An Overview of Employment Law in England and Wales

Contents

1. Categories of worker and associated rights

Employee	Worker	Self-Employed
An employee is an individual who has entered into, or works under, a contract of employment. The contract may be in writing, but can also exist by virtue of how matters operate in practice. The key factors in determining employee status are the level of control the individual is subject to, the mutual obligation for the employer to provide and employee to accept work, whether the individual is required to perform the services themselves (ie they cannot send a substitute). Employees' statutory rights include all those of the worker, in addition to: ▪ Entitlement to Statutory Sick Pay, maternity, paternity, adoption and shared parental leave and pay; ▪ Entitlement to minimum notice periods; ▪ Protection against unfair dismissal; ▪ The right to request flexible working; ▪ Entitlement to time off for emergencies; ▪ Entitlement to Statutory Redundancy Pay; ▪ Covered by Acas Code of Practice on Disciplinary and Grievance Procedures.	The category of worker includes all individuals who have entered into a contract personally to perform any work or services for another party, as long as the other party is not the client or customer of any business carried on by the individual. Employees are also included in the broad definition of 'worker'. Statutory worker rights include the following: ▪ Entitlement to be paid the National Minimum Wage; ▪ Protection against unlawful deductions from wages; ▪ Entitlement to the statutory minimum level of paid holiday; ▪ Entitlement to the statutory minimum length of rest breaks; ▪ Entitlement to not work more than 48 hours on average per week or to opt out of this right if they choose; ▪ Protection against unlawful discrimination; ▪ Protection for 'whistleblowing' – reporting wrongdoing in the workplace; ▪ Entitlement to not be treated less favourably if they work part-time.	An individual is self-employed if they provide services to another party in the course of running a business or profession in their own right. Although self-employed individuals have limited statutory employment rights, they are entitled to: ▪ Protection for health and safety at work and in some circumstances, protection against discrimination; ▪ Have their rights and responsibilities set out by the terms of the contract with their client.

2. Permission to work in the UK

Employers have a duty to ensure that their employees or workers have the required rights to live and work in the UK and as such have an obligation to prevent illegal working. Employers who fail to comply with this duty may be guilty of both civil and criminal offences.

At the time of writing, nationals of countries in the European Economic Area (EEA) and Switzerland do not require permission to live and work in the UK.

Foreign nationals from areas outside the EEA and Switzerland will be subject to the UK's Points Based System for Immigration, with exceptions made for certain individuals, such as spouses, civil partners and children of British citizens, EEA and Swiss nationals.

3. The Good Work Plan

The Good Work Plan sets out the reforms to be introduced by the Government as a response to the 'Taylor Review of Modern Working Practice'. The focus of the Good Work Plan is to bring:

- More robust protections on pay;
- Enhanced workers' rights; and
- Fair and decent work for all.

Since the Good Work Plan was published in December 2018, a limited number of reforms have been implemented, these are:

- The right to itemised payslips, which must be provided at or before the time when any payment of wages or salary is made; and
- An increase in the maximum penalty for an "aggravated" breach of employment law from £5,000 to £20,000, for breaches occurring on or after 6 April 2019.

A number of other reforms are scheduled for April 2020 and further consultations are being conducted by the Government.

4. Regulating the employment relationship

Implied terms

All employment contracts under the law of England and Wales are subject to implied terms and a mutual duty of trust and confidence.
The employee must:

- Serve the employer faithfully;
- Obey the employer's reasonable and lawful orders;
- Exercise reasonable care and skill in performing their duties; and
- Not, during the employment relationship, disclose the employer's confidential information or disrupt its business.

The employer must:

- 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.

The (written) employment contract

Within 2 months of the commencement of employment, the employer is obliged to give each employee a written statement of particulars of his employment, which must set out:

- Names of both employer and employee;
- Employee's job title and a description of their role;
- Employee's start date;
- The place of work and employer's address, if different;
- How much and how often the employee will be paid;
- Terms and conditions of hours of work;
- Terms and conditions of holiday entitlement;
- Terms and conditions of sickness absence and pay;
- Terms and conditions of pension entitlements (and whether the employee's pension is covered by a contracting out certificate);
- Notice period to terminate employment;
- In the case of a non-permanent employee, how long the contract is expected to continue, or the fixed end date;
- Details of disciplinary and grievance procedures relevant to the employee;
- Details of collective agreements that apply to the employee;
- Certain further information must be provided to employees expected to work outside of the UK for periods of one month or more.

