Overview of UK (England and Wales) Employment Law

20 October 2015

This guidance note is intended to provide a brief overview of some of the many UK employment law issues that affect businesses who employ individuals directly, engage the services of workers or provide or use agency workers. Should you have any queries arising from this note then please visit the Contact details section.

Contents

1. Scope of employment regulation

Most laws regulating the employment relationship in the UK apply to foreign nationals wholly or ordinarily working in the UK, just as they do to British citizens. The law chosen by the parties in the employment contract will govern any contractual disputes, but it will not otherwise stop UK legislation applying to the employment relationship.

2. Employment status

Categories of worker

An individual may be an employee, a worker, or self-employed. The distinction is important, as it determines an individual's statutory employment rights, and how he is taxed. This can be particularly important in the context of recruitment businesses and accurately determining the status of agency workers, which can vary on a case by case basis.

Assessing an individual's status is not just determined by how the parties label the relationship. It is a question of law and fact.

An employee is an individual who has entered into, or works under, a contract of employment. A contract of employment may be in writing, but can also be found to exist by virtue of how matters operate in practice. In determining whether an individual is an employee, an Employment Tribunal will assess his integration into the workforce, considering:

- The degree of day-to-day control exerted over the individual by the business.
- Whether the business is obliged to provide work for the individual, and he is obliged to do it.
- Whether the individual is required to provide services personally or can send a substitute.
- The more these elements are present, the more likely the individual is to be deemed an employee.

The category of worker is slightly wider. It includes employees, but will also include an individual who has entered into a contract personally to perform any work or services for another party, as long as that other party is not the client or customer of any business carried on by the individual. Identifying an individual's employment status is not always straightforward, and categorisation of individuals as workers has proven particularly contentious over recent years.

An individual is self-employed if he provides services to another party in the course of running a business or profession in his own right.

Entitlement to statutory employment rights

Employees are entitled to the full range of statutory employment rights discussed later in this guidance note. This includes rights during employment, such as the right to a written statement of terms, and certain statutory minimum payments in the event of illness and some forms of family-related leave. It also includes rights on termination, including the right to a statutory minimum notice period, and some protection against dismissal. Some of these rights only apply after the employee has attained a minimum period of service (for example, unfair dismissal protection).

Workers are entitled to a more limited range of statutory employment rights. Like employees, they are entitled not to be discriminated against on the basis of a statutorily protected characteristic and to accrue a statutory minimum amount of holiday. However, they do not enjoy the same level of protection against dismissal as employees.

Self-employed individuals have few statutory employment rights, but are still entitled to certain minimum rights, such as a safe working environment when working at a client's premises.

Time periods

An individual's employment status is not determined by how long arrangements have been in place. Time periods are, however, relevant in the case of employees, who do not accrue some statutory rights until after they have served a certain period of continuous employment with the same employer.

3. Permission to work in the UK

Employers must prevent illegal working, and those who do not comply with their obligations can face criminal and civil penalties. It is therefore important that employers establish the approvals required for foreign nationals working in the UK.

Nationals of countries in the European Economic Area (EEA) and Switzerland do not require prior approval to live and work in the UK.

Other foreign nationals generally need to apply for prior approval to work in accordance with the UK's Points-Based System for immigration (PBS). There are some exceptions, for example the spouses and

civil partners (and, in certain circumstances, unmarried partners) of British citizens, EEA nationals, Swiss nationals and their dependants.

4. Regulation of the employment relationship

Written employment contract

An employer must give each employee a written statement of the particulars of his employment within two months of employment starting. The statement must contain:

- Names of the employer and employee.
- The employee's job title or a brief description of his role.
- The employee's start date (and when his continuous employment began, if earlier).
- The place of work, and (if different) the employer's address.
- How much and how often the employee will be paid.
- Terms and conditions relating to hours of work.
- Terms and conditions relating to holiday entitlement.
- Terms and conditions relating to sickness absence and sick pay.
- Terms and conditions relating to pensions (including whether the employee's pension is covered by a contracting-out certificate).
- Notice periods to terminate employment.
- For a non-permanent employee, how long the contract is expected to continue (or if it is for a fixed term, the date on which it will end).
- Details of disciplinary and grievance procedures that apply to the employee.
- Details of collective agreements that apply to the employee.
- Certain further information must also be provided to employees expected to work outside the UK for periods of more than one month.

Implied terms

In addition to express terms in a contract, English law implies certain terms into all employment contracts. These include a mutual duty of trust and confidence and obligations on both the employer and employee.

Obligations on the employee to:

- serve the employer faithfully;
- obey the employer's reasonable and lawful orders;
- exercise reasonable skill and care in performing his duties; and
- not, during the employment relationship, disclose the employer's confidential information or disrupt its business.

Obligations on the employer to:

- pay wages (provided the employee is willing and able to perform work), unless there is a contractual right not to do so;
- take reasonable care of the employee's health and safety; and
- promptly give the employee a reasonable opportunity to obtain redress for any grievances.

