MANCHES

Employment law in England and Wales: The essentials

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Introduction

This note aims to give a helpful explanation of the key aspects of UK employment law. Whilst it covers the main topics which employers will need to consider when employing people in the UK, it should not be regarded as an alternative to taking advice on specific matters.

The employment relationship is governed by both contractual and statutory rights. The focus of this briefing note is on statutory employment rights but a summary of these two sources of rights is set out below:

a) Contractual rights

Contractual rights are determined by the terms of the employee's contract of employment. In addition to the terms in an employee's written contract, contractual terms can be agreed orally, or (subject to fairly strict conditions) implied by custom and practice over a period of time. Some terms are automatically implied into the contractual relationship by common law (i.e. case law) or by statute. Claims for breach of contract can (depending on value) be pursued either in the County/High Court or in the Employment Tribunal in so far as they arise from or are outstanding at the time of termination of employment.

b) Statutory rights

There is an increasing volume of statutory law in the UK, some originating from government policy and much deriving from European Directives which all members of the European Union are required to implement. Some of these statutory rights are linked to length of service. The general rule (subject to what is said later in this note about compromise agreements) is that an employee cannot "contract out of" their statutory rights. An employer's contractual rights (e.g. to terminate the contract) must be viewed in conjunction with and subject to the employee's statutory rights since otherwise the employer may find that whilst it has acted in accordance with the contract it nevertheless faces potentially costly claims (e.g. for unfair dismissal and/or discrimination), based on the employee's statutory rights.

In determining if an individual is an employee, the overriding consideration will be the substance of the relationship between the parties.

Employment status

(a) Categories

Individuals providing personal services are, broadly, classified into three categories:

- Employees
- Workers
- Self-employed or independent contractors

(b) What effect does employment status have?

It is important to determine each individual's status as this will affect, among other things:

- Whether the individual has the benefit of the various statutory rights available to employees (for example, the right to a statutory redundancy payment).

- The basis on which the individual's income is taxed.

- Whether the employer has a duty to protect the health and safety of an individual or whether the individual is responsible for his own health and safety.

In determining if an individual is an employee, the overriding consideration will be the substance of the relationship between the parties. However, there are a number of criteria which are traditionally considered in determining employment status, including:

- Mutuality of obligation (that is, the obligation on the employer to provide work and the obligation on the employee to carry out the work provided).

- Sufficient control by the party for whom the work is being carried out.

- Requirement to provide services personally.

Contract of employment

(a) Terms of the contract

The terms of a contract of employment may be:

- Express terms - those terms which have been specifically agreed between the parties;

- Implied terms - terms which are taken to have been agreed;

- Statutory terms – those which are derived from provisions contained in employment legislation; and

- Terms which are incorporated into individual contracts from other sources such as collective agreements.

Although the contract itself need not be in writing, employees who have been employed for one month or more are entitled by section 1 of the Employment Rights Act 1996 (ERA) to receive a written statement of certain particulars of employment within two months of starting employment. The ERA contains a prescribed list of the information which must be provided to each employee. This includes information such as salary, job title, notice periods and holiday entitlement.

Employees must be notified in writing of any changes in these particulars as soon as possible and, in any event, within one month. If an employer fails to provide a section 1 statement, provides an inaccurate or incomplete statement or does not provide an employee with a statement of any changes, an employee may make a claim to an Employment Tribunal for compensation either while the employment continues or, if it has terminated, within three months of the date of termination.

(b) Notice periods

The contract of employment should state the notice period that either party must give to the other party to terminate the employment.

Employees have a statutory right under the ERA 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's and two years' service.

- Thereafter, an additional week's notice for each continuous year of service, up to a maximum of 12 weeks' notice after 12 complete years' service.

Employers have a statutory right to receive one week's notice from employees who have been continuously employed for one month or more.

Employers and employees can agree notice periods which are longer than the statutory minimum requirements.

The employment contract may contain a pay in lieu of notice clause (PILON) entitling an employer to pay an employee a lump sum rather than require them to work out their statutory or contractual notice period.

(c) Wages

A national minimum wage (NMW) applies for all workers over compulsory school leaving age (National Minimum Wage Act 1998). The NMW rates differ depending on the age of the worker and whether or not they are in training.

From 1 October 2010, rates will be:
Age 16 – 17 - £3.64 per hour
Age 18 – 20 - £4.92 per hour
Age 21+ - £5.93 per hour
NMW rates usually increase on 1 October each year.

Employees who are not paid the NMW can bring a claim before an Employment Tribunal. It is a criminal offence for employers wilfully to refuse to pay the NMW.

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

Employers must give employees itemised pay slips at or before the time at which payment is made. They must, among other things, give details of the gross and net wages and the amount and purpose of any deductions from those sums.

Employers are required to deduct income tax from an employee's salary on a Pay As You Earn ('PAYE') basis wherever an employee's earnings exceed specified thresholds.

Income tax rates currently range from 20% to 50% by reference to prescribed thresholds. Employees are entitled to a personal allowance, on which no tax is payable, which varies according to an individual's circumstances.

(d) Hours of work

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 with up to three months' notice at any time.

There are also restrictions on the amount of night work that workers can perform (night workers cannot work more than an average of eight hours a night and must be offered free health assessments).

