Geldards LLP

Employment Law

An overview of employment law in the UK

Introduction

This briefing note summarises the main sources of employment law in the UK and sets out the main obligations of employers to their employees. Geldards LLP also has a number of additional briefing notes on specific subjects where more detailed information is required.

Employment law in the UK is mainly statute based. The scope and range of legislative activity in all areas of employment law has been significant, influenced in particular by the UK's membership of the European Union and the development of anti-discrimination legislation.

Not all employment law can be found in legislation however. There have also been significant case law developments in this area of law.

Traditionally the UK courts have viewed the employment relationship as unique. As a result, judges have developed certain rules in the employment context which are different to the general rules that usually apply in commercial relationships. In developing these rules, the judges have viewed the employment relationship as one in which there is a natural imbalance of bargaining power between employer and employee. The majority of the judge-made rules have therefore aimed to re-balance the relationship in favour of employees. A number of these rules have also been developed to assist employers however.

As a result of the interaction between case law and legislation, the obligations of an employer to its employees depend on the following:-

- terms and conditions of employment that have been contractually agreed;
- implied terms and conditions of employment (arising because of a mixture of case law and legislation); and
- applicable legislative provisions.

This briefing note covers the following topics:

This briefing note does not cover collective labour law topics such as industrial action, trade union recognition and employer's obligations in connection with consulting employees, nor does it cover the operation of the Transfer of Undertakings (Protection of Employment) Regulations 1981. Specific briefing notes are available from Geldards LLP on these topics if required.

Who is an employee?

Not all persons who perform work for others are employees. It is critical for employers to identify which individuals who work for them are employees in order to be aware of the extent of their obligations towards their workforces.

A number of key pieces of legislation containing employment law rights apply only to "employees", as defined in the relevant legislation. An example of this is the right to claim unfair dismissal. Other pieces of employment legislation apply to a much wider category of worker, who are generally referred to in the relevant legislation as "workers". One example of this is the right to paid holiday under the Working Time Regulations 1998. Others who perform work may be genuinely self-employed contractors or may even be employees of a third party such as agency temps.

Although in most cases, establishing an individual's employment status is straight forward, where it is not obvious this can be a complex and difficult issue. The following provides an overview of the relevant issues.

Legislative definitions

Section 230 of the Employment Rights Act 1996 contains a number of definitions which are a useful starting point for determining employment status.

- an "employee" is:

  an individual who has entered into or who works under a contract of employment.

- a "contract of employment" is:

  a contract of service, whether express or implied, and (if it is express) whether oral or in writing.

- a worker can be an employee, but also includes:

  an individual who has entered into or works under a contract (other than a contract of employment) whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Interpretation by the courts

The courts in the UK have struggled to interpret these definitions. In doing so they have reached the conclusion that the two basic components of an employment relationship are:-

- *mutuality of obligation*: for an employment relationship to arise, both the employer and employee must be under legal obligations to each other;

and

- *personal obligation*: for an employment relationship to arise the obligation that falls on the employee must fall on the individual personally – an employee cannot provide a substitute to do his or her job.

When considering whether these two basic components are present, the courts and tribunals have identified a number of key factors and other more minor factors that are indicative (or not, as the case may be) of an employment relationship.

The key factors are:

- *the documentation* if an individual has a written contract of employment which states that it is contract of service rather than a contract for services this is likely to indicate that the individual is an employee. However the written documentation is not conclusive and other factors will always be considered in recognition that it may be a sham.

- *control test* the degree of control which an employer exercises over an individual is also significant. The more control that an employer has over an individual's actions, the more likely the relationship is one of employment.

- *ownership of equipment* if an individual owns and uses his or her own equipment, he or she is less likely to be an employee than if the individual provides their own equipment.

- tax although not conclusive, the scheme under which an individual pays income tax and NI contributions is helpful in determining whether or not he or she is an employee. If income tax and NI contributions are deducted through the employer's PAYE scheme, the individual is likely to be an employee.

Other factors which are often considered are:

- whether an individual hires his or her own helpers. This suggests that the individual is self-employed rather than an employee;
- whether an individual takes a degree of financial risk. This suggests that the individual is not an employee, but is self-employed;
- arrangements for payments of benefits to an individual are also often considered. For example if there is a scheme whereby an individual gets paid sick pay for sickness absences is entitled to be member of the employer's pension scheme. Payment of benefits suggests that an individual is more likely to be an employee, although the absence of such schemes is not conclusive; and
- whether the individual is prohibited from working for other organisations or companies. Where an individual is restricted to working for one organisation this commonly indicates that there is an employment relationship, but as with all the above factors is not necessarily conclusive.

Geldards LLP has a specific briefing note on the issue of employment status if further information is required.

Contracts of employment

What constitutes a contract of employment?

There is no requirement for a contract of employment to be in writing. All employees, whether or not they have ever been given a written document called a contract will be employed under a contract of employment.

The terms of a contract of employment can be express or implied. Express terms are those that are agreed between the parties. The agreement may have been verbal when the offer of employment was made or may have been recorded in writing. Implied terms are terms which have not been agreed between the parties, but which nevertheless form part of the contract of employment. These terms are "implied" into the contract of employment either to make the contract workable, because of custom or practice or because of a particular piece of legislation.