5. National Minimum Wage

All UK workers who are over school leaving age (currently 16) must be paid the National Minimum Wage (NMW). The NMW hourly rate depends on the worker's age. Rates are updated annually. Current rates with effect from 1 October 2015 are:

- £3.30 per hour for apprentices aged under 19 (or apprentices aged 19 or over in their first year of apprenticeship).
- £3.87 per hour for workers aged 16 to 17.
- £5.30 per hour for workers aged 18 to 20.
- £6.70 per hour for workers aged 21 or over.

If the employer provides the worker with free accommodation, it can offset the value of this against his NMW entitlement, by deducting up to £5.35 per day from his pay. No other benefits in kind count for these purposes.

Employers should keep records that confirm eligible employees have been paid at least the NMW. It is a criminal offence to pay eligible employees less than the NMW.

The Government has also recently announced plans to introduce a new compulsory "national living wage", which will effectively "top up" the NMW rate for certain eligible workers. This is expected to be introduced from April 2016.

6. Working time

Working hours

Workers are not generally permitted to work more than 48 hours per week (normally averaged over a 17-week period). However, most workers can, and do, opt out of this limit, although they can opt back in at any time, by giving written notice to the employer. The minimum notice required by statute is seven days, but this can be extended to up to three months by the contract of employment.

Rest breaks

Generally, a worker whose daily working time is over six hours is entitled to a 20-minute rest break away from his work station. Most workers are also entitled to a:

- Daily rest break of 11 hours of continuous rest in every 24-hour period.
- Weekly rest break of 24 hours of continuous rest in every seven-day period (or 48 hours of continuous rest in every fortnight).

Special provisions also apply to night workers, and young workers (those under the age of 18).

7. Holiday entitlement

Minimum holiday entitlement

All workers have the right to 5.6 weeks' paid holiday each year. For these purposes, a week means a normal working week for that individual (although the maximum statutory entitlement is 28 days, regardless of how long the normal working week is). If a worker starts or ends work part way through a holiday year he is entitled to paid holiday on a pro rata basis.

Holiday pay is paid at the same rate as normal pay, and should include any elements of pay directly linked to the work that the worker is required to carry out. Recent case law indicates that this should include commission, shift allowances and at least some forms of overtime (for example, where there is a settled pattern of work and a correspondingly regular overtime payment), at least in respect of the 20 days' holiday conferred by the underlying European legislation. Further case law is expected on this issue in the coming year.

It is unlawful to pay a worker in lieu of holiday entitlement except on termination, when a payment can be made in lieu of holiday that has accrued but not been taken.

Public holidays

There are currently eight permanent public and bank holidays in England and Wales. Although these can be (and frequently are) included in the minimum holiday entitlement of an employee, an employer does not have to let a worker take holiday on these days, if it otherwise provides him with his statutory holiday entitlement.

8. Illness and injury of employees

Entitlement to time off

Employees do not have a specific statutory right to take a set period of time off work in the event of illness or injury. However, it is generally recognised that there will be times when an employee is unable to attend work for these reasons.

An employee's written statement of particulars of employment should contain (or refer to) the terms that apply if he is unable to work due to illness or injury, including any sick pay to which he may be entitled.

Employers should also be aware that, if an employee becomes ill before or during a period of pre-booked holiday, he may request that the time off be re-classified as sick leave, so that he can take the holiday at a later date once he is well. Employers should ensure that appropriate measures are put in place for the reporting of sickness, and supporting medical evidence, in these circumstances to guard against potential abuse.

Entitlement to paid time off

Employees who are unable to work due to illness or injury for four or more consecutive days are entitled to receive statutory sick pay (SSP), provided they meet the qualifying conditions. Employees do not receive SSP for the first three days of any sickness absence. The current weekly rate of SSP is £88.45. The maximum entitlement is 28 weeks' SSP during any period of incapacity for work (or any series of linked periods).

An employee may also be entitled to contractual sick pay (that is, pay during sick leave at a higher rate than SSP) if the employer offers this benefit.

SSP, and any contractual sick pay, is paid by the employer. Since 6 April 2014 this cost is no longer recoverable from the state.

9. Family friendly rights

Maternity rights

Currently, all pregnant employees are entitled to both:

- 26 weeks' ordinary maternity leave (OML).
- 26 weeks' additional maternity leave (AML).

Employees do not have to take all 52 weeks of their maternity entitlement, but must take two weeks' compulsory leave directly after the baby is born (or four weeks, in the case of some factory workers).

Employees entitled to take maternity leave are also entitled to receive up to 39 weeks' statutory maternity pay (SMP) if they meet the requirements for:

- Length of service (at least 26 weeks' continuous service at the end of the 15th week before the expected week of childbirth (EWC)).
- Minimum earnings (which must be above the lower earnings limit for NICs, currently £112 per week).