The WTR also provides the right to daily (11 hours in 24 hours), weekly (24 hours in a seven day period) and in-work rest periods (20 minutes in six hours).

There are exemptions for certain industries (for example, where continuity of production is required) and for workers who determine their own working time (for example, senior managers who can decide when to do work and for how long).

(e) Holidays

The WTR provide a minimum statutory paid holiday entitlement for workers of 28 working days per year (pro rata for part time employees). This holiday entitlement can include public holidays, of which there are currently eight in England and Wales. Statutory holiday entitlement under the WTR cannot be carried over into the following year, nor can workers be paid in lieu of taking statutory holiday, except on termination of employment.

During employment employees are bound by an implied duty of fidelity and good faith which encompasses a duty not to disclose the employer's confidential information.

(f) Pensions
Pension provision in the UK comprises of the State Pension and private pensions.

- **State pension**
  The state provides a basic State Pension for individuals who have paid sufficient national insurance contributions during their working life. Some individuals qualify for an additional state earnings related pension called the Second State Pension.

- **Private pensions**
  Private pensions can either be arranged on an individual basis or through a scheme set up by an employer and can either be tax approved or unapproved and contracted out or contracted into the Second State Pension.

All employers with five or more employees are required, as a minimum, to offer access to a stakeholder pension scheme (a basic form of pension scheme). Stakeholder pensions are normally set up as personal pension schemes and employers are not obliged by law to contribute to them. Employers will not have to offer access to a stakeholder scheme if they offer an alternative private pension arrangement which meets certain criteria.

(g) Benefits
Some employers may also offer employees benefits such as life assurance, permanent health insurance, private medical insurance and company cars.

Where such benefits are provided, their provision should be carefully described in the contractual documentation. For example, you will need to ensure that you have freedom to terminate employment without an employee claiming that in doing so you have disentitled them from receiving a valuable benefit.

Employees may also be eligible to participate in bonus schemes. Where the employer reserves a discretion as to whether or not to pay any bonus or as to the amount of the bonus for a particular year, this discretion must be exercised reasonably.

(h) Sickness and sick pay
Employers are required to pay statutory sick pay (SSP) to employees who are off work due to illness or injury after the third day of absence (subject to certain qualifications). From 6 April 2010 the rate of SSP increased to £77.15 per week. The rate of SSP usually increases anually.

Employers sometimes supplement SSP with contractual sick pay for a specified period.

(i) Confidentiality
Broadly, during employment employees are bound by an implied duty of fidelity and good faith which encompasses a duty not to disclose the employer's confidential information. After termination of employment this implied duty is limited to information which is sufficiently confidential to amount to a trade secret.

Given this limited duty, it is sensible for employers to protect their business interests by adding an express contractual term restricting the employee's right to use or disclose the employer's confidential information after the employment relationship has terminated.

Employees cannot be prevented from making a disclosure of confidential information to the extent that such disclosure amounts to a protected disclosure under the Public Interest Disclosure Act 1998.

(j) Garden leave
The employer may include an express contractual provision requiring the employee not to work, usually during some or all of the notice period but possibly at any time during employment. This is known as a garden leave clause. Such clauses are attractive to employers as a means of protecting confidential information (as the employee is unable to maintain and develop relations with customers and fellow employees while absent from the office) and preventing the employee from working for a competitor or setting up a competing business during the garden leave period.

(k) Restrictive covenants
Since the implied duty of fidelity no longer applies after termination of the employment, the employer may wish to impose express contractual restrictive covenants with a view to restricting the

employee's ability to harm the employer's business after termination (for example by working for a competitor or soliciting customers).

The general rule is that all contractual restraints on a former employee's freedom to work are void and unenforceable as being in restraint of trade and contrary to public policy unless they can be shown to be no wider than reasonably necessary to protect the employer's legitimate business interests. In determining whether or not a particular covenant is reasonable, the courts will, among other things, look at the length and scope of the restriction.

Legitimate business interests fall broadly within the following categories:

- Trade secrets
- Trade connections
- The stability of the employer's work-force

The types of restrictive covenant used to protect these interests are, broadly, as follows:

- Non-competition restrictions, which prohibit the former employee from working in a competing business.

- Non-solicitation covenants, which prohibit the former employee from soliciting specified business connections.

- Non-dealing covenants, which prohibit the former employee from dealing with customers or other business connections of the employer.

- Non-poaching covenants which prohibit a former employee from encouraging his or her former colleagues to leave their employment.

An employer who has acted in breach of contract will not be able to enforce a restrictive covenant against an employee.

(l) Intellectual property

While the law relating to intellectual property rights is complex, as a general rule, the employer will own the copyright, patent, unregistered and registered designs in works created by its employees in the course of their employment. "In the course of employment" refers to the scope of the employee's duties and not the period of employment.

Intellectual property rights created by consultants will vest in those individuals rather than in the recipient of their services. It is therefore advisable to include a specific assignment of intellectual property rights in consultancy agreements.

(m) Data protection

Employers should be aware of their obligations to comply with data protection legislation, in particular in their administration of employee records.