It is obviously vital for an employer to know the terms and conditions under which its staff are employed.

The places where the express terms of a contract of employment can be found include the following:-

- offer letter
- any document called a contract of employment or statement of terms and conditions of employment
- company or organisation employee handbook
- policy documents
- collective agreements that have been agreed with trade unions or workforce agreements
- memos and notices circulated to staff.

Although some employment policies are contractual in nature and therefore legally binding on employer and employees, it is more common for employers to have a number of discretionary policies. These usually set out the rules and regulations which the employer wishes to promote in the work place, but which the employer does not wish to be obliged to follow.

Under section 1 of the Employment Rights Act 1996, employees are entitled to receive a written statement of terms and conditions of employment ("Statement"). The Statement must be provided within 2 months of the date of commencement of employment and must include certain prescribed information, as follows:-

- the names of the parties;
- the date the employment began;
- the date on which the employee's period of continuous employment began (taking into account any prior employment which counts);
- the scale or rate of remuneration or method of calculating remuneration;
- the intervals at which remuneration is paid;
- any terms and conditions relating to hours of work;
- any terms and conditions relating to holiday entitlement, including public holidays and holiday pay;
- any terms and conditions relating to incapacity for work due to sickness or injury, including any sick pay provision;
- any terms and conditions relating to pension and pension schemes (including whether a contracting out certificate is in force);
- the length of notice required from either party;
- the job title or a brief description of the work for which the employee is employed;
- where the employment is temporary, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;
- the place of work or, if the employee is required or permitted to work at various places, an indication of that fact and the employer's address;
- any collective agreements that directly affect the terms and conditions of the employment, including, where the employer is not a party, the persons by whom they were made;
- where the employee is required to work outside the UK for more than a month, the period for which he is to work outside the UK; the currency in which payment will be made; any additional pay and benefits to be provided by reason of the work being outside the UK; and any terms and conditions relating to the employee's return to the UK; and
- a note:

- specifying any disciplinary rules applicable to the employee and any procedure applicable to the taking of disciplinary decisions relating to the employee, or to a decision to dismiss the employee;

or

- referring the employee to the provisions of a document specifying such rules or procedures which are reasonably accessible to the employee

- a note specifying a person (by description or otherwise) to whom the employee can apply if dissatisfied with any disciplinary decision relating to him/her or any decision to dismiss him/her;a note specifying a person (by description or otherwise) to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment and the manner in which any such application should be made, and where there are further steps consequent on any such application by explaining those steps or referring to the provisions of a document explaining them which is reasonably accessible to the employee.

Although the Statement is good evidence of the terms and conditions of an employee's contract of employment, it does not necessarily contain all the terms and conditions. Employers who follow good practice will usually give their employees a contract of employment which incorporates both the information required to be given in the Statement and all other applicable terms and conditions.

If an employer fails to give an employee a Statement as described above this does not, of itself, give rise to a separate cause of action. However if the employee successfully sues the employer for one of the many types of employment related claims described in this briefing note, the employer's failure to comply with its obligations with regard to the Statement may mean that the employee is entitled to additional compensation of between 2 and 4 weeks' pay.

Common express terms of employment contracts

A contract of employment can contain a wide variety of terms and conditions. Some of the most common express terms which a well drafted contract of employment will usually include are explained below.

Length of contract

The most common form of contract of employment is a permanent contract, which continues indefinitely, subject to either party giving notice. However, many people are employed under fixed term contracts. These are generally contracts of employment which from the outset are due to come to an end after a fixed length of time. Sometimes, however, such contracts may be terminable on

completion of a particular task (e.g. a contract for completion of a specific project) or continue until a specific event occurs (e.g. until funding for the post runs out).

The distinction between indefinite contracts and fixed term contracts used to be a lot more important than it is now. It used to be possible to ask employees with fixed term contracts to waive any rights they may have to claim unfair dismissal or a redundancy payment. This is no longer possible however. Many organisations which once used fixed term contracts have found that there is now little advantage in doing so.

In addition, the UK has enacted legislation, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which is intended to ensure that employees on fixed term contracts have similar employment rights to employees on permanent contracts and are not treated less favourably with regard to their terms and conditions of employment, including pay and benefits.

Notice

A very important contractual term is the length of notice which either party must give to bring the contract to an end lawfully. Length of notice is also governed by statute (see below for statutory minimum notice periods).

In the case of fixed term contracts, these often will not contain any notice provisions, but instead, will come to an end when the fixed term expires. However, it is still possible to have a fixed term contract with notice provisions. In such a case the employment may be ended before the end of the fixed term by either party giving the correct notice.

In addition to setting out the length of notice to bring the contract to an end, well drafted contracts of employment will also say whether or not the contract can be terminated by making a payment in lieu of notice and may also specify what this must constitute.

N.B. If a contract states that a payment in lieu of notice may be made on termination, the contract can be ended lawfully by making a payment to the employee instead of giving the employee notice and allowing him/her to work it. The advantage of this is that any terms of the contract which are intended to continue after employment has ended (for example, obligations of confidentiality) will remain in force despite the fact that the employer has chosen to end the employment relationship immediately.

If there is no payment in lieu clause, employers can still make a payment in lieu instead of giving notice, but legally such a payment constitutes damages for the employer's breach of the contract and the employee will no longer be bound by any of the terms of the contract.