5. National Minimum Wage & National Living Wage

All employers are legally required to pay the national minimum wage (NMW) to their employees, provided that the employees are of school leaving age (currently 16).

In order to receive the national living wage (NLW), the employee must be 25 or over. The set hourly rates from 1 April 2019 to 31 March 2020 are set out below:

Apprentice	£3.90 per hour
Under 18	£4.35 per hour
18 to 20	£6.15 per hour
21 to 24	£7.70 per hour
25 and over	£8.21 per hour (NLW)

(Note: apprentices are those aged under 19 or in the first year of their apprenticeship).

Where the employer is providing free accommodation to the worker, it is able to offset the value of the accommodation against the employee's NMW entitlement. In 2019, the maximum daily deduction from NMW for accommodation is £7.55.

It is a criminal offence to pay eligible employees less than NMW and NLW. Employers should keep records to confirm that eligible employees are paid the correct rate.

6. Working Time Regulations

Working Hours

Take reasonable steps to ensure each worker's average working time (including overtime) per week does not exceed 48 hours. Most workers opt out of this limit, but can opt in at any time provided that written notice is given to the employer.

Rest Breaks

Workers must have adequate rest breaks where the work is of a nature which would put their health and safety at risk, in particular monotonous work.

A worker is entitled to:

- A daily rest period of 11 consecutive hours in each 24 hour period; and
- A weekly rest period of 24 hours of continuous rest every 7 days (or 48 hours of continuous rest every 14 days).

Young workers (under 18) and night workers are subject to further special provisions.

7. Holidays

All workers are entitled to a minimum of 5.6 weeks' paid holiday in each year. Where the average working week is 5 days, this will amount to 28 days of leave. A worker cannot be entitled to more than 28 days' statutory leave in one year. Where a worker commences employment part way through the year, they are entitled to paid holidays on a pro rata basis.

Under EU law, all workers are entitled to a minimum of 4 weeks' annual leave each year. In England and Wales, workers are entitled to an additional 1.6 weeks' holiday each year. This accounts for the number of bank holidays there are in each year. An employer is not obliged to let a worker take holiday on bank holidays, but must otherwise allow them to their statutory entitlement.

Holiday pay is paid at the same rate as the worker's normal pay. If the worker receives additional elements to their normal pay on a regular basis, over a sufficient period, this should be included in the calculation of pay for holidays, such as:

- Overtime (compulsory, voluntary or non-guaranteed);
- Commission;
- Incentive bonuses;
- Performance bonuses;
- Payments related to the "personal and professional status" of workers;
- Shift allowances and premiums;
- Travel and other allowances; and
- Standby payments and payments for emergency on-call duties.

At present, the reference period for which holiday pay is calculated is an average taken over 12 weeks. From April 2020, this will increase to 52 weeks (or the number of complete weeks for which the worker has been employed, if that period is less than 52 weeks). This change is being implemented as part of the Good Work Plan.

8. Managing employee absence

Right to time off for illness or injury

- No specific statutory right to take time off work in cases of illness or injury.
- The contract of employment should refer to the circumstances that apply where an employee is unable to work as a result of illness or injury.
- Where an employment contract is silent on the terms of illness and injury, there may be an implied term that an employee is not required to work when they are not fit to carry out their duties.
- Employees may request that their annual leave is reclassified as sickness absence, where they have suffered illness or injury prior to a pre-booked holiday.
- Employers should have appropriate strategies in place to prevent abuse of this system. In particular, appropriate methods of reporting and evidence of illness or injury and a limit on the level of contractual sick pay received by an employee before their entitlement to statutory sick pay.

Right to pay during time off for illness or injury

- Employees have an express right to statutory sick pay (SSP).
- An employee is entitled to SSP where they have been absent from work due to illness or injury for 4 or more days in a row (inclusive of weekends and holidays).
- There is no entitlement to SSP for the first 3 days of sickness absence.
- The current weekly rate of SSP (from 6 April 2019) is £94.25 and this can be paid for up to 28 weeks during any period of time off due to illness or injury.
- Some employment contracts contain a contractual right to company sick pay, which is paid at a higher rate than SSP.
- The employer is responsible for the payment of SSP and company sick pay. Prior to 6 April 2016, this could be recovered from HMRC.

