the CAC may specify.

Mandatory Consultation with Trade Unions/Employee Representatives

UK employment protection legislation currently only imposes a mandatory consultation requirement upon employers in three specific circumstances:

- where an employer is to make collective redundancies of more than 20 employees at an establishment;
- where there is about to be a transfer of an undertaking covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("Transfer Regulations") (see above); and
- for reasons related to health and safety (see above).

In all cases, the obligation to enter into mandatory information and consultation with appropriate employee representatives arises whether or not a trade union is recognised by the employer in question. Under the Transfer Regulations, both the vendor and purchaser are required to consult with the appropriate employee representatives in respect of any employees who may be affected by a business transfer (see page [ ]).

"Appropriate employee representatives" are either representatives from recognised trade unions (in respect of those employees within the collective bargaining unit) or elected employee representatives of the affected employees. Where there is a recognised union, the employer must consult with the representatives of the union. An elected employee representative can either be taken from an appropriate existing staff committee or elected for the specific purpose of a particular business transfer or redundancy programme. Where there are neither trade union representatives, nor existing employee representatives, employers should facilitate the holding of an election for representatives of affected employees. An employer is likely to have to propose the election procedure, for which there is now statutory guidance. Appropriate representatives have the right to liaise with their constituents and to be provided with appropriate assistance and facilities to enable them to carry out their functions.

Time Off for Trade Union Officials and Members/Employee Representatives

The number of workplace trade union representatives is not prescribed by UK law and it is left as a matter for mutual agreement between the employer and the trade union in question. The details of numbers of workers' representatives and their constituencies will normally be covered by the recognition agreement entered into by the employer and the trade union. However, it is not open to a trade union to impose any minimum number of representatives upon an employer.

Where an employer does recognise a trade union, it has an obligation to both its workplace representatives and its ordinary members employed at the workplace.

Time Off for Trade Union Duties

An employer must allow the trade union's workplace representatives to take reasonable time off work with pay to undertake their trade union duties, provided that the duties satisfy the following three conditions:

- they must relate to matters which are the subject of existing or prospective negotiations;

- the purpose for which time off is requested must relate to one or more matters in a statutory list of prescribed issues (e.g., conditions of employment, dismissals/disciplinaries, suspension, allocation of work, engagement of employees, union facilities, physical working conditions etc.);
- the trade union in question must be recognised in respect of the specific subject matter for which time off is requested.

The duties of union workplace representatives might include the following: discussion with the employer, preparation for meetings, advising union members, liaising with other union officials.

There is an ACAS Code of Practice on time off which gives guidance on circumstances when requests for time off and refusals would be regarded as reasonable or unreasonable. A trade union official who considers he has been unreasonably refused time off may present a claim to an Employment Tribunal, who would take account of the employer's compliance with the Code of Practice before deciding whether or not the refusal for paid time off was reasonable in the circumstances.

Time Off for Trade Union Training

Workplace representatives of recognised trade unions are also entitled to reasonable paid time off to undergo training in respect of their trade union duties (as outlined above). However such training must also either be approved by the trade union concerned, or the Trade Union Congress.

Where a trade union representative considers he has been unreasonably refused paid time off to undergo training in respect of his union duties, then he can present a claim to an Employment Tribunal, who will take account of the ACAS Code of Practice.

Time Off for Trade Union Members

Ordinary members of trade unions are entitled to reasonable unpaid time off during working hours to participate in the activities of their trade union (e.g., branch meetings, attending national conferences, attending mass meetings called to decide, for example, whether to accept an employer's wage offer). If an ordinary member is refused time off he may present a claim to an Employment Tribunal, which will take account of the ACAS Code of Practice. Recent case law suggests that a trade union member will be entitled to compensation if he is not allowed to exercise his statutory right to time off for attending to his trade union duties, whether or not he has suffered financial or other loss.

