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EMPLOYMENT LAW OVERVIEW

UNITED KINGDOM 2021-2022

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TABLE OF CONTENTS.

I.	GENERAL OVERVIEW	03
II.	HIRING PRACTICES	05
III.	EMPLOYMENT CONTRACTS	07
IV.	WORKING CONDITIONS	09
V.	ANTI-DISCRIMINATION LAWS	11
VI.	PAY EQUITY LAWS	13
VII.	SOCIAL MEDIA AND DATA PRIVACY	14
VIII.	TERMINATION OF EMPLOYMENT CONTRACTS	15
IX.	RESTRICTIVE COVENANTS	19
X.	TRANSFER OF UNDERTAKINGS	21
XI.	TRADE UNIONS AND EMPLOYERS ASSOCIATIONS	22
XII.	EMPLOYEE BENEFITS	25



I. GENERAL OVERVIEW

1. INTRODUCTION

This guide is intended as a brief outline of employment law in England & Wales. Much of the relevant legislation also applies in Scotland. Northern Ireland has a separate statutory code although much of its employment law is coordinated with that of England, Wales and Scotland. This guide is therefore not to be used as authority for the law in Scotland or Northern Ireland. Provided they are prepared to pay sufficient compensation, employers in England & Wales can usually achieve what they wish. In any event, most businesses are conscientious about wanting to be seen as “good employers”.

2. KEY POINTS

- Termination of employment is process-driven so if the right procedure is followed, liability can usually be avoided.
- Discrimination and whistleblowing laws provide a high degree of protection in the workplace; claims are frequently brought in the tribunals and compensation is based primarily on financial loss (with no cap) and there are no punitive damages.
- Although union representation is declining, workplace representation is becoming more common but is generally not problematic for employers.
- Women are entitled to take one year’s maternity leave, and this leave can be shared with their partner; maternity pay can also be shared but the pay that can be shared is limited to 37 weeks’ pay capped at GBP 151.20 per week.

3. LEGAL FRAMEWORK

- Employment law in the United Kingdom is derived from three main sources:
- Common law (custom and practice and court decisions);
- UK employment legislation which has supplemented the common law rules; and
- European law.

Across the UK, the majority of disputes between employers and employees are heard by employment

tribunals, and not within the civil courts structure. The tribunal, established in the 1970s, has its own set of rules and regulations and is entirely separate from the civil courts. If a party wishes to appeal a tribunal judgment, they may do so to the Employment Appeals Tribunal. Subsequent appeals are made to the Court of Appeal and the Supreme Court.

Although the UK left the EU on 31 January 2020, most EU law has continued to apply during the transition period, which ends on 31 December 2020. The European Union (Withdrawal) Act 2018 provides that EU law will automatically be transformed into UK domestic law when the transition period ends. This includes decisions made by the European court before 31 December 2020, however it is unclear what influence the European court will continue to have in relation to EU-derived law after this date.

4. NEW DEVELOPMENTS

Executive pay reporting requirements have been in force since 1 January 2019. As part of their annual company reporting requirements, UK listed companies with more than 250 UK employees must report on the pay ratio between their CEO and their average UK worker.

Reforms to off-payroll working rules in the private sector are expected to take effect from 6 April 2021, after the original date of 6 April 2020 was delayed because of the coronavirus pandemic. By

way of background, there are tax advantages in the UK for independent contractors who provide their services through an intermediary such as a personal service company. Currently, under the so-called “IR35 regime”, such intermediaries are required to determine whether, if it was not for the intermediary, the contractor would be regarded as an employee of the client organisation engaging them. If the answer is yes, the intermediary is obliged under IR35 to deduct tax and national insurance contributions as if the contractor were an employee. Under the new measures in force from April 2021, the responsibility for determining the contractor’s employment status will shift to the client end-user business. If it determines that the off payroll rules apply, the responsibility for deduction of tax and national insurance contributions will become the responsibility of the entity which contracts directly with the contractor’s intermediary, known as the fee payer. The reforms are designed to tackle perceived non-compliance with IR35 by shifting the responsibility for determining the tax status of contractors to medium and large organisations in the private sector who are using their services. The rules have applied in the public sector since April 2017.

Since March 2020, the UK government has introduced a number of temporary measures in response to the coronavirus pandemic, including the Coronavirus Job Retention Scheme and the Job Support Scheme, and changes to Statutory Sick Pay.

II. HIRING PRACTICES

1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

EU nationals have previously had the right to enter, remain in and work in the UK without a UK visa. This right will end on 31 December 2020 and EU nationals arriving in the UK after this date will be subject to the same immigration requirements as non-EU nationals. Any EU nationals living and working in the UK before this date must make an application under the EU Settlement Scheme by 30 June 2021. They should register for Settled Status (if they have been in the UK for 5 continuous years) or Pre-Settled Status (if they have been in the UK for less than 5 years).

As matters stand, from 1 January 2021 in most cases, non-UK nationals seeking entry into or permission to remain in the UK for the purpose of employment will need to apply under the new Sponsored Skilled Workers (“SSW”) framework of the Points Based System (“PBS”), which replaces the Tier 2 (General) route.