9. Family friendly rights

Maternity Leave and Rights

All pregnant employees are entitled to up to 52 weeks' maternity leave regardless of their length of service. This is made up of:

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

There is no requirement for employees to have all 52 weeks of their maternity entitlement, however it is compulsory for all employees to take 2 weeks of leave following the birth of their child (this is increased to 4 weeks in the case of factory workers).

Statutory maternity pay (SMP) is available for those employees who:

- Have 26 weeks' continuous service with their employer at the end of the 15th week before the expected week of childbirth (EWC);
- Earn at least above the lower earnings limit for national insurance contributions, which is currently £118 a week;
- Are still pregnant 11 weeks before the start of EWC;
- Provide the employer with at least 28 days' notice (or as much notice as reasonably practicable); and
- Supply a certificate from a midwife or doctor confirming the date of the EWC before the birth or as soon as reasonably practicable.

SMP is paid for up to 39 weeks and encompasses:

- 90% of the employees' average weekly earnings (before tax) for the first 6 weeks; and
- The lower of £148.68 (from 7 April 2019) or 90% of the employees' average weekly earnings for the following 33 weeks.

Employees who are not entitled to SMP may be eligible for Maternity Allowance, which is a social security benefit.

Employees returning from OML are entitled to return to the same job. Where this is not reasonably practicable, the employee is entitled to return to a different job, which is suitable and appropriate and is on the same or no less favourable terms than they would have been prior to her absence. If a redundancy situation has arisen, the employee is entitled to preferential treatment. Those returning from AML have similar rights, provided that it is not reasonably practicable for the employee to return to the same role. Where this occurs the employer must find a suitable and alternative role for the employee.

Paternity Leave and Rights

Employees will be entitled to 2 weeks' ordinary paternity leave (OPL) and ordinary statutory paternity pay (OSPP) provided that they:

- Have 26 weeks' continuous service by the beginning of the EWC;
- Earn at least above the lower earnings limit for national insurance contributions, which is currently £118 a week; and
- Have a sufficient connection with the child and mother or other adopting parent.

Employees may be entitled to OSPP, provided that the necessary criteria are met. The current rate of OSPP is the lower of £148.68 (from 7 April 2019) or 90% of the employee's average weekly earnings.

During OPL employees continue to receive the benefit of all contractual terms and conditions of their employment, aside from remuneration which is replaced by OSPP.

Upon return from OPL the employee is entitled to the same job 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 (e.g. parental leave exceeding 4 weeks). If it is not reasonably practicable to offer the same role to the employee, the employer must propose a suitable and appropriate alternative job.

Shared Parental Leave

On 5 April 2015, the Children and Families Act 2014 introduced a new system of shared parental leave which enables parents to share the statutory maternity leave and pay that was formerly only available to mothers.

Parents can share up to 50 weeks of leave and 37 weeks of pay between them in the first year of their child's life or placement with their family.

SPL allows birth parents to share the OML/AML and SMP entitlement and adoptive parents to share the SAL/SAP.

Birth parents and adoptive parents must pass specific eligibility criteria to receive Statutory Shared Parental Pay (ShPP).

Birth mothers and the person claiming adoption pay must take at least 2 weeks of leave and must provide their employer with a binding notice of the date on which they intend to end their maternity or adoption pay.

The current rate of ShPP is the lower of £148.68 a week (from 7 April 2019) or 90% of your average weekly earnings. This is the same rate as SMP, except that there is no higher rate for the first 6 weeks of leave.

Adoption Leave and Rights

An employee who is the primary adopter of a child is entitled to statutory adoption leave (SAL), subject to eligibility criteria, irrespective of whether adopting from the UK or overseas.

Employees will be entitled to up to 52 weeks' leave, which includes 26 weeks' ordinary adoption leave (OAL) and 26 weeks' additional adoption leave (AAL), provided the eligibility criteria are met.

Whilst there is no minimum service requirement for entitlement to SAL, there is a minimum requirement of 26 weeks' service in order to be considered for statutory adoption pay (SAP).

Eligible employees who meet the criteria will be paid:

- 90% of their average weekly earnings for the first 6 weeks; and
- The lower of £148.68 (from 7 April 2019) or 90% of their average weekly earnings for the following 33 weeks.