Elected Employee Representatives

Elected employee representatives authorised for the purpose of collective redundancies and business transfers have similar rights as trade union officials to time off for their candidature to be elected as such, and for their activities and training as such representatives. They are also entitled to appropriate assistance and facilities to enable them to perform their duties as such representatives.

Health and Safety Representatives and Safety Committees

Unionised Workforce

Under the Health and Safety at Work Act 1974, and regulations made pursuant to it,recognised trade unions have the right to appoint safety representatives from amongst the workforce at a particular establishment. These safety representatives

have wide-ranging functions relating to all health and safety matters at their workplace, including the investigation of potential hazards and dangerous occurrences, investigating health and safety complaints, making representations about health and safety, carrying out regular inspections of the workplace at three monthly intervals or following a notifiable accident or dangerous occurrence at the workplace. Safety representatives also have rights to inspect and take copies of any relevant document concerning health and safety in the workplace.

The legislation does not specify a maximum or minimum number of safety representatives which must be appointed at any particular establishment. This is left for agreement between the employer and the trade union.

The trade union also has a right to require the employer to establish a safety committee for the purpose of overseeing health and safety matters at the workplace and establishing a forum at which the employer and safety representatives can discuss health and safety matters.

Safety representatives are entitled to such paid time off to carry out their duties as safety representatives as is reasonably necessary, and also to undergo such training as is reasonably necessary in respect of such duties.

Where an employer has failed to allow safety representatives paid time off work to carry out their duties, a complaint may be made to an Employment Tribunal.

Non-unionised Workforce

Regulations regarding non-unionised workforces came into force in October 1996. Employers are obliged to inform and consult either with employees directly or with elected employee representatives on the following health and safety issues:

- the introduction of any measure at the workplace which may substantially affect the health and safety of employees;
- where applicable, the arrangements for appointing or nominating persons in accordance with the Management of Health and Safety at Work Regulations 1992;
- any health and safety information which the company is required by law to provide to employees;
- the planning and organisation of any health and safety training which the company is required by law to provide to employees; and
- any health and safety consequences for employees of the introduction of new technology into the workplace, including the planning thereof.

There are no maximum or minimum numbers of employee safety representatives.

Employee safety representatives are entitled to such paid time off to carry out their duties as safety representatives as is reasonably necessary, and also to undergo such training as is reasonably necessary in respect of such duties.

Where an employer has failed to allow employee safety representatives paid time off work to carry out their duties, a complaint may be made to an Employment Tribunal.

13 Information and Consultation

From 6 April 2005, in companies with 150 employees or more, the employees of that company have the right to request their employer to inform them of, and consult with them about, business matters affecting their employment. These might include decisions relating to changes in work organisation or contractual relations, resulting in redundancies and/or job transfers.

This right was introduced by the Information and Consultation of Employees Regulations 2004, which provide that at least 10% of the workforce must exercise this right before the employer has to establish a regular system for information and consultation in line with the framework set out in the Regulations.

A valid request under the Regulations must:

- Be in writing;
- Be sent to the registered office, head office or principal place of business of the employer;
- Specify the names of the employees making the request; and
- Specify the date on which it was sent.

If an employer has a pre-existing agreement for informing and consulting, and less than 40% of employees made the request, it may hold a ballot rather than negotiating, provided the agreement meets minimum requirements as set out by the regulations. All employees must be given entitlement to vote in the ballot.

NB The Regulations set out a strict timetable: an employer who receives a request under the Regulations should act and/or seek advice immediately.

As of April 2007, the regulations will apply to those companies with 100 employees or more and from April 2008, this will decrease still further to 50 employees or more.

The Employment Appeals Tribunal has the power to impose a maximum penalty of £75,000 on employers who do not comply with the Regulations. The Central Arbitration Committee has monitoring and enforcement powers.

It will be automatically unfair dismissal for an employer to dismiss an employee for seeking to exercise rights to which he is entitled under the Regulations.