Applications under SSW can only be sponsored by Home Office approved UK-based employers on behalf of the person they wish to employ. Employers must ensure that the role for which they are recruiting is sufficiently skilled and meets the minimum salary threshold requirement, and that anyone coming to the UK speaks English to the required standard. All applicants must also meet the new Good Character requirements which means, for example, that they do not have a custodial sentence of at least 12 months. The government expects to release the final details of the PBS before 31 December 2020.

The previously applicable Tier 2 (General) route could lead to Indefinite Leave to Remain (“ILR”) after five years’ lawful residence in the UK, and the SSW will also be a route to ILR. Alternatively,

UK employers can use the Tier 2 Intra Company Transfer (“ICT”) route for temporary transfers of those already employed by a group company outside the UK. Tier 2 ICT visas do not lead to Indefinite Leave to Remain.

2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers are not required to establish, or work through, a local entity in order to hire employees in the UK. How any tax and national insurance contributions will be dealt with will depend on the circumstances and advice should be sought in relation to this. Care should also be taken that a permanent establishment is not inadvertently created that would mean that trading income derived from the employee’s activities would be subject to the UK tax regime.

3. LIMITATIONS ON BACKGROUND CHECKS

There are certain background checks that must be carried out before hiring an individual. Employers have a duty to prevent illegal working in the UK by carrying out prescribed document checks on candidates before employing them to ensure they have the right to work in the UK.

As regards criminal records checks, employers may seek information about an individual’s criminal records history by:

- Voluntary disclosure – asking the individual directly about the history of their criminal convictions.

- Official criminal records checks through the Disclosure and Barring Service – carried out by the employer or through a registered body.

Most spent convictions do not need to be disclosed to an employer even where there is a direct request for that information or a contractual requirement to disclose it, except in relation to a number of excepted occupations, offices and professions.

The processing of criminal convictions data is restricted under the GDPR and Data Protection Act 2018, and guidance is currently awaited to clarify what this means in practice for employers. It is a criminal offence for an employer to require an individual to obtain a copy of their criminal records by means of a subject access request as a condition of employment, or continued employment.

4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In recruitment, employers are prohibited from discriminating against actual and potential job applicants because of a “protected characteristic” (see part V. Anti-discrimination Laws). Employers must ensure that discriminatory practices are not used during the recruitment process, which includes job advertisements and the interview and selection process.

It is generally unlawful for an employer to ask about the health of a job applicant, or about any disability they may have, before making an offer of employment.

There is no legislation that specifically deals with social media use in recruitment, but when using social media to assess the suitability of potential new recruits, employers need to take care not to discriminate unlawfully. Another area of risk for employers relates to data protection. Some information about an individual that is available through a social media site will constitute personal data and in some cases, it will amount to sensitive personal data under the GDPR. Employers will need to ensure that they are complying with their data protection obligations if using this information during the recruitment process.

Employers should keep clear and objective records of job applicants, focusing on the extent to which each candidate’s qualifications, skills and experience matched up to the requirements given in the job specification.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

The standard type of employment contract in the UK is an “open-ended” contract which can be terminated on notice (subject to the protection which the law provides on unfair dismissal). An employment contract need not be in writing and may be partly written and partly oral. However, the basic terms of the employment must be confirmed to employees in writing.

Since April 2020, further information must be included in the written statement of terms and this must be provided on or before their start date. From April 2020, this right was extended to workers who are entitled to the basic terms of their engagement in writing on or before their first day.

The most common employment relationship is that of full time permanent employment, but an increasing number of staff have flexible working arrangements. This may include working part time, through fixed term contracts or through an agency. UK law gives special protection for these types of workers. Zero hours contracts have become more common in the UK. New regulations prohibit the inclusion of exclusivity clauses in such contracts. There are also special rules relating to apprentices, trainees and young persons.

Agency workers are entitled (i) from day one of an assignment to the same rights as comparable permanent employees in relation to access to shared facilities and job vacancies and (ii) after 12 weeks of an assignment, to additional rights – in particular the same basic working and employment conditions as comparable permanent employees, including those relating to pay, annual leave and working time and rest periods. Agency workers are

also entitled to a Key information document which must include certain basic information about the terms and conditions on which they work.

2. FIXED-TERM / OPEN-ENDED CONTRACTS

Workers may be contracted to work for a fixed period only or to perform a particular task with the contract terminating at the end of this period or on the completion of the task. Examples are those who are employed specifically to cover for maternity, parental or paternity leave; employees who do seasonal or casual work such as agricultural workers and shop assistants during busy periods; employees hired to cover unusual peaks in demand as in the tourist industry; and employees whose contracts will end on the completion of a specific task such as installing a computer system.

There is no requirement for fixed-term contracts to specify the reason why it is a fixed-term, although a job title should be included in the contract to comply with the employer’s statutory requirements on the written statement of particulars of employment.

3. TRIAL PERIOD

Employment contracts often provide that the employee will undergo a trial or probationary period at the start of their employment, during which the employer has the opportunity to assess the employee’s suitability for the position. The exact terms of the trial period will be governed by the employment contract, but it will typically last between three and six months. During this time, the employee may not be entitled to certain benefits.