The presence or otherwise of a payment in lieu clause also dictates whether or not payments in lieu of notice are taxable. A payment made pursuant to a payment in lieu clause is subject to income tax whereas a payment which is made as damages for a breach can usually (although not always) be made tax free.

Recently the concept of garden leave has become a popular mechanism for employers seeking to protect their organisations when a senior employee leaves to join a competitor. Garden leave is where an employee is required to remain at home and not undertake any work during their notice period. This prevents the employee from starting work for the competitor until the end of the notice period. An express contractual provision is required before an employer can put an employee on garden leave.

Job title

A contract will usually include the employee's job title and may also indicate some of the employee's duties and responsibilities. More often a detailed description of duties and responsibilities will be contained in a separate non-binding job description. It is good practice for an employer to include a flexibility provision in the contract of employment which makes it clear that the items set out in the job description are not set in stone and that the employee may be asked to carry out other duties from time to time or their duties may be changed, within reason, in future.

Place of work

A contract must contain a description of the employee's place of work. Often employees are required to travel for the purposes of their employment and it is helpful for employers to state this in the contract of employment.

One common issue that arises for employers is whether they have the power to move employees from one office to another in the event of relocation. Good practice, in order to anticipate this problem occurring, is to include a mobility clause in a contract of employment. Such a provision has the advantage of making it clear to all the parties that an employee may be relocated to work elsewhere, perhaps within a specific area. Sometimes such clauses will go on to specify that relocation expenses may be paid if relocation takes place.

Hours of work

Another extremely important area of a contract of employment are provisions which relate to the hours an employee is expected to work. Sometimes employees will have set fixed hours and will not be expected to work outside these hours. Sometimes employees may be expected to work outside their normal working hours, but will be paid to do so. For more senior employees, it is common to find contractual clauses that require employees to work as many additional hours as may be required to perform their duties properly without any additional remuneration. It is important to ensure that the

employer and employee understand what is expected and that the contract of employment properly reflects this.

See also Working Time Regulations below.

Holidays

Before the introduction of the Working Time Regulations 1998 (see below) employees did not have any entitlement to paid holiday. Their entitlement therefore depended entirely upon what was contractually agreed.

Although the basic entitlement to annual leave is now governed by the Working Time Regulations 1998, it is still important for the contract of employment to be specific about an employee's entitlement to holidays. Well drafted contracts will also include details of other rules connected with taking leave, including notification and approval procedures, how holiday pay is calculated, whether or not leave can be carried over to other leave years and the position on termination of employment. If an employer wishes to claw back payments from an employee who has taken in excess of his or her holiday entitlement on termination, an express provision is required.

Pay and benefits

Some of the most common terms in a contract of employment relate to the payment of wages or salary which an employee is to receive plus any additional benefits. In the case of benefits, it is vital that the contract clearly sets out whether or not the benefits are contractual or discretionary. Whereas an employer can vary the terms relating to discretionary benefits unilaterally, any variations to the terms relating to contractual benefits must be agreed.

Confidentiality

Although all contracts of employment have implied into them a duty of confidentiality on the part of employees, the implied duty is quite limited in its scope. It is therefore far preferable for employers to include a clear, express confidentiality clause in their contracts of employment, which sets out exactly the scope of the duty on employees and clearly defines the types of information which are considered by the employer to be confidential.

For employers who place particular importance on protecting intellectual property, clauses relating to protecting such things as patents and copyright are also important.

The ability to "gag" employees has, however, been affected by the enactment of the Public Interest Disclosure Act 1998 (see below) and employers must bear this in mind when imposing confidentiality restrictions on employees.

Restrictions

In order to protect their organisations, employers often want to place restrictions on their employees, both during employment and after employment has ended. Such restrictions may include the following:

- a prohibition on working for a competitor during or outside working hours;
- a prohibition on soliciting business from clients of the employer for the employee's own purposes;
- a general prohibition on acting in any way (whether deliberate, negligent, or otherwise) which harms the interests of the employer;
- a restriction on whom the employee can work for (competitors etc) after employment has ended; and/or
- a restriction on whom the employee can deal with and/or contact after employment has ended.

These types of clauses (often referred to as restrictive covenants or restraints of trade) are only enforceable to the extent that they are considered reasonable to protect the legitimate interests of the employer.

Implied terms in contracts of employment

As stated above, in addition to the express terms contained in contracts of employment, the courts and tribunals have over the years implied a number of additional terms into them.

In general there are only four reasons for implying terms into a contract of employment:-

Business efficacy

The basic rule is that a term will be implied into a contract of employment if it is necessary to give the contract "business efficacy", or put more simply, to make sense in practice.

Custom and practice

Terms may also be implied out of custom and practice. This occurs if, although unwritten and unspoken, a particular practice has operated in an organisation such that it has become well established. Providing the court or tribunal considering the question is satisfied that a right or obligation has been established by custom and practice, this will then become contractual.

An example of this might be allowing employees to take an afternoon off without losing pay if their children become ill. It may be that the fact that this is allowed has not been written down anywhere, but everyone knows it happens and relies upon it to the extent that it has become a contractual right.