The obligations in relation to the storage of personal data on a computer were originally governed by the Data Protection Act 1984. Under the Data Protection Act 1998 (DPA), the law of data protection has been extended to cover not only personal data stored on a computer but also manual records containing personal data that are stored in a relevant filing system.

Any activity relating to personal data carried out by a data controller will amount to processing for the purposes of the DPA and must be carried out by data controllers in accordance with eight data protection principles. The DPA requires employers (as data controllers) to process their employee records "fairly and lawfully", which means complying with the conditions set out in the DPA.

The eighth data protection principle requires that personal data must not be transferred to a country outside the European Economic Area unless that country also ensures an adequate level of protection for such data. Broadly speaking, this will require the other country to have legislation in place which provides similar protection for personal data as that provided by the DPA, although there are certain exceptions to this rule which would enable data to be transferred between countries irrespective of the level of protection provided. Companies wishing to establish offices in the UK will therefore have to give careful consideration to the data protection rules in their own country in order to be able to transfer data between the companies in their group.

An eligible employee who is dismissed will have a successful claim for unfair dismissal, unless the employer can prove that the only or principal reason for the dismissal was one of six potentially fair reasons and that it was reasonable for the employer to rely on the reason to dismiss the employee.

Termination of employment

(a) Methods of termination

There are several ways in which a contract may be terminated, including:

- Notice being given by either the employer or the employee
- Mutual agreement
- Frustration
- Expiry of a fixed-term contract
- Dismissal by the employer
- Summary termination (termination without notice)

Employers need to ensure that proper procedures are followed before terminating and employee's employment by any of these means.

(b) Contractual rights – wrongful dismissal

An employee is entitled to bring a claim for wrongful dismissal if the employer terminates the contract in breach of its terms. This is generally where the employer has terminated the contract without giving the employee the necessary period of notice (or making a PILON, if permitted by the contract).

The measure of damages for a wrongful dismissal claim is the salary and benefits that the employee would have received had he worked out his notice period, reduced by any income that the employee has earned (or could have earned) during the period equivalent to the notice period (this is known as mitigation) and by an appropriate percentage to reflect the fact that the money is received in one lump sum rather than monthly over the equivalent to the notice period (this is known as accelerated receipt).

Claims for wrongful dismissal may be brought in the County Court or the High Court, or before an Employment Tribunal. The maximum compensation that an Employment Tribunal can award for a successful claim for wrongful dismissal is limited to £25,000. There is no limit on the compensation that can be awarded by the High Court or the County Court.

(c) Statutory rights - unfair dismissal

An employee who has been continuously employed for at least one year has a statutory right not to be unfairly dismissed.

An eligible employee who is dismissed will have a successful claim for unfair dismissal, unless the employer can prove that the only or principal reason for the dismissal was one of six potentially fair reasons and that it was reasonable for the employer to rely on the reason to dismiss the employee.

The reason or principal reason must be one which:

- Related to the capability or qualifications of the employee to perform work of the kind which that employee was employed to do; or
- Related to the conduct of the employee; or
- Was that the employee was redundant; or
- Was that the employee could not continue to work in the position which they held without contravention of a duty or restriction imposed by or under an enactment; or
- Was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held; or
- Was due to the employee reaching retirement age.

Certain dismissals are automatically unfair (for example, dismissals relating to pregnancy, certain health and safety matters, for making a protected disclosure, trade union membership and trade union activities) irrespective of the employee's length of service.

An employee who has been unfairly dismissed must generally bring a complaint before an Employment Tribunal within three months of the dismissal seeking reinstatement/re-engagement or an award of compensation.

Compensation for unfair dismissal comprises a number of elements, the key two being:

- A basic award based on the employee's age, weekly pay (subject to a statutory maximum and length of service).

- A compensatory award of such amount as the Tribunal considers just and equitable, subject to the current statutory maximum of £65,300. This maximum usually increases on 1 February each year. The aim of the award is to compensate for financial loss sustained by the employee in consequence of the dismissal.

(d) Redundancy

An employee's dismissal will be due to redundancy if the dismissal is wholly or mainly due to the fact that:

- The business in which they work has ceased or will cease to exist;

- The business has ceased or will cease to exist in the place in which they work; or

- The requirements of the business for employees to carry out work of the particular kind carried out by the employee either generally, or at the place where the employee works, have ceased or diminished or are expected to cease or diminish.

A redundancy is a potentially fair reason to dismiss for the purposes of unfair dismissal. However, the procedure must also be fair in order for an employer to avoid a successful claim for unfair dismissal. Broadly, a fair redundancy procedure involves:

- Fair selection of the employees to be made redundant.

- Consultation with selected employees before making a final decision.

- Considering alternatives to dismissal.

- Considering whether there are any suitable jobs elsewhere in the organisation for the redundant employees and offering any such positions to them.

If an employer proposes to make 20 or more employees at one establishment redundant in a period of 90 days or less it must consult with appropriate representatives of affected employees. The representatives must be trade union representatives (if a union is recognised) or elected employee representatives. Consultation must begin in good time and no later than 30 days before the first dismissal (or no later than 90 days before, if 100 or more redundancies are proposed). There is also an obligation to notify the Secretary of State where the employer is proposing to dismiss as redundant 20 or more employees at the same establishment within a period of 90 days or less.