4. NOTICE PERIOD

The employment contract should state the notice period that either party must give to the other party to terminate the employment. Employees have a statutory right to receive a minimum period of notice from employers once they have been employed for one month, as follows:

- one week's notice for those with between one month and two years' service;
- thereafter, an additional week's notice for each continuous year of service, up to a maximum of 12 weeks for 12 complete years' service.

The statutory minimum notice periods will be implied into the employment contract and will override any express terms providing for a shorter period of notice than that provided by statute.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Employers have extensive obligations to safeguard the health, safety and welfare of all of their employees under both common law and statute (see section re: Health and Safety in the Workplace).

2. SALARY

Employers must pay all workers (not just employees) at least the statutory minimum pay per hour that they are entitled to. The National Minimum Wage (“NMW”) is the minimum pay per hour payable for those under the age of 25. There are four hourly rates for the NMW, depending on the age of the worker and whether they are an apprentice; the top rate is currently GBP 8.20 (for those aged 21 and over). The National Living Wage (“NLW”) is payable to most workers aged 25 and over and is currently GBP 8.72 per hour. Workers who are not paid at least the correct rate can bring a claim before the employment tribunal. It is a criminal offence for employers, wilfully, to refuse to pay the statutory minimum rates of pay.

Employers can only make deductions from wages if the deduction is required by statute (for example deductions for income tax), the employee has expressly authorised the deduction or the deduction is provided for by a term of the employment contract.

Men and women have the right to be paid the same for the same, or equivalent, work (see part VI. Pay and Equity Laws).

Since April 2019, all workers (not just employees) have had the right to a written itemised pay statement (a ‘payslip’) at the time, or before, their

wages are paid to them, to enable them to establish whether they have been paid correctly. Payslips must include the number of hours paid for where an individual is paid on an hourly rate basis.

3. MAXIMUM WORKING WEEK

Workers’ hours of work are regulated by the Working Time Regulations 1998 (“WTR”). Workers may not work, on average, for more than 48 hours per week (normally calculated over a 17-week reference period). In the UK employers can ask workers to consent, in writing, to opt-out of the 48-hour weekly working limit. However, workers must have the right to cancel their opt-out by up to three months’ notice at any time. The WTR also provides the right to daily, weekly and in-work rest periods.

4. OVERTIME

If employers may want to require their employees to work longer than their normal working hours, they should ensure that the employment contract provides for this with an overtime clause. This clause should state whether or not the overtime is paid.

5. HEALTH AND SAFETY IN THE WORKPLACE

Employers have a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees. This statutory duty is enforced by the Health and Safety Executive (“HSE”), which has the power to investigate breaches, and to prosecute and sentence individuals and organisations.

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Employers' health and safety obligations include:

- a common law duty to have regard to employees' safety;
- an obligation to consult with elected trade union safety representatives, or where there is no trade union, to establish a means of consultation with employees;
- vicarious liability for accidents caused by employees who are acting in the course of their employment;
- a duty of care owed to employees and other visitors to the premises that the employer occupies;
- an obligation to prepare a written health and safety policy;
- an obligation to give health and safety representatives facilities and time off for training;
- an obligation to maintain insurance against liability for bodily injury or disease sustained by employees through their employment in the UK;
- a requirement to report accidents, injuries, diseases and dangerous occurrences.

B. COMPLAINT PROCEDURES

If a worker believes their employer is exposing them to risks or is not carrying out their legal duties relating to health and safety, and if the worker has informed the employer but no satisfactory response has been received, they can make a complaint to the HSE.

C. PROTECTION FROM RETALIATION

Workers are protected from being subjected to a detriment or being dismissed because they have made a protected disclosure about malpractices at work (see section re: Whistleblower Laws), this includes disclosures of information about health and safety breaches or risks.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Anti-discrimination legislation in the UK is concerned with protecting employees, applicants for employment and other categories of protected individuals from discrimination and harassment in respect of the following protected characteristics:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation.

2. EXTENT OF PROTECTION

Discrimination can be either direct or indirect:

- direct discrimination occurs where, 'because of one of the protected characteristics', an employer treats an employee less favourably than it treats or would treat others.
- indirect discrimination occurs where acts, decisions or policies are applied which have the effect of disadvantaging a group of people with one of the protected characteristics.

If an employee can show that they have been treated less favourably compared to a colleague with circumstances broadly similar to their own, then they may have a claim for discrimination against their employer.

However, the extent of protection afforded to employees is not without limits, and employers may be able to rely on the objective justification defence if the act etc. was a "proportionate means of achieving a legitimate aim".

Victimisation relating to any of the protected characteristics is prohibited. Victimisation occurs where an employer treats a person less favourably because they have brought a discrimination complaint or have assisted another in doing so.