The express terms of a contract of employment can also sometimes be varied by custom and practice. An example of this may arise where employees have written employment contracts which say that they are contractually obliged to work a 35 hour week. However, if in fact have only worked a 34.5 hour week for many years, the employer may find itself in difficulty if it tries to enforce the 35 hour week again. The employees may be able to argue that their contracts have been varied by established custom and practice.

"Special" employment relationship

One of the main areas of development in employment law has been the readiness of courts and tribunals to find that the employment relationship is of a special nature and, as such, certain obligations fall upon employer and employee. This has led the courts and tribunals to imply certain terms into contracts of employment by virtue of the special relationship.

Legislation

Finally, the effect of many pieces of legislation is to imply terms into contracts of employment to ensure that employees can enjoy their statutory rights.

Examples of common implied terms in contracts of employment

The most wide-reaching implied term in an employment contract is that there should be mutual trust and confidence between employer and employee. Essentially, this means that an employer must not behave in such a way as to damage his or her employee's trust and confidence in him. This includes ensuring that the employee does not suffer from bullying and harassment in the workplace and respecting the privacy of the employee. In return, the employee owes the employer a duty of good faith whilst the employment relationship continues.

Some examples of behaviour which may be in breach of the implied term of trust and confidence include:

- demoting an employee;
- behaving inappropriately or using offensive language towards an employee;
- invasion of an employee's privacy;

- bullying and harassment of an employee;
- failing to deal with an employee's grievance in a reasonable manner; and
- taking unwarranted disciplinary action against an employee.

Some other common implied terms include:-

- Safe system of working – the employer must ensure that the organisation of work is safe.
- Reasonable support – the employer must ensure that employees have adequate resources.
- Suitable working environment – the employer must ensure that all equipment is safe and in good working order.
- Confidentiality – the employee is required to keep the employer's trade secrets confidential, even after employment has ended.

Breach of contract claims

The number of different breach of contract claims which employees can bring against employers is potentially endless, or at least as numerous as the many terms and conditions found in an average contract of employment.

Breach of a particular term

If an employer fails to comply with one or more of the terms in an employee's contract this will be a breach of contract. It is possible for an employee to bring a breach of contract claim against his/her employer whilst his/her employment is ongoing or after it has ended.

If an employer has a contractual disciplinary or grievance procedure but does not follow it, this can also constitute a breach of contract.

Constructive dismissal

Not all of these types of breaches are considered serious enough to justify an employee resigning and claiming constructive dismissal however. Some examples of the more important terms of a contract which if they are breached are considered serious are as follows:

- non payment of wages
- trying to relocate an employee without agreement or a mobility clause

- putting an employee on garden leave without an express clause permitting this – this is said to be in breach of the implied term that exists in some types of employment contract that an employer will provide an employee with work
- imposing a change on an employee's terms and condition without an employee's consent, for example to working hours

Wrongful dismissal (notice)

Not to be confused with unfair dismissal, an employee will be wrongfully dismissed if he or she has been dismissed without the correct period of notice or without a payment in lieu of the correct period of notice. The only time that an employee can be legitimately dismissed without notice or a payment in lieu of notice is when he or she is guilty of gross misconduct.

Where the contract is silent as to the employee's entitlement to notice, the court or tribunal will imply the appropriate length of notice. Usually this will be the same as the statutory minimum entitlement to notice, but in some cases, such as for the contracts of senior managers, may be longer.

If an employee is working under a fixed term contract, there may be no provision for allowing the contract to be terminated with notice. In such circumstances, when making a payment in lieu of notice, the employee is entitled to be paid an amount equivalent to his or her full salary until the end of the contract.

Pursuing a breach of contract claim

Eligibility and forum

No length of service is required to be eligible to bring a claim for breach of contract. Generally employees can choose whether or not to issue proceedings in an employment tribunal or through the civil courts. Only employees whose employment has finished can sue through an employment tribunal however.

Time limits

In employment tribunals, employees must submit contractual claims within 3 months of the termination of their employment. This time limit can only be set aside if the employee can show that it was not reasonably practicable to submit the claim within three months. This test is very strictly applied.

Employees have six years to submit claims in the civil courts.

Remedies

Where a court or employment tribunal finds that an employer has breached an employee's contract, it will award the employee damages. The amount of damages will be to compensate the employee for his or her financial loss as a result of the breach of contract. The tribunal or court will decide what the employee's financial position would have been had the contract been performed properly by the employer and consider the difference between this and the employee's actual financial position.

In the case of wrongful dismissal (failure to give the correct notice), the court or tribunal will award the employee an amount representing the wages and any other benefits which the employee would have earned during the correct notice period. The amount of damages that the employee will receive for other types of breach of contract will depend upon the nature of the breach.

There is currently a maximum limit of £25,000 on the amount of contractual damages which can be awarded by an employment tribunal.

Employment legislation

This section of this briefing note considers the various statutory provisions which apply in the employment context.

Employment Rights Act 1996

This Act gives employees perhaps their most important right, the basic right to claim unfair dismissal. This is discussed in more detail below. The Act also gives employees some additional important rights:-

- The right to be given a written statement of terms ad conditions of employment (as described above) is contained in this Act.

- An important section of the Act (which used to be a separate act called the Wages Act) deals with the right of employees to receive an itemised pay statement and not to suffer unauthorised deductions. This part of the Act also provides than an employer must pay an employee in full and not take any money out of an employee's pay packet, unless the employee has first given his or her written consent.