Employees who meet these requirements are entitled to SMP at the rate of:

- 90% of their average weekly earnings (calculated according to the set statutory formula), for the first six weeks.
- The lesser of £139.58 per week or 90% of their average weekly earnings, for the remaining 33 weeks.

If an employee does not qualify for SMP, she may qualify for maternity allowance, which is a social security benefit paid by Jobcentre Plus (and currently available at the same rate as SMP). Except for remuneration, employees remain entitled to the benefit of contractual terms and conditions of employment during OML and AML.

An employee returning from OML is entitled to return to the same job she held before her absence, on the same or no less favourable terms of employment (unless a redundancy situation has arisen in the interim, in which case she is entitled to certain preferential treatment). An employee returning from AML has similar rights, unless it is not reasonably practicable for her to return to the same job, in which case the employer must let her return to another suitable and appropriate role.

Shared parental leave (SPL)

The new system of shared parental leave (SPL) and shared parental pay (SPP) is now available to eligible employees with a child due on or after 5 April 2015.

This effectively lets two eligible parents share the OML/AML and SMP entitlement currently available to the mother or a couple of adopters share the SAL and SAP entitlement currently available to the primary adopter, on the general basis set out below.

In a maternity context, if an expectant mother chooses to take SPL with her partner (instead of taking OML/AML herself), the couple can share up to 50 weeks' SPL and up to 37 weeks' SPP, between them. This is broadly equivalent to the maternity rights that the mother would otherwise have had, with the exception of:

- The two weeks' compulsory maternity leave directly after the baby is born, which the mother must still take.
- The rate of SPP, which is equivalent to the lesser "flat rate" of SMP only (as there is no higher rate for the first six weeks of leave).

Each parent can request SPL in up to three separate blocks of leave, to be taken either at the same time as each other or separately. Various advance notification requirements apply, and the employer's flexibility in responding to a request depends on the manner in which the SPL is requested:

- Where a parent requests a single continuous period of SPL, the employer must agree to the request.
- Where a parent requests multiple discontinuous periods of SPL, the employer can agree to the request, refuse it, or propose alternatives. If the employer refuses the request, the employee can choose to take the total amount of leave requested as a single continuous period instead (rather than in separate blocks), or can withdraw the request.
- Where the parents work for different employers, the employers do not have to contact each other to discuss their employees' respective leave requests, although in practice it can be helpful to do so.

Employees taking SPL have broadly similar rights to return to work as under the relevant maternity or adoption leave regime.

Paternity rights

With the advent of the new SPL regime, entitlement to additional paternity leave and additional statutory paternity pay has been abolished in respect of babies due on or after 5 April 2015 (although eligible employees may remain entitled to it in respect of babies born before this time).

Going forward, eligible employees' paternity rights will consist of two weeks' ordinary paternity leave (OPL) and ordinary statutory paternity pay (OSPP). To be eligible an employee must meet the requirements for:

- Length of service (at least 26 weeks' continuous service by the beginning of the EWC).
- Minimum earnings (which must be above the lower earnings limit for NICs, currently £112 per week).
- A sufficient connection with the child and mother/fellow adopter in question.

An employee who takes paternity leave may also be eligible for OSPP if he meets the necessary criteria. OSPP is currently paid at the lower of £139.58 per week or 90% of the employee's average weekly earnings (calculated according to the set statutory formula). Employees on paternity leave receive the benefit of all contractual terms and conditions of employment during OPL except remuneration (which is replaced by OSPP).

An employee returning from OPL is entitled to return to the same job he held before his absence, on the same or no less favourable terms of employment, unless the OPL was not an isolated period of leave, or was combined with other statutory leave (for example, parental leave exceeding four weeks). In the latter case, the employer is entitled to propose a suitable and appropriate alternative job for the employee, if it is not reasonably practicable for him to return to his old role.

Surrogacy

Surrogate mothers are entitled to take maternity leave and pay if they meet the relevant criteria.

Adoption and paternity leave are available for parents under a surrogacy arrangement if they adopt the child. There is no entitlement to maternity leave for the female adopter of a child born by way of a surrogate.

Adoption rights

An eligible employee who has elected to be the primary adopter of a child is entitled to statutory adoption leave (SAL), whether adopting from the UK or overseas (although slightly different procedural requirements apply in each case).

Eligible employees are entitled to 26 weeks' ordinary adoption leave and 26 weeks' additional adoption leave, provided they fulfil the necessary evidential and procedural requirements.

For a child placed for adoption after 5 April 2015, the adopter no longer needs to meet the previous requirement for 26 weeks' continuous employment before the start of the week when matched with the child by the adoption agency. However, this requirement still applies for an employee to be entitled to statutory adoption pay (SAP). Employees who satisfy the criteria are paid SAP at the lower of £139.58 per week or 90% of the employee's average weekly earnings (calculated according to the set statutory formula), for up to 39 weeks.