The employer must disclose in writing to the representatives the following information:

- Reasons for its proposals.

- Numbers and descriptions of employees whom it is proposed be dismissed as redundant.

- Proposed method of selection.

- Proposed method of carrying out the dismissals.

- Proposed method of calculating redundancy payments.

The consultation must discuss the reasons why redundancies are being considered, ways of avoiding or reducing the number of proposed redundancies and mitigating the consequences of the dismissals. Consultation must be undertaken with a view to reaching agreement with the representatives. Employees can complain to an Employment Tribunal in relation to a breach of the statutory rules governing the election of employee representatives a failure to inform and consult more generally. A Tribunal may make a protective award of up to 13 weeks' pay to each affected employee.

An employee who has been continuously employed for at least two years has the right to receive a statutory redundancy payment if he or she is made redundant. Claims must generally be made within six months of the dismissal. An employee will forfeit the right to a statutory redundancy payment if they have unreasonably refused an offer of suitable alternative employment by the employer.

The ACAS Code is intended to help employers and employees deal effectively with issues of alleged misconduct or poor performance. It does not apply to redundancies or the non-renewal of fixed term contracts

Disciplinaries and grievances under the ACAS Code

(a) Purpose of the ACAS Code

The Employment Act 2008 introduced a new regime for dealing with employment disputes and repealed the statutory dispute resolution procedures with effect from 6 April 2009. These had been widely viewed as unworkable given their complexity.

The ACAS Code is intended to help employers and employees deal effectively with issues of alleged misconduct or poor performance. It does not apply to redundancies or the non-renewal of fixed term contracts. The ACAS Code is a lengthy document and this note provides only a brief overview of the guidance.

The main consequences of failing to follow the ACAS Code are that:

- A Tribunal will consider the provisions of the ACAS Code when deciding if the employer has followed a fair procedure and ultimately whether a dismissal is unfair.
- Employment Tribunal compensation can be reduced or increased by up to 25% where a party has failed to follow it.

(b) Dismissals and discipline

The ACAS Code sets out five main stages that should be followed to ensure a fair process:

- The employer should investigate the issues. This may include an investigatory meeting with the employee or collation of other evidence.
- The employer should inform the employee of allegations against them in writing and should provide any written evidence. The notification should set the time, date and place of the disciplinary hearing.
- The employer should always hold a disciplinary hearing with the employee before taking any action. At this meeting:
  - The employer should explain the allegations and go through the evidence;
  - The employee should be allowed to set out their case and answer the allegations; and
  - The employee should have a reasonable opportunity to ask questions, present evidence, call relevant witnesses and raise points about any information provided by the witnesses.
- The employer should inform the employee of the decision in writing. The level of sanction will depend on the severity of the act, but generally a dismissal will only be appropriate where there has been a first written warning and a final written warning.
- The employee has a right of appeal.

(c) Grievances

The ACAS Code sets out a three stage process for handling grievances:

- The employee should raise the grievance in writing. Failing to raise a grievance in writing no longer prevents an employee from bringing a Tribunal claim, however they may receive less compensation if they have not done so.
- The employer should hold a meeting and investigate the complaint. When the meeting is concluded, the employer should communicate its decision in writing outlining any action it intends to take to resolve the grievance.
- The employee has a right of appeal.

(d) Right to be accompanied

A worker will normally have the right to be accompanied by a colleague or a trade union official at grievance and disciplinary meetings. The right to be accompanied may also apply in circumstances outside the statutory procedures. If the employee's choice of companion is unreasonable (i.e. could be prejudicial) the employer can request that the employee choose a different companion.

Discrimination

(a) Types of discrimination

Employees and applicants for employment have statutory protection against discrimination on a number of grounds:

- Race, colour, nationality or ethnic origin.
- Sex (which includes pregnancy, marital or civil partner status, or gender reassignment).
- Disability.
- Sexual orientation.
- Religion or similar belief.
- Age.

(b) Common discrimination concepts

Discrimination may take various forms:

- direct discrimination e.g. an employer decides not to offer an applicant with the requisite skills a position because he is believed to be gay;
- indirect discrimination e.g. an employer's dress code which does not allow employees to wear hats or scarves in the office would indirectly discriminate against Sikh men or Muslim women who wear turbans or hijabs;
- victimisation e.g. failing to promote an otherwise able candidate because she has made allegations of discrimination; or
- harassment e.g. teasing an employee about his partner's religious convictions. In the case of sex discrimination, harassment includes both sexual harassment and harassment on the ground of sex that is not necessarily sexual in nature.

There is a statutory defence to discrimination for employers where there is a genuine occupational requirement (in extremely rare circumstances employers will be able to specify that a particular characteristic, for example, a specific race or religion, is necessary for a job).

In each type of discrimination, it is unlawful for an employer to discriminate against a person on the particular discriminatory ground either:

- Prior to employment:
  - in the arrangements the employer makes for the purpose of determining who should be offered employment;
  - in the terms on which the employer offers employment; or
  - by refusing or deliberately omitting to offer him employment.
- During employment:
  - in the terms of employment which are afforded;
  - in relation to opportunities for promotion, transfer or training, or other benefits, facilities or services, or by refusing or deliberately omitting to afford the employee access to them; or
  - by dismissing the employee or subjecting him to any other detriment.
- After termination of the employment.