  There are of course some exceptions to this general rule, the most obvious being that an employer is allowed to and must make deductions in respect of Income Tax and National Insurance Contributions.

  As a result of this legislation, many employers include a standard clause in their contracts of employment which allows for deductions. This means they do not have to worry about getting written consent every time a deduction is to be made.

- The Act also contains provisions giving employees rights to time off in certain specific circumstances including to attend ante-natal appointments, to participate in various committees, to perform various public functions and to participate in certain trade union activities.

- the Act also contains important provisions setting out the minimum notice periods to which employees are entitled. The effect of the Act is that even if an employee's contract states a particular length of notice, if this is less than the statutory minimum length of notice, the employee must be given the full statutory minimum notice.

- The entitlement to statutory minimum notice depends on an employee's length of service as follows:-

Length of Service	Notice Entitlement
Less than 1 month	None
1 month or more but less than 2 complete years	1 week
2 complete years or more	1 week for each complete year of service
12 complete years or more	Maximum entitlement of 12 weeks

- Another of the very important rights contained in this Act is the right of employees with more than 2 years' service to receive statutory redundancy payments if their employment is terminated by reason of redundancy. This is discussed in more detail below.

Unfair dismissal

Unfair dismissal is probably the most important statutory right contained in the Employment Rights Act 1996. Although contracts of employment can be lawfully terminated quite easily at common law, provided the correct notice is given, the statutory position is a great deal more complicated. Unless an employer dismisses an employee "fairly" in accordance with the provisions set out in the Employment Rights Act 1996, the employee will be entitled to sue the employer for unfair dismissal.

Dismissal

The right to claim unfair dismissal only arises where an employee can establish that he or she has been dismissed. Determining this is not always straight-forward however, as under the Employment Rights Act 1996, three different situations are deemed to constitute dismissals for the purposes of bringing an unfair dismissal claim. These are:

- a straightforward dismissal - whenever an employer dismisses an employee;
- a failure to renew a fixed term contract - when an employee is working under a fixed term contract which comes to an end and the employer fails to renew the contract. Under the

Employment Rights Act 1996, the failure to renew a fixed term contract is deemed to be a "dismissal";

N.B. It used to be possible to ask employees working under fixed term contracts to give up any rights to claim unfair dismissal, but this has now been abolished for new contracts or renewals of existing contracts entered into on or after 25th October 1999.

- a constructive dismissal – this occurs if the employer acts in such a way so as to "force" the employee into resigning because the employer has committed a serious breach of the employee's contract making it intolerable for the employee to continue working.

The reason for dismissal

Fair reasons

The reason for a dismissal is very important. Under the Employment Rights Act 1996, there are only six fair reasons for dismissing an employee.

These are:

- misconduct;
- incapability;
- redundancy;
- legal requirement;
- retirement at 65 or above (providing a particular procedure is followed); and
- some other substantial reason of a kind so as to justify the dismissal of an employee holding the position which that employee held.

Unless the employer can show that its reason for dismissing an employee falls within one of these categories, the dismissal will be unfair. If, however, the employer can show that the dismissal was for one of the above reasons, the employer must then satisfy the tribunal that the dismissal was fair procedurally and substantively in all the circumstances of the case.

Automatically unfair dismissal

If an employee is dismissed for any of the reasons listed below, the dismissal is deemed to be automatically unfair. This means that once the tribunal has established that the reason for the dismissal is one of these "automatically unfair" reasons, the employee wins the case. The tribunal

does not go on to consider whether the dismissal was fair procedurally or substantively fair in all the circumstances as in other cases.

The main "automatic" reasons include:

- a reason relating to pregnancy, child-birth or maternity leave;
- a reason relating to the assertion of the right to paternity leave, adoption leave or parental leave;
- a reason relating to the assertion of the right to time off for dependants;
- certain limited health and safety reasons;
- a reason relating to the assertion of rights under the Working Time Regulations 1998;
- because the employee is a trustee of an occupational pension scheme;
- because the employee is an employee representative or a candidate to be such a representative;
- a reason relating to the assertion of a statutory right, including asserting the right to a written statement of terms and conditions of employment, the right to an itemised pay statement, the right not to suffer unauthorised deductions, the right to a guarantee payment, the right to time off for public duties, the right to time off for ante-natal care and certain rights to trade union membership and to participate in trade union activities;
- a reason relating to the assertion of rights under the National Minimum Wage Act 1998;
- a reason relating to the assertion of rights under the Tax Credits Act 1999; and
- because the employer has made a protected disclosure under the Public Interest Act (whistleblowing legislation).

This list is not exhaustive.

Procedural and substantive fairness

Where a dismissal is for one of the five fair reasons, the employer must then ensure that it is procedurally and substantively fair and reasonable in all the circumstances of the case. This means that it must have been fair and reasonable for the employer to dismiss the employee, rather than take some other kind of action or give the employee some other kind of penalty.

For certain types of dismissal, the statutory dismissal and disciplinary procedure ("DDP") will apply. This was introduced by the Employment Act 2002 and requires an employer to follow a simple 3 stage procedure as follows:-

Step one	The employer must write to the employee explaining the circumstances which are leading the employer to consider dismissal and invite the employee to attend a meeting;
Step two	The employer must meet with the employee, following which the employer must write to the employee to confirm the dismissal; and
Step three	The employee must be given an opportunity to appeal against the dismissal.