3. PROTECTION AGAINST HARASSMENT

Harassment occurs where an employer subjects a worker to unwanted conduct relating to a protected characteristic, which has the purpose or effect of:

- violating a worker's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the worker.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

UK anti-discrimination legislation imposes a duty on employers to make reasonable adjustments to their premises or employment arrangements (e.g. altering working hours) if they substantially disadvantage a disabled worker or job applicant, unless the employer does not know, and it cannot be expected to know, that the worker or applicant is disabled.

A number of factors can be taken into account to assess whether it is reasonable to make a particular adjustment, including the cost of the adjustment, the financial resources of the employer, how easy it is to make the adjustment and how much it would improve the situation.

5. REMEDIES

A dismissal on discriminatory grounds is not subject to any limit on compensation and there is no requirement for any period of continuous service. The award is made up of:

- a compensatory award – uncapped for past and future financial losses and career loss, judged in the light of the employee’s future job prospects; and
- an injury to feelings award – there are three guideline bands, with the upper band ranging from GBP 27,000 – GBP 45,000, depending on the seriousness of the case – but an exceptional case may exceed GBP 45,000.

In addition, the Equality and Human Rights Commission has a range of powers, including the power to undertake formal investigations and issue non-discrimination notices.

6. OTHER REQUIREMENTS

Employers in the UK are not required to monitor how many job applicants they recruit from different groups of people, or the characteristics of the people working for them, but many employers do.

VI. PAY EQUITY LAWS

1. EXTENT OF PROTECTION

Equal pay legislation in the UK prohibits discrimination in relation to the terms and conditions of employment as between men and women. EU law which underpins the legislation will continue to be directly effective post-Brexit. Where men and women are paid at different rates, an employee can bring an equal pay claim and the employer must prove that the reason for this is not gender-related, or be able to objectively justify this.

2. REMEDIES

Equal pay claims are usually brought in the employment tribunal, either during employment or within six months of the termination of their employment or appointment.

Equal pay awards are made up of:

- compensation of arrears of pay plus interest, limited to 6 years; and
- revised contractual terms, including remuneration terms, so that they are, in the future, the same as that of the person of the opposite sex doing the same work.

In a successful equal pay claim, the tribunal will also order the employer to undertake an equal pay audit (unless an exception or exemption applies). This involves publishing relevant information about gender pay (such as gender pay information relating to the people in question, identifying the differences in pay and any reasons for those differences and the employer's plan to avoid future equal pay breaches) on the employer's website and providing this to the individuals involved.

3. ENFORCEMENT/ LITIGATION

While historically equal pay claims were predominantly brought in the public sector, a significant number of claims have been brought against private sector employers in recent years, in particular in the retail sector. In one such claim, the UK Supreme Court's (the final court of appeal) judgment is awaited as to whether shop floor staff are entitled to compare their wages to those of distribution centre staff for equal pay purposes. Their decision will have an impact on other similar group action claims, currently being brought against other major supermarkets.

4. OTHER REQUIREMENTS

UK employers with 250 or more employees must report their gender pay gap figures annually. These are published on a government website and on the employer's own website in an easily accessible place for the public to view. Although there are no formal monetary penalties for non-compliance, reputational risk of non-compliance is high. There was no requirement to report gender pay gaps for the 2019/20 reporting year due to the Covid-19 pandemic.

VII. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

Employers can set their own rules in relation to use of the Internet and social media at work.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

It is advisable for employers to implement clear policies on the use of social media and social networking websites, setting out the standards of conduct expected from staff and making clear that a breach may lead to disciplinary action, including dismissal. Otherwise it could be difficult for employers to defend dismissing an employee for inappropriate conduct on a social networking site. Employers can lawfully intercept, monitor and record communications for certain specified purposes, including investigating or detecting unauthorised use of the system by employees, provided they have made "all reasonable efforts" to inform employees that they may monitor email and Internet use.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

In some cases, posting disparaging statements about the employer on social media may constitute misconduct amounting to a potentially fair reason for dismissal, and may be a repudiatory breach of contract leading to grounds for summary dismissal (i.e. dismissal by the employer without notice). Disclosure of the employer's confidential information on social media is likely to amount to a breach of the employee's employment contract, either of an express confidentiality clause or of the employee's implied duty of confidentiality, which could lead to the employer taking disciplinary and other action against them. Employers should consider putting in place clear rules on the use of social media and communicate these to employees. This could be in a social media and/or electronic communications policy.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

There are several ways in which a contract may be terminated. These include: Notice being given by either the employer or the employee; Mutual agreement; Expiry of a fixed-term contract. A fixed-term contract automatically terminates at the end of the fixed-term without the need for notice; Dismissal by the employer; Termination by the employee based on a serious breach of contract by the employer (that is, constructive dismissal).

2. COLLECTIVE DISMISSALS

A redundancy situation arises where the business, workplace or job disappears, or fewer employees are needed. For a fair redundancy, the employer must show:

- the reason for the dismissal is redundancy;
- it is reasonable to dismiss the employee for redundancy; and
- a fair procedure was followed.

There must be fair selection of employees for redundancy and genuine consultation with the affected employees. Although redundancy is a fair reason for dismissal, a redundant employee is still entitled to a statutory redundancy payment. Employees with over two years' service have the right to a statutory redundancy payment currently capped at GBP 16,140.