An employee returning from SAL is entitled to return to the same job held before absence, on the same or no less favourable terms, unless the SAL was not an isolated period of leave, or was combined with other statutory leave (for example, parental leave exceeding four weeks). In this case, the employer can propose a suitable and appropriate alternative job if it is not reasonably practicable for the employee to return to his old role.

Under the new SPL system introduced on 5 April 2015, an eligible couple adopting can choose to take SPL/SPP instead of any SAL/SAP entitlement. This effectively lets them share the SAL and SAP entitlement previously only available to the primary adopter, in a similar manner to maternity leave and pay. Adoption leave can also apply in surrogacy cases.

Parental rights

Parental leave allows eligible employees to take unpaid time off to care for a child or make arrangements for the child's welfare. An eligible employee can take off up to 18 weeks' unpaid parental leave for each child, up to the child's 18th birthday.

Carers' rights

Any employee with at least 26 weeks' continuous service can make a flexible working request if certain criteria are met. If granted, such requests involve a permanent change to the employee's terms and conditions, for example, by allowing him to work particular hours or to work from home. They are therefore often made by employees with caring responsibilities (although this is no longer a prerequisite).

An employer has three months to consider and respond to an employee's flexible working request, and must do so in a reasonable manner. ACAS has published useful guidance outlining how an employer might comply with this requirement.

An eligible employee may only make one flexible working request within any 12-month period. An employer is not obliged to agree to a request if a statutory reason for rejection applies, for example, cost, impact on performance, or inability to reorganise work among other staff.

10. Fixed term, part-time and agency workers

Fixed-term employees

A fixed-term employee is an employee employed for a fixed period of time, rather than on a permanent basis. If an employer wishes to engage employees temporarily or for a specific task itself, rather than via an employment business, it will often do so on a fixed-term basis.

Generally, an employer should not treat a fixed-term employee less favourably than a comparable permanent employee in relation to his contractual terms, or subject him to any detriment because of his fixed-term status, unless that treatment can be objectively justified. An employer can objectively justify a difference in contractual terms if the fixed-term employee's terms, taken as a whole, are at least as favourable as those of a comparable, permanent employee. Remuneration and benefits may also generally be applied on a pro rata basis to reflect the time actually worked.

Fixed-term employees accrue employment rights in the same way as permanent employees. In addition, a fixed-term employee will be considered automatically unfairly dismissed if the reason for his dismissal was that he sought to assert a right conferred on him by the legislation governing fixed-term employees.

Employers should also be aware that an employee who is continuously employed under a series of fixed-term contracts for at least four continuous years will be deemed to be a permanent employee. The employer must also be able to objectively justify continuing to use fixed-term contracts after this time.

Part-time workers

A part-time worker is an individual paid wholly or partly by reference to the time he works, and who works fewer hours in a given period than a comparable full-time worker. A part-time worker can be engaged on a permanent or fixed-term basis.

Similarly to fixed-term employees, a part-time worker is entitled to be treated no less favourably than a comparable full-time worker by reason of his part-time status, unless the employer can objectively justify the differential treatment. Remuneration and benefits may also generally be applied on a pro rata basis to reflect time actually worked.

Part-time employees accrue employment rights in the same way as full-time employees. In addition, a part-time employee will be considered automatically unfairly dismissed if the reason for his dismissal was that he sought to assert a right conferred on him by the legislation governing part-time workers.

Agency workers

An agency worker "signs up" with an employment business to work for one or more of their clients (or hirers). Therefore, agency workers could, more accurately, be described as employment business workers. They often undertake specific pieces of work or are engaged for a fixed period; their work is therefore often temporary. However, agency workers can be engaged on an open-ended basis and engagements do not have to be short term. They may last for some time, depending on the needs of the client to which they have been assigned by the employment business.

Rights of agency workers

The rights of agency workers are often far from clear because:

- Different employment rights and obligations are based on different tests of employment status. Rights may depend on the agency worker being: an employee, a worker, or "in employment" for the purposes of the Equality Act 2010 (EqA 2010).

- Some legislation deals specifically with agency workers and either grants or excludes certain rights regardless of their employment status.

Agency Workers Regulations 2010

The Agency Workers Regulations 2010 (SI 2010/93), which implement the European Temporary Agency Workers Directive 2008/104/EC, came into force on 1 October 2011. They introduce new rights for agency workers, including:

- The right to the same pay and other "basic working conditions" as equivalent permanent staff after a 12-week qualifying period.

- Access to collective facilities and to information about employment vacancies from day 1 of their assignment.

Discrimination

Agency workers may potentially be protected against discrimination by the EqA 2010 in the following ways:

- Agency workers are often "employed" by the employment business in the wide discrimination law sense, so can claim against the employment business under the normal "employee" discrimination provisions.

- Further, there are specific rules set out in sections 55 and 56 of the EqA 2010 protecting work-seekers and others against discrimination by employment businesses and employment agencies.