When an employee returns from SAL, they have the right to return to the same job they held before their absence on the same or no less favourable terms unless this was not an isolated period of leave or was combined with other statutory leave. Where this occurs and it is not reasonably practicable for the employee to return to the same role, the employer may propose a suitable and appropriate alternative role.

Flexible Working

All eligible employees are entitled to make a request for flexible working.

In order to be eligible to make a flexible working request, the employee must have at least 26 weeks' service (although it is possible that employers will consider requests from those with less).

When a request for flexible working is made, the employer will have 3 months to consider and respond to the request and there is a requirement to do so in a reasonable manner. Further guidance on this matter is published by ACAS.

An employee may only make one flexible working request every 12 months and there is no obligation on the employer to agree to a request provided that they have a statutory reason for the rejection (for example cost or impact on performance).

Surrogacy Leave and Rights

Surrogate mothers are entitled to maternity leave and pay, provided they meet the relevant criteria.

Parents under a surrogacy arrangement may consider adoption and paternity leave if they adopt a child. Please note there is no entitlement to maternity leave for the female adopter of a child born by way of surrogate.

Unpaid Parental Leave

Employees who are parents are able to take a period of unpaid leave of up to 18 weeks in order to care for their child or make arrangements for the child's welfare, provided that:

- The child is under 18 years of age;
- The employee has worked for the company for more than a year;
- The employee is named on the child's birth or adoption certificate or they have or expect to have parental responsibility;
- The employee is not self-employed or a worker; and
- The employee is not a foster parent (unless they have parental responsibility).

Any period of leave must be taken in whole weeks and cannot be taken in individual days unless the employer is agreeable to this arrangement.

The full period of leave is available for each child of the employed parent, subject to the above criteria.

Increasing Parental Rights

As part of the Good Work Plan, the Government launched several consultations which look at increasing the rights of parents, including extending redundancy protection for new parents and expectant mothers and considering paid parental leave and neonatal pay.

10. Fixed term, part-time and agency workers

Fixed-term employees

Fixed-term employees are employees working under a fixed-term contract of employment, which can be terminated either on a set date or on the non/occurrence of a specific event. Often fixed-term workers will be engaged when a business needs a worker temporarily or for a specific task rather than using an employment business.

Fixed-term employees have the right not to be treated less favourably than a comparable permanent employee either in relation to the terms of their contract or by being subjected to any other detriment by any act, or deliberate failure to act, of their employer. An employer may be able to treat fixed-term employees less favourably than permanent staff if it can "objectively justify" the treatment. This occurs where as a whole the fixed-term employee's contract is at least as favourable as the terms of the comparable permanent employee's contract of employment.

In addition to accruing the same employment rights as permanent employees, fixed-term employees who are dismissed for asserting a right conferred on them by legislation governing fixed-term employees will be "automatically unfairly dismissed".

Employees who have been continuously employed for four years or more on a series of successive fixed-term contracts are automatically deemed to be permanent employees. If the employer seeks to continue using fixed term contracts it must be objectively justified.

Part-time workers

A person who is paid wholly or in part by reference to the time they work, and who is not identifiable as a full-time worker usually working less hours is a part-time worker.

Part-time workers have the right not to be treated less favourably than a comparable permanent employee unless an employer can "objectively justify" the treatment. The pro rata principle, which must be applied unless it is inappropriate means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the full-time comparator.

Part-time employees accrue employment rights in the same way as full-time employees. Part-time employees who are dismissed for asserting a right conferred on them by legislation governing part-time workers will be "automatically unfairly dismissed".

Agency workers

Agency workers "sign up" with an employment business to work for one or more of their clients/hirers. Often their work is temporary as they are engaged for a fixed period/to complete a specific task. However, they can be engaged on an open-ended basis.

Rights of agency workers

Determining the rights of agency workers can be unclear due to:

- Employment rights and obligations can be based on their employment status (the agency worker being an employee, worker, or "in employment" for the purposes of the Equality Act 2010 ("EqA 2010")
- Certain legislation deals specifically with agency workers and either grants or excludes certain rights regardless of the worker's employment status.