Any claim must be submitted to an Employment Tribunal within three months from the date of the alleged act of discrimination, unless the Tribunal believes that it is just and equitable to extend the time limit.

There is no minimum service requirement, that is, there is no minimum period during which an employee must have been employed before he is eligible for protection against discrimination.

There is no statutory maximum on the amount of compensation which can be awarded for a successful claim of discrimination. However, three bands have been identified by the courts for injury to feelings awards depending upon the seriousness of the discrimination in question: £600-6,000, £6,000-£18,000, and £18,000-£30,000.

By way of example, a requirement for employees to work full time is indirectly discriminatory against women with child care responsibilities whom, it is recognised, will find it harder to comply with such a requirement than men.

If the claimant proves facts which the Employment Tribunal could conclude, in the absence of an adequate explanation, to be an act of discrimination, victimisation or harassment, the Tribunal must uphold the complaint unless the Respondent proves otherwise.

(c) Sex discrimination

The Sex Discrimination Act 1975 (SDA) prohibits "direct" and "indirect" discrimination, harassment and victimisation on grounds of sex and marital status.

Direct Discrimination occurs where (regardless of motive) the employer:

- treats a woman less favourably on grounds of her sex than it treats, or would treat a man (or vice versa);
- treats a married person less favourably than it treats, or would treat, a single person (but **not** vice versa); or
- treats a transsexual less favourably than it treats, or would treat, someone who is not intending to undergo, is not undergoing or has not undergone a gender reassignment.

Indirect Discrimination occurs where the employer applies to a woman or married person a provision, criterion or practice which it applies or would apply equally to a man or an unmarried person, but which:

- puts or would put women or married persons at a particular disadvantage when compared with men or unmarried persons;
- does put the particular woman or married person at that disadvantage; and
- cannot be justified as a proportionate means of achieving a legitimate aim.

By way of example, a requirement for employees to work full time is indirectly discriminatory against women with child care responsibilities whom, it is recognised, will find it harder to comply with such a requirement than men. The test then is whether the requirement can be objectively justified as proportionate to achieving a legitimate, non discriminatory, aim in respect of the operation of the employer's business.

Harassment is defined as unwanted conduct with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This is judged by reference to all the circumstances, and in particular the perception of the person in question.

Victimisation occurs where the employer treats a person less favourably than others because that person threatens to bring proceedings, to give evidence or information, to take any action or make any allegation concerning the employer with reference to any legislation protecting against discrimination, or has already done any of those things.

(d) Race discrimination

Under the Race Relations Act 1976 (RRA) discrimination on grounds of race, ethnic and national origin is unlawful. In certain circumstances, there is also protection against discrimination on grounds of colour and nationality.

The RRA is drafted in very similar terms to the SDA. Both direct and indirect race discrimination are unlawful, as are harassment and victimisation.

(e) Age discrimination

The relevant legislation is the Employment Equality (Age) Regulations 2006, which has been in force since 1st October 2006.

The Age Regulations are drafted in very similar terms to the SDA and RRA in relation to direct and indirect discrimination, harassment and victimisation.

The Age Regulations also deal with the issue of retirement, which has been one of the most contentious aspects of the Regulations. Compulsory retirement of a worker once they reach a particular age is, in principle, direct discrimination on the grounds of age.

However, there is a special regime whereby compulsory retirement may be permitted for employees only. It does not apply to freelance workers, consultants, partners or directorships and other

company officers. The main principles are set out below.

- There are restrictions on the setting of normal retirement ages (NRA) for employees. An NRA of 65 or over is automatically permitted. An NRA of under 65 may be permitted if it can be objectively justified for the role in question, but this will be difficult in most cases. Where there is no NRA, the law sets a default retirement age of 65.

- A procedure has been introduced that must be followed prior to compulsory retirement of an employee, including a duty to consider an employee's request to continue working.

  - The employer must give 6-12 months' notice of retirement and of the right to request to continue working.

  - If an employee makes a request to continue working beyond their NRA, in writing, 3-6 months before the NRA, the employer must hold a meeting to consider it but the employer is under no obligation to grant it. The employee has a right of appeal.

  - If the employer grants an employee's request, it will have to follow the procedure again for the new retirement date if employment is extended for more than six months.

The government has recently set out proposals for phasing out the default retirement age. From 6 April 2011, employers will no longer be able to give notification of retirement on the basis of the default retirement age. From this date it is likely that employers will have to "objectively justify" the decision to retire an employee. In practice this means that the decision to retire an employee on the grounds of his age must:

- Correspond to a real need on the part of the employer;
- Be appropriate with a view to achieving the objectives pursued; and
- Be necessary to that end.

The burden is on the employer to prove justification.

(f) Sexual orientation

The relevant legislation is the Employment Equality (Sexual Orientation) Regulations 2003.

Sexual orientation is defined in terms of an orientation towards persons of the same sex, opposite sex or both. Discrimination on grounds of perceived as opposed to actual sexual orientation is also covered regardless of whether that perception is right or wrong. In each case, again, both direct and indirect discrimination are unlawful, as are harassment and victimisation.