If an employer proposes to dismiss as redundant a total of 20+ employees across any site in the UK within a 90-day period, it must also follow a collective consultation procedure involving a minimum consultation period of 30/45 days, depending on the number of redundant employees,

in addition to any individual redundancy procedure. Employers that breach these collective obligations may be liable for protective awards of up to 90 days' pay for each affected employee.

3. INDIVIDUAL DISMISSALS

An employee who has been continuously employed for two years or more has a statutory right not to be unfairly dismissed.

Provided there is no discrimination, employers will not be liable for dismissals where:

- they follow a fair procedure;
- the reason for dismissal is one of the designated fair reasons set out in the legislation.

These fair reasons are:

- capability or qualifications;
- conduct;
- redundancy;
- contravention of a duty or restriction imposed by or under an enactment; or
- some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held e.g. personality clash, a reorganisation.

Certain dismissals are automatically unfair and there is no requirement for any qualifying service (for example, dismissals relating to the employee's pregnancy, certain health and safety matters, trade union membership and trade union activities).

A. IS SEVERANCE PAY REQUIRED?

Except for redundancy dismissals (where an eligible employee will be entitled to a statutory redundancy payment) there is no statutory entitlement to

a severance payment as such. An employee is entitled to notice, and it is common for employees to be paid a sum in lieu of notice, usually equal to the value of pay over the notice period.

4. SETTLEMENT AGREEMENTS

A. IS A SETTLEMENT AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

A settlement agreement (separation agreement) is an agreement made between an employer and an employee to settle a dispute and/or to waive any claims that could be brought by the employee against the employer. The employee will receive consideration in return, generally in the form of a termination payment.

Although there is no statutory requirement for parties to settle their dispute by way of a settlement agreement, it is advisable for employers to make an offer of a payment, which is more than the employee's statutory and contractual entitlement on termination, conditional on the employee waiving all claims they have against the employer. Employees can only waive unfair dismissal and other statutory claims if the waiver is contained in a settlement agreement or ACAS agreement (ACAS being the body that provides advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems). A settlement agreement should not prevent the employee from blowing the whistle (making a protected disclosure) or otherwise speaking up where they have the right to do so, for example by informing the police or a regulatory authority that a crime has taken place.

ACAS agreements are generally only used when settlement is reached after the employee has brought a claim in the employment tribunal.

B. WHAT ARE THE STANDARD PROVISIONS OF A SETTLEMENT AGREEMENT?

To be effective in settling statutory claims, the settlement agreement should include:

- a brief description of the circumstances leading up to the settlement agreement;
- list the specific claims being waived;
- a statement that the employee has taken legal advice on the terms and effect of the agreement from an independent legal adviser, who must be identified.

Additional provisions which generally appear in settlement agreements include a term:

- requiring the employee to maintain confidentiality of the terms of settlement;
- prohibiting the employee from making derogatory comments about the employer;
- imposing restrictions on the activities the employee can pursue after termination of their employment;
- requiring the employer to provide a reference.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

Save that employers should avoid directly or indirectly discriminating against an employee on grounds of age; and an employee's redundancy payment is dependent on their age as well as length of service, the age of the employee does not make any difference.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Employers must take care when raising the issue of a settlement agreement. An offer of a settlement agreement will not be treated as being "without prejudice" unless:

- there was a pre-existing dispute between the parties, or
- it was introduced as part of a "protected conversation".

Protected conversations are not protected from disclosure in automatically unfair dismissal or discrimination claims, or where the employer had acted improperly.

There have been changes to the treatment of tax and NICs on termination payments over recent years. All payments made in lieu of notice on termination of employment, regardless of whether there is a contractual entitlement, are subject to income tax and NICs.

Since April 2020, employers are liable to pay employer's NICs on termination payments over GBP 30,000.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

In a successful claim, the employee will generally be entitled to compensation equal to the net value of the salary and benefits, which they would have received if they received their full notice period. However, the employee is under a duty to mitigate their loss i.e. to take reasonable steps to seek alternative employment.

If the employer terminates an employee's employment against their will, the employee will generally have no choice but to accept the dismissal, bringing an end to the employment contract, and the employees will then have to consider their options in terms of any claims they may have against their employer, for either breach of contract (such as failure to give proper notice or failure to make payments under the contract of employment) or breach of some other statutory right, such as unfair dismissal or discrimination. Commonly, an employee might threaten a tribunal claim and secure a settlement with the employer through legal advisors, particularly if the employer is keen to avoid the publicity of an employment tribunal claim or if the employer is concerned that there is a good chance they will lose at tribunal. An employee who has been unfairly dismissed may ask for reinstatement but it is very rare for a tribunal to make a reinstatement order; and even where one is made, the employer can opt to pay compensation instead.

An unfair dismissal award, which is currently capped at a maximum of GBP 104,659, is made up of:

- a basic award (calculated according to the employee's age, length of service and pay) - currently capped at GBP 16,140; and
- a compensatory award (a "just and equitable" amount) – currently capped at the lower of one year's gross pay (excluding pension contributions, benefits in kind and discretionary bonuses) and the overall cap of GBP 88,519.