Agency Workers Regulations 2010	These regulations came into force on 1 October 2011 introducing the following new agency worker rights: - After a 12-week qualifying period the right to the same pay and other "basic working conditions" as equivalent staff at the client/hirer. - From day 1 of their assignment access to collective facilities and amenities and to information about employment vacancies
EqA 2010	Under the EqA 2010, they may be protected against discrimination in the following ways: - In the wide discrimination law sense agency workers may be "employed" and therefore can claim against the employment business under the normal "employee" discrimination provisions. - S.55 and S.56 of the EqA 2010 protect work-seekers and others against discrimination by employment businesses and employment agencies. - Agency workers who are "employed" by the employment business and are supplied to the end user client will be "contract workers". As such, they are protected against discrimination by the end user.

National Minimum Wage ("NMW")	Agency workers are entitled to the NMW if either: - They satisfy the "worker" definition under S.54 of the NMW Act 1998. - If there is no worker's contract, the agency work provisions in the NMW Act 1998 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."
Statutory Sick Pay ("SSP")	Where an agency worker is an "employed earner" for NIC purposes they will be treated as an employee for SSP purposes and will be entitled to SSP if they satisfy the qualifying conditions.
Pregnancy, maternity, paternity and adoption	Agency workers entitlement to "family-friendly" rights are not as favourable in comparison to employees. Pay and leave Agency workers who are "employed earners" for NIC purposes are entitlement to statutory maternity, paternity, adoption or shared parental pay from the employment business if they meet the other qualifying conditions. However, they will only be entitled to statutory maternity, paternity, adoption or shared parental leave if they are employed by the employment business. Pregnancy and maternity discrimination Agency Workers who fall within the scope of the EqA (see above) will be protected against unfavourable treatment because of pregnancy (including pregnancy-related sickness) during the "protected period" and less favourable treatment related to pregnancy or childbirth or its consequences. The "protected period" for employees is in most cases from conception to the end of statutory maternity leave. Where a woman is not entitled to statutory maternity leave (E.g. if she is not employed under a contract of employment) this period ends two weeks after the end of the pregnancy. For agency workers this often means the protected period will end 2 weeks after birth. 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. This has the effect 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. Following the end of the protected period, under the EqA a woman does not have 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 if the reason for doing so is because she is pregnant/has had a baby. Whilst the flexible working legislation doesn't apply to agency workers, client should be prepared to consider requests for changes to working hours to accommodate an agency worker's childcare responsibilities. A refusal may amount to indirect discrimination unless it can be objectively justified.
Working time under the Working Time Regulations 1998 ("WTR")	Agency workers are entitled to protection under the WTR if either: - They satisfy the definition of a "worker" - If there is no worker's contract, the agency work provisions in the WTR 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."
Flexible Working	As confirmed above, 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, as agency workers are protected from discrimination to avoid any indirect discrimination claims business may consider such requests from agency workers.

11. Discrimination and harassment

Protection from discrimination

Discrimination against job applicants/workers is unlawful 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 and disability.

Both job applicants and workers are protected from the following forms of discrimination: Direct discrimination, indirect discrimination, discrimination arising from disability, harassment and victimisation

No qualifying period of service is need to bring a discrimination claim. Any compensation award for discrimination is uncapped.

Protection from harassment

Harassment related to any of the protected characteristics (except for marital or civil partnership status, or pregnancy and maternity) is a form of unlawful discrimination. It occurs when a person is subjected to unwanted conduct which has the purpose or effect of violating their dignity or it creates an intimidating, hostile, degrading, humiliating or offensive environment. The effect of the conduct is judged subjectively from the person subjected to the treatment and the next step is determining whether it was objectively reasonable for the conduct to have had that effect.

Whilst employers aren't specifically liable for third-party acts of harassment (E.g. from customers), it is 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

Employees are entitled to a statutory minimum period of notice on termination. Employees are entitled to one week's notice if they are employed for over one month but less than two years.

Thereafter, their entitlement is an additional week's notice for each complete year of service, up to a maximum 12 weeks. In contrast, an employee's requirement to provide statutory notice remains fixed at one week regardless of their length of service. If the contractual notice period exceeds the statutory notice period then the longer contractual period will apply. Often employment contracts provide for the discretionary right to make a payment in lieu of notice, in these cases care should be taken drafting such clauses.