Under the Civil Partnership Act 2004 two people of the same sex can gain legal recognition of their relationship by entering into a "civil partnership". Civil partners have the same status as a married person under the Sexual Orientation Regulations so civil partners who are treated less favourably than a married person may bring a claim for discrimination on the grounds of sexual orientation.

(g) Discrimination on grounds of religion or belief

The relevant legislation is the Employment Equality (Religion or Belief) Regulations 2003. Religion or belief are merely defined as "any religion, religious belief or philosophical belief".

In this context, discrimination extends to perceived as well as actual religion or belief and discrimination by association. In each case, again, both direct and indirect discrimination are unlawful, as are harassment and victimisation.

(h) Disability discrimination

The relevant legislation is the Disability Discrimination Act 1995 (as amended by the Disability Discrimination Act 2005) (DDA).

The DDA contains rather different definitions of discrimination to those referred to above. The DDA protects against direct disability discrimination, disability related discrimination, and failure to comply with a duty to make a reasonable adjustment. These are all explained below. In addition, harassment and victimisation are also unlawful on the grounds of disability.

The DDA contains a complex definition of disability, each aspect

An employer is under a separate duty to make reasonable adjustments where a provision, criterion or practice applied by or on behalf of it, or any physical feature of premises occupied by it, places a disabled person at a substantial disadvantage compared with people who are not disabled.

of which is supported by statutory guidance and common law. A person will count as disabled under the DDA if they have a "physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities". A person will also count as disabled if they suffered from such a condition in the past. The beneficial effects of medication and other treatment are discounted for the purposes of assessing whether a person has a disability and special rules apply in respect of progressive conditions. Often it will be unclear whether an employee's ill health amounts to a disability until a detailed medical report, ideally geared towards addressing the various aspects of the disability definition, has been obtained.

An employer's treatment of a disabled person will amount to unlawful direct discrimination if:

- It is on grounds of their disability;
- The treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
- The relevant circumstances, including the abilities of the person with whom the comparison is made, are the same as, or not materially different from, those of the disabled person.

Thus, if an employer makes generalised or stereotypical assumptions about a disability or its effects this is likely to amount to direct disability discrimination. For example, if an employer decides not to employ an applicant in a wheelchair on the basis of the assumption that the wheelchair will cause an obstruction in the office, that could constitute disability discrimination.

There is no justification defence for direct disability discrimination. The rationale of this is that employers should not be able to justify discrimination that occurs simply because someone has a disability, regardless of their ability to do the job. In particular, the distinction between treatment that is "on grounds of" disability which is unjustifiable, compared to treatment that is "related to" disability which is justifiable, will often be difficult to determine in practice.

An employer's treatment of a disabled person will amount to unlawful disability related discrimination if:

- It is for a reason related to their disability;
- The treatment is less favourable than the way in which the employer treats (or would treat) others to whom that reason does not (or would not) apply; and
- The employer cannot show that the treatment is justified.

In such cases the discrimination is not on the grounds of the disability itself, but a reason related to it, for example, where a disabled employee is on sick leave for a considerable period due to his disability and is dismissed on the basis of his prolonged absence. The dismissal may or may not be justified in the circumstances.

An employer is under a separate duty to make reasonable adjustments where a provision, criterion or practice applied by or on behalf of it, or any physical feature of premises occupied by it, places a disabled person at a substantial disadvantage compared with people who are not disabled. The employer must take such steps as are reasonable for it to take in all the circumstances to prevent that disadvantage. Where the duty arises, a failure to make a reasonable adjustment cannot be justified.

What amounts to a reasonable adjustment will vary from case to case depending upon the nature of the disability, the employee's role and the nature, size and resources of the employer's business. Typically reasonable adjustments might include changes to an employee's working days and hours or their job description – at least on a temporary basis, provision of extra resources or support and perhaps a greater tolerance of absence than would be enjoyed by non-disabled employees and flexibility of sick pay entitlement.

Consideration of reasonable adjustments should be undertaken in consultation with the employee and with reference to expert medical advice. It is worth talking to organisations representing those with the disability in question and the employer should also explore whether any grants are available to assist with making the adjustments under consideration.

Where dismissal is contemplated and the employee has more than twelve months service, the employer will also need to bear in mind the risk of an unfair dismissal claim.

(i) Treatment of part-time workers and fixed-term employees

It is unlawful for employers to treat part-time workers less favourably than comparable full-time workers in their terms and conditions of employment, unless different treatment can be objectively justified (Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

It is also unlawful for employers to treat fixed-term employees less favourably than similar permanent employees, unless different treatment can be objectively justified. Further, if fixed-term employees have their contracts renewed, or if they are re-engaged on a new fixed-term contract, when they already have a period of four or more years of continuous employment, the renewal or new contract takes effect as a permanent contract unless employment on a fixed-term contract was objectively justified or the period of four years has been lengthened under a collective agreement or workforce agreement (Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002).

(j) Equal pay

While the SDA 1975 is concerned with the elimination of discrimination in recruitment, training, promotion and other aspects of the employment relationship, the Equal Pay Act 1970 (EqPA 1970) is concerned with the establishment of equal terms and conditions of employment for both sexes. The application of the EqPA 1970 is subject to the overriding views of the European Court of Justice applying article 141 of the Treaty of Rome and the Equal Pay Directive (75/107/EEC). Article 141 provides that member states shall apply the principle that men and women should receive equal pay for equal work.