- Agency workers who are "employed" by the employment business and supplied to the end-user client will be "contract workers", and therefore protected against discrimination by the end-user "principal."

National minimum wage

Agency workers will be entitled to receive the national minimum wage (NMW) either:

- If they satisfy the definition of "worker" under section 54 of the National Minimum Wage Act 1998 (NMWA 1998).

- Where there is no worker's contract, under the specific agency work provisions in the NMWA 1988. These provide that an agency worker will be treated:

"... as if there were a worker's contract for the doing of work by the agency worker made between the agency worker and:

(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) if neither the agent or the principal is so responsible, whichever of them pays the agency worker in respect of the work." (Section 34(2), NMWA 1998.)

Statutory sick pay

If an agency worker is an "employed earner" for NIC purposes, they are also treated as an employee for statutory sick pay (SSP) purposes, and will be entitled to SSP if they satisfy the qualifying conditions.

Pregnancy, maternity, paternity and adoption

The "family-friendly" rights of agency workers are not as favourable as those of employees.

Pay and leave

If an agency worker is an "employed earner" for NIC purposes, they will be entitled to statutory maternity, paternity or adoption pay from the employment business if they meet the other qualifying conditions.

However, agency workers will only be entitled to statutory maternity, paternity or adoption leave if they are employed by the employment business. In practice, an agency worker who is not an employee but wants to take paid maternity, paternity or adoption leave will notify the employment business at the appropriate time and will decline any further placements until they want to start work again. If they are not employees, agency workers will generally have no right to return to the same or a similar job following a period of leave related to birth or adoption. In some circumstances, however, they may be able to claim the protection of discrimination law.

Pregnancy and maternity discrimination

If an agency worker falls within the scope of the EqA 2010, they will be protected against unfavourable treatment because of pregnancy (including pregnancy-related sickness) during the "protected period" (section 18(2), EqA 2010), and less favourable treatment related to pregnancy or childbirth or its consequences (section 13, EqA 2010), as interpreted in line with ECJ case law.

For employees, the "protected period" is in most cases the period from conception to the end of statutory maternity leave. If a woman is not entitled to statutory maternity leave (for example, because she is not employed under a contract of employment), the protected period ends two weeks after the end of the pregnancy (section 18(6), EqA 2010). Generally, this means that the protected period of an agency worker ends two weeks after birth (if they are not employees and therefore not entitled to maternity leave). However, where an agency worker is an employee and therefore entitled to maternity leave, her protected period will last until the end of her statutory maternity leave period. The effect is that, although the client is not obliged to give her maternity leave, it cannot treat her unfavourably because she has taken statutory maternity leave from the employment business (section 18(4), EqA 2010).

After the end of the protected period, the EqA 2010 does not give women an absolute right to return to work in their previous assignment. However, it may be unlawful to refuse to "reinstate" an agency worker in her previous role where the reason for doing so is because she is pregnant or has had a baby.

Clients should also be prepared to consider requests for changes to working hours to accommodate an agency worker's childcare responsibilities, even though the flexible working legislation does not apply to agency workers. A refusal may amount to indirect discrimination unless it can be objectively justified.

Working time

Agency workers are entitled to protection under the Working Time Regulations 1998 (WTR 1998) either:

- If they satisfy the definition of "worker".

- Where there is no worker's contract, under the specific agency worker provisions in the WTR 1998. These provide that an agency worker will be treated:

"... as if there were a worker's contract for the doing of work by the agency worker made between the agency worker and:

(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) if neither the agent or the principal is so responsible, whichever of them pays the agency worker in respect of the work, and as if that person were the agency worker's employer." (Regulation 36(2), WTR 1998.)

If the agency worker is a "worker" of either the employment business or the client, that party will be responsible for ensuring that the requirements of the WTR 1998 are observed. However, if the individual does not meet this definition, in a similar manner to the NMWA 1998, the party with specific responsibility for paying the agency worker will be treated as the employer for the purposes of compliance with the WTR 1998. If there are no specific arrangements, the party which actually pays the agency worker will be obliged to comply with the WTR 1998.

Flexible working

The right to make a flexible working request is available only to employees; other than an agency worker who is returning to work from a period of parental leave, agency workers are expressly excluded.

However, since agency workers are protected by discrimination law, a female agency worker who requests more "family-friendly" hours will be able to take advantage of the law on indirect sex discrimination.

11. Discrimination and harassment

Protection from discrimination

It is unlawful to discriminate against job applicants and workers on the basis of any of the following protected characteristics:

- Sex.
- Marital or civil partnership status.
- Race (including colour, nationality and ethnic or national origin).
- Gender reassignment.
- Religion or belief.
- Sexual orientation.
- Pregnancy and maternity.
- Age.
- Disability.

Job applicants and workers are protected from various forms of discrimination, including:

- Direct discrimination.
- Indirect discrimination.
- Harassment.
- Victimisation.