The length of time a claim takes from start to finish depends on the complexity of the case and the particular region the claim is brought in. However, it is not uncommon for a case to take, from claim until hearing, anything between 3 months and one year.

6. WHISTLEBLOWER LAWS

The dismissal of an employee will be automatically unfair if the reason or principal reason for their dismissal is that they have made a "protected disclosure". It is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they disclose information with a reasonable belief in its truth, about certain types of wrongdoing by the employer. A qualifying disclosure arises where a worker discloses information which in their reasonable belief shows a certain type of wrongdoing has and/or will take place within the workplace. Such wrongdoing includes, but is not limited to:

- committing a criminal offence;
- breaching a legal obligation; and
- endangering healthy and safety.

The worker must also have a reasonable belief that the disclosure is in the public interest. There is no requirement for good faith. A qualifying disclosure is "protected" if it is made directly to the employer, a "responsible" third party or a "prescribed" person such as a regulator. Wider disclosures (e.g. to the police or to the media) may be protected but only if they meet certain rigorous conditions. Workers should be encouraged to raise concerns internally in the first instance. A whistleblowing policy should be put in place to encourage this. As with discrimination claims: there is no qualifying period of employment necessary to bring a "whistleblowing" claim nor is there a cap on the level of compensation that may be awarded. The awards in whistleblowing claims are assessed on

a similar basis to discrimination claims. It is not uncommon for employees to raise whistleblowing claims as part of the tactics of bringing a tribunal claim.



IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

A restrictive covenant is a clause, which is intended to protect an employer's business by restricting the activities of its employees, generally after the employment has terminated.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

This restricts an employee's ability to work for certain competitors or carry on a competing business for a certain period of time after termination.

B. NON-SOLICITATION OF CUSTOMERS

This prohibits an employee from soliciting certain clients or customers of their former employer for a certain period of time after termination.

C. NON-SOLICITATION OF EMPLOYEES

This prohibits an employee from soliciting certain employees of their former employer for a certain period of time after termination.

D. NON-DEALING CLAUSES

This prohibits an employee from doing business with certain clients or customers of their former employer for a certain period of time after termination.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Restrictive covenants are not automatically enforceable simply because they have been incorporated into a contract of employment. In fact, there is a presumption that restrictive covenants are automatically void for being in restraint of trade and contrary to public policy, unless the employer can show that:

- it has a legitimate proprietary interest that it is appropriate to protect, and
- the protection sought is no more than reasonable having regard to the interests of the parties and the public interest.

If an employer can demonstrate this, then restrictive covenants are usually enforced by way of equitable remedies such as injunctions, which are granted at the discretion of the court.

Alternatively or additionally, an employer may make a claim for damages, a claim for inducing breach of contract against the employee's new employer, or they may seek undertakings from the employee that they will observe the contractual restrictions pending the outcome of a speedy trial of the action.

4. USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace but will still receive full pay. This has the effect of

restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express term in the employment contract permitting it to do so. Otherwise, they could be breaching the employee's implied right to work and therefore be in breach of contract.



X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") applies to employees when either: a business or asset is transferred from one entity to another; or there is a change of identity in an entity providing a service (e.g. outsourcing). TUPE implements European law (the EU Acquired Rights Directive). The effect of TUPE is that all employees "assigned" to the economic entity or activity will transfer to the transferee (i.e. the successor). In addition, the transferor's (i.e. the original employer's) rights, powers, duties and liabilities under the employment contracts of those employees who are transferring, transfer to the transferee. The transferor and transferee have a duty to inform and consult with "appropriate representatives" (generally trade union representatives or representatives elected from the affected employees) of "affected employees" about the facts and implications of the transfer. Employers that breach this duty may be liable for up to 90 days' pay for each "affected employee". Finally, subject to certain exceptions, dismissals are automatically unfair if the sole or principal reason for dismissal is the TUPE transfer unless there is an economic, technical or organisational reason entailing changes in the workforce.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Both the transferor and the transferee (predecessor and successor) have an obligation to inform and, if appropriate, consult with appropriate representatives in relation to any of their own employees who may be affected by the transfer or any "measures" (any step, action or arrangement) taken in connection with the transfer. The duty to consult only arises if the employer envisages taking measures in relation to the affected employees. Certain information must be provided to the appropriate representatives long enough before the transfer to enable consultation to take place.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Employees in the UK can be represented in a number of ways including through trade unions, works councils and employee representatives.

Works councils and trade unions are not mutually exclusive representative bodies and these organisations work alongside each other with both performing a representative role. There may be a division of responsibilities, with the trade unions typically concentrating on collective bargaining, while the works councils are often more involved with information and consultation.

In the UK, it is possible for an employer to establish employee representative bodies that are neither trade unions nor works councils, such as a staff or employee association. These employee representative bodies will often have lesser rights and powers than trade unions or works councils, and may be established for a limited range of purposes, such as consultation for large-scale redundancies.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Employees have the right to join an independent trade union but the number of workers who belong to a trade union has diminished in recent years. Just under a quarter of UK workers are members of a trade union and around three in ten workers

have their contracts regulated through collective bargaining between unions and employers.