If the ("DDP") applies, the dismissal will be deemed to be unfair if the employer does not follow it. Although you might expect that the converse of this would be true so that if an employer follows the DDP the dismissal will be fair, this is not the case. The fact that an employer follows the DDP will not guarantee that a dismissal is fair. Depending on the particular circumstances of the specific dismissal the employer will probably need to take additional procedural steps, as well as the minimum steps contained in the DDP.

Ultimately the test an employment tribunal will apply, when considering whether a dismissal was fair or not, was whether the employer's decision to dismiss fell within the band of reasonable responses of a reasonable employer. The factors the employment tribunal will consider when making this decision will depend upon the type of dismissal including whether or not it was for misconduct, incapability, redundancy or some other substantial reason.

Pursuing an unfair dismissal claim

Eligibility and forum

The employment tribunal has exclusive jurisdiction to consider claims for unfair dismissal.

Generally only employees with one year's continuous service with their employer are eligible to bring a claim for unfair dismissal. Care needs to be taken when dismissing someone if the dismissal is close to the time when the employee would have had 1 year's service, however. This is because an employment tribunal will factor in the employee's notice entitlement (meaning the statutory minimum notice) where appropriate.

An exception to the one year rule exists where an employee can establish that his or her dismissal was for one of the automatically unfair reasons listed above. In such a case there is no length of service eligibility requirement.

Time limits

It used to be that an employment tribunal would only consider an employee's claim for unfair dismissal if it was submitted to the tribunal within 3 months of the date of the dismissal, unless it was not reasonably practicable for the employee to do so. This test was strictly applied but was amended in October 2004 to allow an employer and ex-employee extra time (of up to an additional 3 months) to try to resolve their dispute internally. Extra time is only granted if certain statutory conditions are met.

Remedies

If an employee is successful in his or her claim for unfair dismissal, he or she could be awarded the following remedies:

- reinstatement or re-engagement - if ordered, the employer will have to take the employee back into his or her old job or a similar job, unless it can show that it is not reasonably practicable to do this.

- basic award - this is calculated in the same way as a redundancy payment and depends upon the employee's gross weekly rate of pay, age and length of service. In a case where the dismissal is unfair because the employer has failed to follow the DDP, the employee will get a minimum basic award of 4 weeks' pay.

- compensatory award - this is to reflect the employee's actual financial losses arising from losing his/her job. Usually, awards of between 6 and 12 months' salary are given. There is a current maximum limit of £60,600. This cap increases every year, usually on 1 February.

If the employment tribunal finds that, although technically an employee was unfairly dismissed, he or she has acted in such a way as to contribute to the dismissal, the employee's award of compensation will be reduced. An example of this is a reduction for an employee's contributory conduct in a misconduct case.

In addition, the employment tribunal can adjust the total compensation package to take account of either parties' failure to comply with the requirements of the DDP. If the failure is due to the fault of the employer, the overall compensation package can be increased by between 10% and 50%. Conversely, if the failure is due to the fault of the employee, the overall compensation package can be reduced by between 10% and 50%.

Redundancy payments

Another of the most significant provisions contained in the Employment Rights Act 1996, is the right of employees to be paid statutory redundancy payments. Under the Act, any employee who has two or more years' service and who is dismissed in a genuine redundancy situation is entitled to receive a statutory redundancy payment.

A genuine redundancy situation only arises if an employer ceases or intends to cease:-

- to carry on the business in which the employee is employed;
- to carry on the business in which the employee is employed at the employee's place of work; or
- to need the employee to do the kind of work he or she is employed to perform.

A statutory redundancy payment is calculated on the basis of the employee's gross weekly rate of pay (subject to a current statutory maximum of £310 per week, although this will increase from 1 February 2008)), length of service (subject to a maximum of 20 years) and age.

National Minimum Wage Act 1998

This piece of legislation was introduced for the specific purpose of allowing the Government to set a minimum wage rate at which employees should be paid. There are various different methods for calculating the national minimum wage, depending on the type of work done by an employee. The main rate is currently £5.35 per hour or adult workers. There is also a reduced rate of £4.35 per hour for young workers aged between 18 and 21 and of 3.30 per hour for workers who are aged under 18, but above compulsory school leaving age.

There are also regulations which set down the rate at which employees should be paid sick pay and pay during statutory leave such as maternity leave and paternity leave.

Working Time Regulations 1998

This piece of legislation introduced for the first time the right for employees to enjoy paid annual leave. Employees now have a statutory right to 4 weeks paid annual leave per year. This is increasingly shortly in October 2007 to 4.8 weeks and will eventually be 5.6 weeks by October 2009. The regulations also contain provisions dealing with how pay, during periods of leave, should be calculated.

The Working Time Regulations also contain provisions relating to the maximum number of hours which employees can work per week – currently 48 hours per week as averaged over a 17 week reference period. Employees can agree to opt-out of the maximum weekly limit on working hours.