The forms of discrimination apply to each of the protected characteristics to varying degrees.

A worker does not need any qualifying period of service before bringing a discrimination claim (or even to have started work at all, in the case of job applicants). The amount of compensation that can be awarded in the event of a successful claim is uncapped, although it is generally linked to actual and/or potential future loss suffered by the individual, in the usual way.

Protection from harassment

Harassment is a form of unlawful discrimination. It is prohibited if it relates to any of the protected characteristics (except for marital or civil partnership status, or pregnancy and maternity).

An employer is liable for harassment if it is found to have engaged in unwanted conduct related to a relevant protected characteristic, that either:

- Has the purpose or effect of violating a worker's dignity, or
- Creates an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

The test for whether the conduct had either of these effects is partly subjective, and partly objective. The first step is to consider whether the individual in question perceived the conduct as having this effect. If so, the next step is to determine whether it was objectively reasonable for the conduct to have had that effect or whether the individual was being hyper-sensitive in perceiving it as such.

An employer should also take care in dealing with any situation involving the harassment of its workers by third parties (for example, customers). Even though employers are no longer specifically liable for third-party acts, it is potentially arguable that an employer's reaction (or failure to react) to this situation could amount to harassment by the employer itself in certain circumstances.

12. Termination of employment

Notice periods

All employees are entitled to receive from their employer the minimum notice of termination to which they are entitled by statute.

An employee who has been continuously employed for more than one month but less than two years is entitled to receive one week's notice. Thereafter, he is entitled to receive an additional week's notice for each complete year of service, up to a maximum of 12 weeks. By contrast, the statutory minimum notice that an employee must give to his employer does not increase with time but remains fixed throughout employment at one week.

It is common for employment contracts to provide for notice periods that exceed the statutory minimum, in which case the longer contractual period will apply. Employment contracts also often give employers the discretionary right to make a payment in lieu of an employee's notice period, although care should be taken in drafting and exercising such provisions.

An employee may be dismissed summarily (that is, without any notice period) if he commits a repudiatory breach of the employment contract that would justify this (for example, gross misconduct).

Severance payments

An employee who has been continuously employed by his employer for two years is entitled to a statutory redundancy payment (SRP) if he is dismissed on grounds of redundancy. SRP is calculated in accordance with a statutory formula based on the employee's age, salary and length of service.

There are no further statutory rights to severance payments, although an individual's employment contract may provide for some form of severance payment. On termination, the employee is entitled to any amounts he has accrued under the contract that have not yet been paid.

An employee who has the required length of service and brings a successful claim for unfair dismissal may also be awarded a compensation payment. This will consist of:

- A basic award (calculated in the same way as SRP but only payable if the employee has not already received this).
- A possible compensatory award based on an employee's actual and/or potential future financial loss. This is currently capped at the lower of £78,335, or 52 weeks' actual gross pay at the time of dismissal.

Currently, any redundancy payment or other such compensation payment may be paid free of tax up to £30,000 in aggregate and without payment of National Insurance contributions. However, HMRC is currently reviewing this arrangement.

Procedural requirements for dismissal

An employer should comply with any contractual obligations regarding termination of employment to avoid giving rise to a breach of contract claim.

A fair and reasonable process is required in dismissing any employee who has acquired the right not to be unfairly dismissed. It is also good practice for an employer to follow such a process in other cases, to reduce the risk of other claims that might arise from the dismissal, for example, discrimination claims.

What constitutes a fair and reasonable process depends on the circumstances and the reason for the dismissal. For example, when dealing with misconduct issues, employers should comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (Code). This typically involves:

- Conducting a reasonable investigation.
- Determining whether it is appropriate to instigate the disciplinary procedure.
- Informing the employee of the allegations against him.
- Holding a disciplinary hearing.
- Providing an opportunity to appeal.

This is particularly important when dealing with employees who are entitled to claim unfair dismissal, as failure to follow the Code can result in an employee's compensation award being increased by up to 25%, in the event of a successful claim. Similarly, an employee who fails to comply with the Code could suffer a reduction in his compensation award of up to 25%.

Protection against dismissal

Employees who have been continuously employed by an employer for two years or more have a right not to be unfairly dismissed.

An employee is unfairly dismissed unless an employer can establish that both:

(1) One of the five statutory reasons for dismissal applies, namely:

- conduct;
- capability;
- redundancy;
- breach of statutory restriction; or
- some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) It acted reasonably in treating that reason as sufficient to justify dismissal of that employee. In practice this generally requires that, among other things, the employer follows a fair and reasonable process in effecting the dismissal.

Some specific categories of employee are not entitled to claim unfair dismissal, generally key roles in the public sector (for example, members of the armed forces and police service employees).

Employees who successfully bring a claim for unfair dismissal may be entitled to compensation.