Unions are required to register each year with the Certification Officer. There are many small specialist unions but most of the larger unions, such as Unite and Community, are affiliated with the Trade Union Congress ("TUC").

Union rights may be collective or individual. The union, its representatives and its members benefit from collective rights, which protect them in the exercise of collective functions. For example, a union will be protected from legal proceedings where it calls industrial action provided that it follows the correct procedures. As regards individual rights, it is unlawful to refuse to employ a person, because they are a member of a trade union. In addition, the dismissal of an employee or detrimental treatment on union grounds will be an automatically unfair dismissal.

3. TYPES OF REPRESENTATION

An official who is an employee of the union is often known as a 'trade union officer', whereas lay union officials or union representatives are elected or appointed to represent members in a given workplace or location.

Union representatives are appointed by an independent union in workplaces where the union is recognised for collective bargaining purposes. In workplaces where the union is recognised, there may also be: union learning representatives, to promote and enable learning; health and safety representatives; and information and consultation representatives, who may work alongside non-union representatives. Union representatives may also be members of a European Works Council.

A. NUMBER OF REPRESENTATIVES

The union and the employer will agree the number of representatives appointed per 'bargaining unit'. If they do not reach agreement, then the Central Arbitration Committee (which assists in the resolution of collective disputes in England, Scotland and Wales, either by voluntary agreement or, if necessary, through a legal decision) will impose an agreement, which is likely to prescribe how many representatives should be appointed.

B. APPOINTMENT OF REPRESENTATIVES

Depending on the particular union's rules, union representatives will be appointed or elected.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

If the union is independent and recognised (see below), the employer is obliged to give reasonable time off to trade union members, representatives and Union Learning Representatives ("URL") so that they can participate in union activities. Representatives and URLs also have the right to be paid for time taken to perform their duties or for training.

If a union is "recognised" by an employer, it will be able to undertake "collective bargaining" with the employer. The employer and trade union may enter into a collective agreement covering matters such as terms and conditions of employment, conditions of work, disciplinary procedures, and hiring and firing employees. Collective agreements are generally not legally enforceable.

Apart from engaging in collective bargaining, a union representative may also represent and give advice to colleagues in relation to workplace problems and may also accompany union members to disciplinary or grievance hearings.

A union might be recognised either by voluntary agreement between the employer and the union or as a result of following a statutory recognition process. The statutory recognition process only

applies to employers with 21 or more workers, and to independent unions. To succeed in obtaining statutory recognition, the union will need the support of the majority of the relevant bargaining unit in the workplace.

Once a union has been recognised, it may have a right to be informed and consulted on a number of issues, including redundancies. An employer can withdraw voluntary recognition from a trade union at any time, but will need to follow a specific de-recognition procedure if recognition was originally granted under the statutory procedure.

The action that employers can take against employees as a result of industrial action is limited. If employees are on strike, the employer does not need to pay them for the times they are not working. However, they will usually be entitled to full pay when they take industrial action short of a strike.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

There are no separate employee representation requirements for management.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Workers have the right to be accompanied in the workplace in certain situations, such as in disciplinary and grievance hearings. Where the worker is a trade union member, they will usually be accompanied by a union representative or official, but they can choose to be accompanied by a work colleague instead.

A European Works Council ("EWC") is a consultative body set up by employers for the purposes of fulfilling its obligations to inform and consult employees at European level. The EWC has the right to receive information about the business and to be consulted about some of the business' activities.

Employers who have at least 1,000 employees throughout the European Economic Area (“EEA”) and at least 150 employees in each of at least two of the relevant member states must establish a European Works Council on receipt of a qualifying request. Where the European central management of an undertaking is situated in the UK, the employer’s obligations are contained in the Transnational Information and Consultation of Employees Regulations 1999 (“TICE”). On 1 January 2021, when the Brexit transition period ceases to apply, UK employees will no longer be able to ask their employers to set up an EWC. Employees who currently sit on an EWC may be able to continue if this is agreed between the parties.

A National Works Council (“NWC”) is a permanent consultative body made up of management and employee representatives whereby a UK-based employer can inform and consult its workforce about economic and employment-related matters. The Information and Consultation of Employees Regulations 2004 provide that UK employers with 50 or more employees must put in place an Information and Consultation Agreement (“ICA”) if certain criteria are met. Under these rules, the employees must have made a valid request to negotiate or the employer must have given a valid notification of intention to negotiate. In April 2020, the percentage of employees required for such a request to be valid was reduced from 10% to 2% of employees. It remains a requirement that at least 15 employees must make the request. Once a valid request or notification has been given, the employer must negotiate with representatives of the employees to put in place an ICA. If the parties can’t agree on its terms within a specific timescale, the regulations provide a set of standard information and consultation provisions, which will automatically apply until any agreement to the contrary.