Employees can be dismissed without notice if they commit a repudiatory breach of the employment contract, commonly for gross misconduct.

Severance payments

If an employee has two years continuous service and they are dismissed by reason of redundancy they are entitled to as a minimum a statutory redundancy payment ("SRP"). This is calculated by reference to the employee's age, length of service and salary.

Employees may also have a contractual right to enhanced contractual redundancy payments. On termination, the employee is entitled to any amounts he has accrued under the contract that have not yet been paid.

Employees who bring a successful claim for unfair dismissal may also be awarded compensation consisting of:

- A basic award which is calculated in the same way as a SRP. Employees are not entitled to receive this award if they have received a SRP.
- A compensatory award which is based on their losses/potential losses flowing from their dismissal. This is currently capped at the lower of £86,444 (from 6 April 2019) or 52 weeks' actual gross pay at the time of dismissal.

Currently, any redundancy payment may be paid free of tax up to £30,000 in aggregate and without payment of National Insurance contributions.

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. Employers can only dismiss for one of the five potentially fair reasons which are: conduct, capability, redundancy, breach of a statutory restriction, or for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

Employers must also show that they acted reasonably in treating that reason as sufficient to justify the dismissal and that they followed a fair and reasonable process in reaching their decision.

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).

Protected employees

Employees who do not have the requisite service to bring a claim may be able to claim unfair dismissal where the dismissal relates to:

- Their political beliefs or affiliations.
- Their membership/non-membership of a trade union, or participation in union-related activity.
- Their participation in health and safety-related activity.
- Their status as an employee representative (or candidature for such a role).
- Their 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.

Procedural requirements for dismissal

Employers should comply with any contractual obligations relating to termination of employment as a failure could give rise to a breach of contract claim.

For employees with the requisite service to bring an unfair dismissal claim, failing to follow a fair and reasonable procedure can make the dismissal unfair. Employers may want to follow this procedure in other cases to reduce the risk in other claims. E.g. discrimination claims.

What constitutes a fair and reasonable process depends on the circumstances and the reason for the dismissal. In cases of misconduct it is important for the employer to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (Code) as failure could result in an increase of any successful unfair dismissal award by up to 25%. Similarly, an employee who fails to comply with the Code could suffer a reduction in his compensation award of up to 25%. A fair and reasonable procedure will normally involve:

- 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.

13. Redundancy/layoff

Definition of redundancy/layoff

The statutory definition of redundancy identifies three sets of circumstances as set out below:

- A business closure, where the business is closed altogether.
- A workplace closure, where a site is closed or relocated.
- A diminished requirements of the business for employees to do work of a particular kind. Often where fewer employees are needed to do the work.

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.

Redundancy Pay

Employees with the requisite service are entitled to SRP if they are made redundant based on their age, salary and length of service at the termination date. Employees are entitled to:

- 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.

Length of service is capped at 20 years and weekly pay is capped at £525 (from 6 April 2019). The maximum amount of statutory redundancy pay is £15,750.

Procedural Requirements

For a redundancy dismissal to be fair the employer must establish redundancy was the real reason for the dismissal and that it acted reasonably, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee. In practice, employers should follow a fair and reasonable process which will usually involve:

- Adopting a fair basis when selecting the role to be made redundant;
- 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.

Collective redundancies

Employers must collectively consult with representatives of employees where it proposes to make 20 or more employees redundant within a period of 90 days or less. Redundancy for these purposes is defined as a dismissal "for a reason not related to the individuals concerned". This would include dismissals following an employer changing an employees' terms through termination and re-engagement (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 a view to reaching agreement with the appropriate representatives" on ways of:

- Avoiding the dismissals.
- Reducing the number of employees to be dismissed.
- Mitigating the consequences of the dismissals.

Consultation should start in good time before any redundancies are confirmed. Where 100 or more redundancies are proposed, consultation must begin at least **45 days** before the first dismissal takes effect. For fewer than 100 redundancies, the minimum period which must elapse is **30 days.**

14. Consequences of a business transfer

Automatic transfer of employees

The Transfer of Undertakings (Protection of Employment) Regulations (commonly referred to as “TUPE”) applies where either employees are affected by a business transfer or a service provision change. Where there is a relevant transfer the contracts of the employees automatically transfer to the transferee (the purchaser of the business/new provider of the services) with the exception of old age, invalidity and survivors' benefits under occupational pension schemes.