Protected employees

An employee who does not meet the minimum service requirement can still claim unfair dismissal in certain situations, for example where the dismissal relates to:

- His political beliefs or affiliations.
- His membership or non-membership of a trade union, or participation in union-related activity.
- His participation in health and safety-related activity.
- His status as an employee representative (or candidature for such a role).
- His status as a fixed-term employee or part-time worker.
- A protected characteristic possessed by the employee or a claim of discrimination previously made by the employee.
- A protected disclosure made by the employee.

13. Redundancy/layoff

Definition of redundancy/layoff

An employee is made redundant when he is dismissed by his employer wholly or mainly as the result of any of the following:

- Business closure (the employer closing down, or intending to close down, the business for which an employee works).
- Site closure (the employer closing down, or intending to close down, the particular site where an employee works).
- Headcount reduction (the employer needing fewer employees to carry out work of a particular kind, either across the business or at the particular site where the employee works).

An employee is "laid off" when his employer exercises a contractual right not to provide him with work, or, therefore, pay during a given period.

Procedural requirements

Redundancy is a potentially fair reason for dismissal if a genuine redundancy situation exists. However, for the dismissal to be fair (when dealing with employees who have accrued unfair dismissal rights, the employer must also act reasonably in treating the redundancy situation as sufficient to justify dismissal. In practice, this means that the employer should follow a fair and reasonable redundancy process. What constitutes a fair process depends on the circumstances, but it will generally involve:

- Making a fair assessment of which roles are at risk of redundancy.
- If appropriate, using a fair and objective method of selecting which individuals are to be put at risk of redundancy.

The employer should also consult affected employees about:

- The proposed redundancy.
- The selection process.
- Any potential alternatives to redundancy, such as any suitable alternative vacancies in the employer's organisation into which those at risk of redundancy might be redeployed.

If redundancies are confirmed, those dismissed should be given an opportunity to appeal. The employer may also have to comply with collective consultation obligations.

Redundancy pay

Employees with two or more years' continuous service are entitled to receive SRP if they are made redundant.

SRP is calculated on the basis of a set formula that takes account of the employee's age, salary and length of service at the termination date. An employee is entitled to receive:

- Half a week's pay for each complete year of employment while under the age of 22.
- One week's pay for each complete year of employment between the ages of 22 and 40.
- One-and-a-half week's pay for each complete year of employment at the age of 41 or over.

The amount of a week's pay for these purposes is capped by statute at £475, and the maximum amount of SRP payable to any employee is capped at £14,250.

Collective redundancies

An employer must consult collectively with elected employee representatives if it proposes to dismiss as redundant 20 or more employees within a period of 90 days or less. Recent case law has confirmed that the figure of 20 is drawn from redundancies proposed at one establishment, rather than across the employer's entire workforce (although what is meant by "establishment" will depend on the facts in each case).

Employers should also be aware that, for these purposes, a "dismissal" will include any dismissal proposed for a reason that does not relate to the particular employee. Dismissals proposed should an employee not agree to changes in his terms and conditions will therefore count towards the total as well as redundancies (although the non-renewal of a fixed-term contract when it expires will not).

In the absence of any pre-existing arrangement, an employer's collective consultation obligations include making arrangements for the election of employee representatives, and consulting with those representatives about whether there are any:

- Alternatives to the proposed redundancies.
- Ways to mitigate the impact of the proposed redundancies on affected staff.

Consultation should start in good time before any redundancies are confirmed. Any dismissals should not take effect until at least:

- 30 days after an employer's consultation obligations have been triggered if between 20 and 99 redundancies are proposed.
- 45 days after an employer's consultation obligations have been triggered, where 100 or more redundancies are proposed.

14. Consequences of a business transfer

Automatic transfer of employees

The Transfer of Undertakings (Protection of Employment) Regulations (commonly referred to “TUPE”) protects the employment of employees affected by a business transfer or a service provision change. It automatically transfers the employment of all those assigned to the undertaking in question (that is, the part of the business being sold, or the function being in/outsourced) to the transferee (that is, the buyer of the business, or the provider of the in/outsourced services).

Transferring employees' terms and conditions of employment are protected and transfer intact (with the exception of some specific types of benefits under an occupational pension scheme, to which different rules apply).

Protection against dismissal

In tandem with the automatic transfer of their employment, employees with unfair dismissal rights also receive additional protection from dismissal, before and after the transfer.

Dismissal is automatically unfair if the sole or principal reason for it is the transfer itself.

A dismissal will also be unfair if the sole or principal reason for it is an economic, technical or organisational reason that entails changes in the numbers or functions (or a change in the workplace) of the workforce (an ETO reason), unless the employer can also show that a fair process was followed.

Harmonisation of employment terms

Employers often wish to change the terms of any employees inherited under TUPE to harmonise them with their existing workforce.

However, this can be difficult to achieve in practice, because TUPE provides that any change to a transferring employee's terms and conditions of employment will be void and unenforceable if the sole or principal reason for the change is the transfer itself.