Recognised trade unions have the right to appoint health and safety representatives at a particular establishment. They have wide-ranging functions relating to health and safety issues, including being consulted on health and safety matters.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

The UK has a comprehensive social security system, funded from general taxation and from National Insurance Contributions. The social security system provides state benefits to cover maternity/paternity/adoption, childcare, disability and carer matters. It also administers retirement pensions. State benefits can be contractually supplemented by employers. The National Insurance Fund aims to provide subsistence level benefits to all those in need. Employers are under an obligation to collect income tax at source from employment income, pensions and taxable state benefits under the Pay As You Earn (“PAYE”) system. Employed earners and their employers must also pay National Insurance Contributions (“NICs”). Various contributions are required to be made in respect of all UK employees. Class 1 contributions are payable in respect of earnings by both employer and employee.

2. HEALTHCARE AND INSURANCES

Employers carrying on business in Great Britain are required to have in place employer’s liability insurance against liability for bodily injury or disease sustained by employees and arising out of and in the course of their employment in Great Britain. Some employers may offer employees benefits such as life insurance, permanent health insurance, private medical insurance and company cars.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Employees and workers are entitled to 5.6 weeks’ paid annual leave (pro-rated for part-timers). This holiday entitlement can include public holidays, of which there are currently eight in England and Wales.

Statutory holiday entitlement under the Working Time Regulations cannot normally be carried over into the following year, nor can workers be paid in lieu of taking statutory holiday, except on termination of employment.

B. MATERNITY, PATERNITY AND ADOPTION LEAVE

Pregnancy rights include health and safety protection and the right to reasonable paid time off for ante-natal care. Family rights to leave and pay have been subject to major reform in Great Britain with the introduction of shared parental leave and pay which applies to all qualifying working parents of children. Whilst the default 52 weeks’ maternity/adoption leave for employed mothers/adopters remains, those employees are entitled to give up their leave and pay and share it with the father/their partner (i.e. whoever shares the main caring responsibility for the child at the date of birth/adoption).

Employees with 26 weeks’ service also qualify for Statutory Maternity/Adoption Pay which is calculated as follows: (i) six weeks at 90% of salary; and (ii) 33 weeks currently at a flat rate of GBP 151.20, or 90% of salary if that is lower. Shared Parental Pay follows the same flat rate for up to 37 weeks.

Fathers/co-adopters continuously employed for 26 weeks are entitled to: two weeks’ Ordinary Paternity Leave; and two weeks’ Statutory Paternity Pay: currently at GBP 151.20, or 90% of salary if that is lower.

All employees continuously employed for 26 weeks have the right to request flexible working, i.e. to change the hours/times they work or their work location, irrespective of their caring responsibilities.

Although compensation for non-compliance, or for a decision based on incorrect facts, is capped at

eight weeks' pay, victimisation, sex discrimination and unfair dismissal claims may also be brought following an employer's refusal to grant the employee's request.

C. SICKNESS LEAVE

Employers are required to pay Statutory Sick Pay ("SSP") to employees who are off work due to illness, after the third day of absence (subject to certain qualifications). The current rate of SSP is GBP 95.85 per week from April 2020, for a maximum of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period.

The UK government introduced a number of temporary measures in response to the coronavirus pandemic. SSP is available from the first day of sickness absence to those advised to self-isolate for various reasons including because they are showing symptoms of COVID-19, or they are caring for others within the same household who have symptoms. The cost of providing SSP to any employee off work due to coronavirus is refunded by the government for up to 14 days for businesses with fewer than 250 employees.

D. DISABILITY LEAVE

Employers are required to pay SSP to employees who are off work due to injury, after the third day of absence (subject to certain qualifications). The current rate of SSP is GBP 95.85 per week from April 2020, for a maximum of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period.

E. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Unpaid parental leave: eligible employees can take unpaid parental leave to look after their child's welfare. They can take up to 18 weeks' leave for each child and adopted child, up to their 18th birthday. The limit on how much parental leave each parent can take in a year is 4 weeks for each child (unless the employer agrees otherwise). The employee's employment rights (such as the right to holiday and to return to a job) are protected during parental leave.

Time off for dependants: all employees are entitled to reasonable unpaid time off work to deal with an emergency involving a dependant (for example, if a

dependant falls ill or is injured, if care arrangements break down, or to arrange or attend a dependant's funeral).

Time off for public duties: employees can take time off work for certain public duties. All employees have to be allowed time off for jury duties/service. Employers do not have to pay employees for time spent on public duties or jury service, but some choose to do so.

Time off for losing a child or suffering stillbirth: a new law was introduced in April 2020 giving employed parents the right to 2 weeks' leave if they lose a child under the age of 18 or suffer a stillbirth from 24 weeks of pregnancy. Parents are also able to claim Statutory Parental Bereavement Pay for this period, subject to meeting the eligibility criteria.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Employers have to ensure that workers in the UK, between the ages of 22 and state pension age, and earning a salary of at least GBP 10,000 per annum are automatically enrolled into a qualifying pension scheme to which the employer must contribute. There are minimum total contributions that have to be made. Currently for employers this is 3% of each employee's qualifying earnings.

5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Some employers choose to provide other benefits to employees such as season ticket loans to enable employees to buy an annual train ticket to commute to work or subsidised gym membership, but this is entirely at the employer's discretion.

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