Broadly, the EqPA 1970 implies into all contracts of employment an "equality clause" which will operate when an employee is employed either on:

- Like work (that is work which is the same or broadly similar);
- Work which has been rated as being equivalent under a job evaluation scheme; or
- Work which is of an equal value;

to that performed by a member of the opposite sex in the same employment.

If any of these three situations exist, any term in a woman's contract which is less favourable than a man's contract shall be modified so as to be not less favourable, and any benefit in a man's contract shall be included in a woman's contract (or vice versa). An individual's remedy under the EqPA 1970 is to claim for breach of contract to an Employment Tribunal either during employment or within six months after leaving the employment to which their claim relates. They may claim arrears of remuneration or damages and such claims can be backdated for a period of six years.

(k) Equality Act

The Equality Act 2010 (the "EA") is due to come into force in stages from 1 October 2010. Under the EA various strands of discrimination law will be brought within the same act for the first time. The EA is very extensive and this note provides only a very brief overview of the major changes.

In summary the Act will:

- Harmonise the definition of direct discrimination to cover "associative" and "perceptive" cases of discrimination.
- Require large employers (of more than 250 employees) to report on their gender pay gap.
- Limit the enforceability of contractual "pay secrecy" clauses.
- Require public sector bodies to consider the "socio-economic" disadvantages when taking strategic decisions.
- Outlaw employers' pre-employment health enquiries unless they are for prescribed reasons.

A pregnant employee is entitled to a period of 26 weeks' ordinary maternity leave, a period of 26 weeks' additional maternity leave, Statutory Maternity Pay (SMP) for up to 39 weeks, paid time off to keep appointments for ante-natal care and protection from dismissal or detriment.

Families and pregnancy

(a) Maternity leave

A pregnant employee is entitled to the following rights:

- A period of 26 weeks' ordinary maternity leave (OML) during which she is entitled to the benefit of the terms of her employment, except remuneration, which would have applied if she had not been absent. The employee remains bound by any of her contractual obligations that are compatible with being on maternity leave. There is no qualifying service requirement for OML, although the employee must satisfy certain notification requirements. At the end of OML the employee has the right to return to her original job. If a redundancy situation arises, she must be offered a suitable alternative vacancy if one is available (that is, in preference to any affected employee who is not on maternity leave). If the employer cannot offer suitable alternative work, she may be entitled to statutory redundancy pay (if she has the requisite service).

- A period of 26 weeks' additional maternity leave (AML) during which terms and conditions which apply during OML will also apply. At the end of the AML the employee is entitled to return to her original job or, if this is not reasonably practicable, to a suitable alternative job. If the employer cannot offer suitable alternative work, she may be entitled to redundancy pay (if she has the requisite service).

- Statutory Maternity Pay (SMP) for up to 39 weeks if she has been employed by her employer for a continuous period of at least 26 weeks ending with the 15th week before the expected week of childbirth (EWC). The employee is entitled to 90% of their normal salary for the first 6 weeks of absence, then a further 33 weeks of pay at the lesser of 90% of their normal salary or the statutory rate which was increased from 4 April 2010 to £124.88. Employers may be able to recover some or all of the SMP which they pay to the employee. Employers who need to can get funding in advance from HM Revenue and Customs for payments of SMP.

- Paid time off to keep appointments for ante-natal care made on the advice of a registered medical practitioner, midwife or health visitor. Ante-natal care may include relaxation classes and parenting classes. The employee must show her employer (if it so requests) a certificate from a doctor and an appointment card. The time off should be paid. It is unlawful for an employer to dismiss an employee or to select her for redundancy in preference to other comparable employees, solely or mainly because she has sought to assert her statutory right to ante-natal care.

- Protection from dismissal or detriment. An employer may not dismiss an employee or select her for redundancy on grounds related to pregnancy or childbirth. A woman dismissed in these circumstances may make a complaint of automatically unfair dismissal, regardless of her length of service.

(b) Adoption leave

One half of an adopting couple (which includes civil partners) will be able to claim under the adoption leave provisions (the other half may be able to claim under the paternity leave provisions). Adoption leave is comprised of Ordinary Adoption Leave (OAL) and Additional Adoption Leave (AAL). Payment during adoption leave is on the basis of Statutory Adoption Pay (SAP). The rights which are available to an adoptive parent are broadly similar to those available to a woman who wishes to take maternity leave.

(c) Paternity leave

An employee who satisfies the following conditions will be eligible to receive two weeks' paid paternity leave at the weekly rate of £123.06 or 90% of normal salary, whichever is lower:

- 26 weeks continuous employment ending with the 15th week before the EWC.

- Is the biological father of the child or is married to or the partner (which includes civil partners) of the child's mother.

- Has or expects to have responsibility for the upbringing of the child.

Leave must normally be completed within 56 days from the birth of the child and must be taken to care for the child or support the mother.