However, TUPE does not prevent a change to an employee’s contractual terms if either:

- The terms of the contract itself permit the employer to make that change.
- The sole or principal reason for the change is an ETO reason, and the employer and employee both agree to the change.

An employer also has scope to change terms that are incorporated into an employee’s contract from a collective agreement, so long as the change takes effect more than one year after the transfer date, and overall leaves the rights and obligations in the contract "no less favourable" to the employee than previously.

Employers who seek to harmonise terms will generally still run the risk that an employee might claim that any detrimental change to their old terms is not valid under TUPE, while potentially accepting any changes that do benefit them.

In practice, employers therefore often wait until some time after the transfer before making any changes, to lessen the chance an employee might claim that the change is connected with the transfer. However, the passage of time is no guarantee that a connection with the transfer will not exist. It can therefore be more effective to look for a strong ETO reason to make changes (for example, a general reorganisation of the transferee's business, affecting all employees rather than just those transferred).

Information and consultation

Transferring employees are entitled to elect representatives, whom the employer must:

- Inform about the proposed transfer.
- Consult about any measures envisaged in relation to the proposed transfer that will impact on affected employees.

The employer can discharge any consultation duties under TUPE by engaging in consultation with the employee representatives with a view to reaching agreement. It is not a requirement of TUPE that agreement is actually reached between the parties before the proposed transaction can proceed. TUPE does not therefore give the employees of either party a right to block a proposed transaction.

15. Taxation of employment income

Taxation of individuals in the UK is determined by residence and domicile status. Residence is defined according to the satisfaction of certain criteria contained within a statutory residence test (SRT) and domicile is a concept that derives from case law. Domicile can be determined by origin, choice or dependency and does not necessarily align with nationality.

The SRT distinguishes between "Arrivers" and "Leavers". In outline, Arrivers are individuals who have not been resident in the UK for any of the three previous tax years and Leavers are those who have been. Residence is determined by the number of days an individual spends in the UK during the tax year in question and that individual's connections to the UK. The application of the SRT is very fact specific, however, as a basic rule, where an individual has spent 183 days or more in the UK, that individual will be considered UK resident for the tax year in question. The UK tax year runs from 6 April to 5 April. For the purpose of SRT, a "day" is defined by statute. Broadly, a day counts as a day spent in the UK where the individual is present in the UK at the end of the day (midnight).

Foreign nationals

Work carried out in the UK by a foreign national employee is taxable in the UK. This is the case regardless of where the employing entity is located.

Foreign nationals can be resident in the UK for tax purposes. Potentially, individuals resident in the UK can be liable to UK tax on their worldwide income (subject to reliefs for double taxation). However, the rules relating to residence and domicile are very complex and some short term residents and individuals who are regarded as resident but not domiciled in the UK may not be taxed on offshore income and gains if the funds are not remitted to the UK (the Remittance Basis). If a non-UK domiciled but UK resident employee who claims the Remittance Basis of taxation carries out their employment duties overseas for an overseas employer, then HM Revenue & Customs (HMRC) may accept that the overseas employment income is not subject to UK tax, to the extent that the funds are not remitted to the UK. However, HMRC would apply UK tax to overseas employment income if any duties are carried out in the UK, apart from "merely incidental" duties.

It used to be commonplace for UK resident non-domiciled individuals with employment activities in both the UK and overseas to enter into separate dual employment contracts with both a UK employer and an overseas employer in order to avoid UK tax on remuneration received for overseas duties, provided that the Remittance Basis was claimed and funds were not remitted to the UK. However, new legislation introduced in the tax year 2014-2015 has greatly restricted use of dual employment contracts in this way.

Foreign nationals who are not resident in the UK for tax purposes will pay UK tax only on UK source income and gains including UK source investment income.

Broadly, where an individual is in full time work in the UK and there is no significant break in work over 30 days, that individual will most likely be considered resident for UK tax purposes.

For the purposes of the SRT, a "working day" means at least three hours spent working.

Rate of taxation on employment income

For the 2015 to 2016 tax year, income is taxed at the following rates, depending on the level of income after any applicable allowances or relief:

- Income up to £31,785 is taxed at 20%.
- Income of £31,786 to GB£150,000 is taxed at 40%.
- Income over £150,000 is taxed at 45%.

16. Useful Links

If you would like further information on the topics raised in this advice note, guidance can be found at the following websites:

- http://www.acas.org.uk/
- http://www.jobsatteam.com/
- http://npaworldwide.com/
- http://www.brabners.com/practices/employment
- The SSP Calculator (https://www.gov.uk/calculate-statutory-sick-pay) and holiday calculator (https://www.gov.uk/calculate-your-holiday-entitlement) can be useful tools to help businesses calculate holiday and SSP entitlement.

17. Contact details

If you would like more information about any of the topics set out above, or you wish to discuss any employment law issue you may have, please contact:

Paul Chamberlain: 0161 836 8864
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