The Regulations also include provisions setting out the entitlement of employees to rest breaks, and daily/weekly rest. The basic provisions are as follows:-

- rest breaks – 20 minutes rest is required where the worker's daily working time is more than six hours
- daily rest – 11 consecutive hours rest are required in each 24 hour period
- weekly rest – a rest period of 24 hours is required per week or 48 hours per fortnight

There are no provisions for opting-out of rest breaks. Employers, however, can agree alternative arrangements with their employees providing equivalent compensatory rest is given instead.

Public Interest Disclosure Act 1998

This act is better known as the Whistleblowing Act. It contains provisions designed to protect workers who "blow the whistle" on their employers' fraudulent, criminal or dangerous activities.

A worker is protected if he/she reasonably believes that information he/she is disclosing shows:-

- criminal activity;
- a failure to comply with the law;
- a miscarriage of justice;
- health & safety dangers; or
- environmental damage

The Act sets out a procedure which a worker seeking to rely on its protection must follow. Disclosures must generally be made in good faith to the worker's employer (or a person nominated by the employer). If the worker genuinely believes that his/her employer would do nothing about the employee's concern, or may even destroy evidence if the disclosure was made to the employer, there are provisions allowing employees to make disclosures to external organisations.

Any worker who is dismissed as a result of having made a protected disclosure will be considered to be automatically unfairly dismissed. The usual rule about having to have 1 year's service will not apply, nor does the usual limit on compensation. Compensation in whistleblowing cases is uncapped.

In order to ensure that employers are aware of any protected disclosures made, it is recommended that they introduce Whistleblowing Policies so that they have clear procedures which employees must follow.

Employment Relations Act 1999

This legislation introduced, for the first time, a statutory right to be accompanied to a disciplinary or grievance hearing. This right has subsequently been extended to cover any meeting held under the statutory dismissal and disciplinary procedure. The companion can be a work colleague or an appropriately trained trade union official.

Employment Act 2002

The Employment Act 2002 introduced the concept of statutory procedures applying to dismissals, disciplinary matters and grievances. If an employer fails to comply with the procedures in relation to an employee who brings a subsequent tribunal claim, the employee will get increased compensation. If an employee fails to raise an internal grievance, before submitting an employment tribunal claim against his or her employee, he or she will be barred from bringing a tribunal claim, unless he or she can rely on an exception.

Anti-Discrimination Legislation

One major area of employment law in the UK is the area of anti-discrimination. It is currently unlawful for employers to discriminate against people on the grounds of their sex, race, disability, sexual orientation, religious or similar beliefs or age. The relevant legislative provisions are the:-

- Equal Pay Act 1970;
- Sex Discrimination Act 1975;
- Race Relations Act 1976;
- Disability Discrimination Act 1995;

- Employment Equality (Sexual Orientation) Regulations 2003;
- Employment Equality (Religion Or Belief) Regulations 2003; and
- Employment Equality (Age) Regulations 2006.

Unlawful discrimination in employment

Discrimination may occur in many situations. The legislation expressly provides that discrimination in employment is unlawful. It is important to remember that protection against discrimination in employment includes protection for:-

- employees;
- prospective employees;
- former employees; and
- contract and temporary workers.

It is unlawful for an employer to discriminate as follows:-

- in the arrangements made for the purpose of determining who should be offered employment;
- in the terms on which employment is offered;
- by refusing or deliberately omitting to offer a person employment;
- in the way a person is given access to opportunities for promotion, training, transfer or any other benefits, facilities or services or by refusing or deliberately omitting to give the person access to them; and
- by dismissing the person, or subjecting the person to any other detriment.

Key concepts

Most of the legislation prohibiting discrimination is very similar and contains the same key forms of protection. These are dealt with in turn.

Direct discrimination

This arises where an employer treats an employee less favourably than he would treat another employee because of that employee's sex, race, disability, sexual orientation, religious belief or age. Direct discrimination is, for the most part, always unlawful, unless a genuine occupational requirement in the relevant legislation can be relied upon. The standard definition used in the legislation states:-

A person ("A") discriminates against a person ("B") if on the grounds of B's [gender,, race, disability, sexual orientation or religious belief] A treats B less favourably that he treats or would treat other persons.

Indirect discrimination

This arises where an employer applies a requirement or condition which although it appears to be applied equally to all employees, a substantial proportion of the members of a particular protected group cannot comply. This type of discrimination will not be unlawful if the employer can objectively justify it. Although the precise definitions in the individual pieces of anti-discrimination legislation are slightly different, essentially, indirect discrimination is defined as:

A person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same [gender, race, disability, sexual orientation or religious belief, age] as B but:

- *which puts or would put persons of the same [gender, race, disability, sexual orientation or religious belief, age] as B at a particular disadvantage when compared with other persons, and*
- *which puts B at that disadvantage.*

and

A cannot show the provision, criterion or practice [being applied] is a proportionate means of achieving a legitimate aim.

An example of indirect race discrimination might be requiring employees to wear protected head gear. Seikh employees who wear turbans may need adapted head gear. If an employer requires his/her workforce to wear protective head gear this is not directly discriminating against Seikh employees, but because a larger number of people who are Seikhs could not comply with this practice, the very requirement will constitute indirect race discrimination unless the employer can objectively justify the requirement.

Victimisation

All of the anti-discrimination legislation provides protection for an employee who has raised a complaint of discrimination. The relevant provisions seek to protect any individual who has made a complaint of discrimination to his or her employer, brought proceedings under legislation or who has assisted another in doing so.