An employee who satisfies the following conditions (in addition to

those required to be eligible for OPL) will be entitled to additional paternity leave (APL) of between two and twenty-six weeks:

- The mother or adopter (as applicable) must have returned to work having not exhausted their entitlement to OML or adoption leave. Only if the mother decides not to take a portion of her OML or AML will the father's right to APL crystallise.

The earliest that APL can be taken is twenty weeks from the date of birth of the child or placement for adoption.

Employees on APL are entitled to additional paternity pay (APP) at the same rate as SPP for the number of weeks the mother has remaining from her SMP entitlement.

(d) Parental leave

The key elements of parental leave are as follows:

- The right to take parental leave is available to employees with one year's service who have responsibility for a child.

- Up to 13 weeks' unpaid parental leave may be taken for each child up until the child's fifth birthday.

- Up to 18 weeks' unpaid parental leave may be taken for each disabled child up until the child's eighteenth birthday

- Leave is to be taken for the purpose of caring for a child.

- Leave must be taken in blocks of at least one week.

(e) Flexible working

Employees have the right to request a change to certain of their terms and conditions of employment if:

- On the date on which the application for a contract variation is made, they have been continuously employed for a period of no less than 26 weeks.

- They are the mother, father, adopter, guardian or foster parent of the child or are married to or are the partner (which includes civil partners) of such a person.

- They have or expect to have responsibility for the upbringing of the child. The child in question must be under the age of 17, or, if disabled, under the age of 18.

On receiving such a request the employer must consider it within a specified timetable and can only refuse on the basis of one or more of certain prescribed grounds. There are also a number of procedural requirements that must be followed by the employer.

The Employment Tribunal will have the power to order employers to reconsider decisions and award just and equitable compensation of up to eight weeks' pay.

(f) 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).

Compromise agreements can be used to settle disputes or breach of an employee's rights in the context of ongoing employment but are more commonly used to formalise termination packages.

Employment aspects of corporate transactions

(a) Share sales

When control of a company is acquired by way of a share sale, there is no direct effect on the employees of the target company. There is no change of employer in these circumstances and all contractual and statutory rights of the employees are preserved.

(b) Business transfers/asset sales

On the transfer of a business as a going concern the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) apply as follows:

- All employees of the seller (the transferor) who are employed in the "organised grouping of resources or employees" immediately before the transfer automatically become the employees of the buyer (the transferee) on their existing terms of employment without breaking their continuity of service.

- All rights, powers, duties and liabilities under the employment contract pass to the transferee.

- Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational (ETO) reason entailing changes in the work force. It will also be necessary to show that the dismissal was procedurally fair.

- Employees may refuse to transfer to the purchaser, but the effect is to terminate their employment without any right to compensation.

- The transferor and the transferee must inform and consult with elected employee representatives or trade union representatives of their own affected employees in relation to the transfer. If these obligations are breached an employment tribunal can award up to 13 weeks' actual pay for each affected employee.

Compromise agreements

One way in which an employee's statutory (as opposed to contractual) complaints can be settled (other than through an ACAS "COT3" agreement which can only be used once legal proceedings have commenced) is through a statutory "compromise agreement". As well as containing certain prescribed wording, in order for the agreement to be effective, the employee must have received independent legal advice in respect of the strength and value of their potential claims and the effect of the agreement in barring them from pursuing them.

Compromise agreements can be used to settle disputes or breach of an employee's rights in the context of ongoing employment but are more commonly used to formalise termination packages. The advantage to the employer is in having the comfort that there will be no subsequent claims from the employee as the employee will have waived their right to bring any such claims. The disadvantage is that if the employee would not otherwise have taken legal advice, they will end up better informed about their rights and potential claimsand may therefore seek more compensation from the employer than otherwise. Sometimes compromise agreements will be used as a pragmatic alternative to the employer properly complying with relevant statutory procedures, although generally the employer will be in a better negotiating position if it has at least made some effort to so comply. The mere suggestion of entering into a compromise agreement may also sometimes be interpreted as an admission by the employer that it has been at fault.

The employer will be expected to at least contribute towards the employee's legal costs, and to provide consideration to the employee in return for the compromise of their legal rights of action, beyond their basic financial entitlements upon termination.

Immigration

In 2008, the UK's work permit application process was replaced by a points – based migration system. There are five tiers under the new system: Tier 1 (highly skilled migrants); Tier 2 (skilled workers); Tier 3 (low-skilled workers); Tier 4 (students); and Tier 5 (temporary or exchange workers)

Any non – EEA national seeking entry or permission to remain in the UK for the purpose of employment will require immigration permission to work in the UK under one of the above tiers of the points based system before the employment starts. They may also need to comply with any visa requirements. Most EEA nationals have the right to enter, remain in and work in the UK without a work permit.

The precise requirements of the application process will vary depending on the nature of the work and the background of the proposed employee so it is strongly advised that employers wishing to employ foreign nationals in this country seek advice before doing so.

Employing someone who is not entitled to work in the UK may make the employer liable to a civil penalty or guilty of a criminal offence. An employer can be subject to a penalty of up to £10,000 per employee and up to two years' imprisonment. It is therefore vital that employers ensure that their employees have the appropriate permission to work in the UK before employment commences.

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These notes are intended merely to provide a summary of the law in this area and are not a comprehensive guide. They are not intended to provide advice for individual cases upon which specific advice should be taken.