Protection against dismissal

TUPE provides employees with addition protection from dismissal for those who have the requisite length of service for an unfair dismissal claim. Dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. However, if the sole or principal reason for the dismissal is an economic, technical or organisational reason (“ETO reason”) this dismissal is only potentially unfair. If an ETO reason is established an employer will need to show that it has acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal.

Harmonisation of employment terms

Employers will often wish to harmonise the terms of any employees inherited under TUPE with their existing workforce. Unfortunately, this can be problematic as the starting point is that any variation to an employee’s contract is void if the sole or principal reason for the change is the transfer.

However, changes will be permitted where:

- The contract permits the particular variation;
- The sole or principal reason for the change is an ETO reason, and the employer and employee both agree to the change.
- Terms are incorporated from a collective agreement, so long as the change takes effect more than one year after the transfer date and the varied terms "when considered together" are no less favourable to the employee.

Generally employers seeking to harmonise terms will 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 often wait until some time after the transfer before making any changes, in an attempt 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. Therefore, it can be more effective to look for a strong ETO reason to make changes (E.g. a general reorganisation of the transferee's business, affecting all employees rather than just those transferred).

Information and Consultation

The obligation to inform (and, if appropriate, consult) relates to "appropriate representatives" of affected employees. Employers must:

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

Employers can discharge its TUPE consultation duties by engaging in consultation with the employee representatives with a view to reaching an agreement. TUPE does not require that an agreement is actually reached between the parties before the proposed transaction can proceed. Therefore, it does not give the employees of either party a right to block a proposed transaction.

15. Taxation of employment income

An employee's UK income tax liability for employment income is determined by residence and domicile status. The underlying principle is individuals with the strongest links to the UK should pay more tax than individuals whose connections are weaker. An individual's residence status is determined by the application of a statutory residence test ("SRT"). As a basic rule an individual will be a UK resident for a tax year if either the automatic residence test is met or the sufficient ties test is met. If these are not met the individual won't be a resident in the UK for the tax year.

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).

In contrast domicile status of individuals for UK tax purposes is determined by a mixture of common law and statute. Broadly, domicile can be summarised as the country in which an individual has made their "permanent home". Domicile can be determined by origin, choice or dependency and does not necessarily align with nationality.

Foreign nationals

If foreign national employees carry out work in the UK this work is taxable in the UK regardless of where the employer is located.

Foreign nationals can be a resident in the UK for tax purposes. An individual who is a resident and domiciled in the UK will be liable to UK tax on their worldwide income (subject to reliefs for double taxation). If the individual is a resident but not domiciled in the UK they may not be taxed on offshore income and gains if the funds aren't remitted to the UK (the "Remittance basis"). If an individual is a UK resident but isn't domiciled in the UK, earnings which are earned overseas in a tax year may not be taxable in the UK unless and until they are remitted to the UK. However, if any duties are carried out in the UK HMRC would apply UK tax to overseas employment income unless an individual can show the work they do in the UK is merely incidental to the duty of their employment overseas.

Dual employment contracts, whereby individuals who are UK residents and not domiciled in the UK entered into separate employment contracts (one with the UK employer for UK duties and one with the foreign employer for non-UK duties) used to be commonplace. However, with effect from 6 April 2014, new legislation has been introduced to prevent dual contract arrangements being used artificially to avoid tax.

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.

Rate of taxation on employment income

For 6 April 2019 to 5 April 2020, income is taxed at the following rates depending on the level of income after any applicable allowances or relief:

Band	Taxable income	Tax rate
Personal allowance	Up to £15,500	0%
Basic rate	£1,501 to £50,000	20%
Higher rate	£50,001 to £150,000	40%
Additional rate	Over £150,000	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/	https://www.jmw.co.uk/services-for-business/employment-law
The SSP Calculator (https://www.gov.uk/calculate-statutory-sick-pay)	The holiday calculator (https://www.gov.uk/calculate-your-holiday-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 Head of Employment - Manchester	0161 838 2762 Paul.Chamberlain@jmw.co.uk
Simon Bloch Partner – Employment	0161 838 2628 Simon.Bloch@jmw.co.uk
Emma James Senior Associate – Employment	0161 507 1021 Emma.James@jmw.co.uk