Harassment

One specific form of discrimination is harassment. This is defined as follows:-

> *A person ("A") subjects another person ("B") to harassment where, on grounds of [gender, race, disability, sexual orientation or religious belief], A engages in unwanted conduct which has the purpose or effect of:-*
>
> – *violating B's dignity;*
>
> – *creating an intimidating, hostile, degrading or humiliating or offensive environment for B.*

For the purpose of this definition, conduct is generally assumed to violate B's dignity or to create a hostile environment only if it should be reasonably considered to do so, taking into account all the circumstances including in particular the perception of B. The intention is to cover banter and jokes which may not be directed at an individual but which are are genuinely found to be offensive.

Failure to make reasonable adjustments

This form of discrimination only applies in disability cases. For the purposes of the disability discrimination act 1995, a "disabled person" is defined as a person who has a physical or mental impairment which has a substantial and long-term effect (i.e. more than 12 months) on his or her ability to perform certain everyday tasks.

An employer is under a duty to make reasonable adjustments where any arrangements made by or on behalf of an employer, or any physical feature of premises occupied by the employer, place "the disabled person concerned" at a substantial disadvantage in comparison with persons who are not disabled. A failure to make reasonable adjustments will be treated as discriminatory treatment.

- making adjustments to premises;
- allocating some of the disabled person's duties to another person;
- transferring him/her to fill an existing vacancy;
- altering his/her working hours;
- assigning him/her to a different place of work;
- allowing him/her to be absent during working hours for rehabilitation, assessment or treatment;
- giving him/her, or arranging for him/her, to be given, training;

- acquiring or modifying equipment;
- modifying instructions or reference manuals;
- modifying procedures for testing or assessment;
- providing a reader or interpreter; or
- providing supervision.

Pursuing a discrimination claim

Eligibility and forum

All employees, regardless of length of service are entitled to bring a discrimination claim. In addition, as described above contract workers are protected from unlawful discrimination. The employment tribunal has exclusive jurisdiction to consider employment related discrimination claims.

Time limits

Usually claims must be submitted within three months of the act of discrimination complained of, but the employment tribunal has a wide discretion to extend this time limit if it considers it just and equitable to do so. In addition, since October 2004, the normal time limit of 3 months can be extended to six months, providing the employer and employee are trying to resolve their dispute internally.

Remedies

If an employee brings a successful claim for discrimination, he or she could be awarded the following remedies:-

- a declaration;
- a recommendation by the tribunal of steps that the employer should take to obviate or reduce the adverse effect of the discrimination – this may include re-instatement or re-engagement and other steps;
- compensation - this is to reflect the employee's actual financial losses to the date of the hearing and future financial losses. There is no limit on the amount of compensation that can be awarded;
- compensation for injury to feelings – the award may range from £500 to £25,000 depending upon the degree of offence caused to the employee; and

- compensation for psychiatric injury – if the employee has suffered depression or another clinically well recognised form of mental illness as a result of the discrimination, he or she may also be entitled to compensation for this.

Part time workers

Following the implementation of an EU directive, employers are required to ensure that part time workers are not treated less favourably than comparable full time workers, that is those doing broadly the same or similar work. The principle of equal treatment extends to all terms and conditions of employment including entitlement to pay and benefits and training. In fact, many part time female workers were previously able to rely on the indirect discrimination aspects of the sex discrimination act for protection so the regulations clarify rather than extend legal rights.

Fixed term employees

The rights of fixed term employees were extended with the enactment from 1 October 2002 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. These regulations require employers to ensure that employees on fixed term contracts are not treated less favourably than comparable employees on contracts of indefinite duration. The regulations also limit the length of time for which an employee's fixed term contract can be renewed. From July 2006, once an employee has continuous service of four or more years, his or her contract will be automatically converted to a contract of indefinite duration. Agency workers, apprentices and employees on government training schemes are specifically excluded from the scope of the regulations.

Work and Families

Maternity leave was first introduced in 1975. Since then the right has been developed by various pieces of legislation. Today the provisions relating to maternity leave are found in the Maternity and Parental Leave etc Regulations which came into force at the end of 1999. These regulations also introduced a right to unpaid parental leave for the first time and provisions relating to when employees are entitled to take time off to deal with certain domestic incidents involving their dependants.

From April 2007 however, maternity leave rights were further enhanced and extended. In addition, new rights to take leave at the time of adopting a child and for partners to take paternity leave are to be introduced.

In addition to forms of statutory leave, UK employment law also includes provisions enabling employees to ask their employers if they could work flexibly, including part-time working, job sharing

and homeworking. This right applies to employees with more than 1 year's service who have children under the age of 6 or disabled children under the age of 18 or who have caring responsibilities for certain categories of adult relatives. Employers are only able to turn down flexible working requests for a limited number of reasons which must be justified.

For further information please contact Stephen Jenkins, Rhian Brace, Kim Howell, Lowri Phillips, Emma Burns, Cher Jones, Claire Davies , Helen Irons, Lucy Jones or David Sheppard at our Cardiff office on (029) 2023 8239, or Mike Butler, Rachel Hatton or Victoria Lang at our Nottingham office on (0115) 983 3650 or Chris Sing at our Derby office on (01332) 331 631.