A GUIDE TO
UK EMPLOYMENT LAW 2010-2011
Foreword

October 2010

The credit crunch and recession have impacted businesses in various different ways, but what remains a constant for all employees is the need to adapt and progress, making the best of the resources at their disposal – including in particular their staff.

With such an environment in mind, this employment law guide is designed to help you stay on top of the various rules and regulations which can so easily trip up even the most accomplished of HR practitioners. Whilst endeavours to ensure that the guide is concise, easy to read and helpful in identifying issues which may be a particular concern or a potential stumbling block, it is of course no substitute for legal and specific advice on more complex matters.

Working with all kinds of businesses that sell, buy or rely on technology, digital media and communications means that we are at the forefront of helping our clients manage change.

Should you require assistance with any employment issues, we would be delighted to help. Please see the section about our employment team for contact details.
In the meantime, we hope that you find the guide useful.

David Williams
Head of Employment
Our Employment Team

The Kemp Little LLP employment team has an established reputation for expert, pragmatic and user-friendly assistance on all employment-related matters.

We understand the need to deliver commercial, efficient, timely and cost-effective advice to our clients, and have considerable experience helping them manage risk and implement strategic projects from a human resources perspective.

The team advises on all aspects of employment law, including:

- reorganisations and redundancies;
- dispute resolution, including advice on avoiding disputes and defending claims; and
- transactional support and outsourcing.

“This vibrant practice is noted by clients for its ‘flexible, prompt, creative advice, provided at a reasonable cost’. Clients particularly value the group’s employment workshops and seminars, which help them keep abreast of changing legislation in this sector.” Chambers Guide

“The team has a ‘clear understanding of business’ and offers ‘practical, sensible advice linked to a commercial reality’” Legal 500

For further information about the firm’s employment team and to view details about seminars and publications on UK employment law, please visit our website at www.kemplittle.com or contact a member of our team.

For employment-related issues, please contact David or Chris or any other member of our team for assistance.

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Introduction

1 SOURCES OF UK EMPLOYMENT LAW

There are three main sources of employment law in the UK: the common law, statute and European law (in the form of both European Directives and decisions of the European Court of Justice).

1.1 Common law

Since all employees in the UK work under a contract of employment with their employer, the common law (particularly the law of contract) forms the legal basis of the employer/employee relationship. A contract of employment need not be but is usually recorded in writing. The parties are free to stipulate which law will be the governing law of the contract. However, certain mandatory statutory employment protection rights will apply regardless of the law of the contract, provided that the employee is UK-based. In addition, the law of tort will govern matters such as an employer’s liability for the acts of its employees and liability for workplace accidents.

1.2 Disability Discrimination Act 2005

Since the early 1970s, there has been a dramatic growth in the amount of employment protection legislation in the UK which has significantly supplemented the common law rules. Some of the main employment law statutes are:

Health & Safety at Work etc Act 1974
Trade Union and Labour Relations (Consolidation) Act 1992
Employment Tribunals Act 1996
Employment Rights Act 1996
Public Interest Disclosure Act 1998
Data Protection Act 1998
National Minimum Wage Act 1998
Human Rights Act 1998
Employment Relations Act 1999
Employment Act 2002
Employment Relations Act 2004
Disability Discrimination Act 2005
Equality Act 2010

In addition, there is a substantial amount of secondary legislation in the form of regulations which contain further provisions which affect the employment relationship. In some cases the legislation is supported by Codes of Practice drawn up by various government agencies. Although the Codes do not have direct legal effect, they are often, and in some cases have to be, taken into account by Employment Tribunals when deciding whether an employer has complied with its statutory obligations.

1.3 European law

If UK domestic law has failed to implement EC Treaty obligations properly, individuals may rely directly on the EC Treaty in the UK courts. EC legislation has been particularly important in the areas of equal pay, discrimination and employees’ rights on business transfers. In addition, since the European Court of Justice is the final arbiter in matters of interpretation of European legislation, its judgments are important when it comes to questions relating to the interpretation of obligations derived from European Directives.

2 TYPES OF WORKER IN THE UK

There are traditionally three main categories of worker in the UK:
(i) the self-employed or independent contractors,
(ii) agency workers or temps, and
(iii) employees

with each category experiencing different employment protection rights. In recent years a fourth category, called ‘workers’ has also become established, primarily from European law developments. However, confusingly, this fourth category overlaps with the others.
2.1 **Self-employed people/Independent Contractors**

In essence, someone who is self-employed or an independent contractor is someone who is in business on their own account and who is responsible for making their own decisions as to how the job is performed. There are advantages for both the employer and the individual in having a relationship of this nature; the employer is freed from most statutory employment protection legislation, and the individual enjoys a favourable tax position. However, these types of relationship have come under increasingly closer scrutiny by the courts and HM Revenue & Customs (HMRC) (formerly the Inland Revenue). The fact that an individual is labelled an independent contractor by both parties to the relationship will not be the determining factor. Case law suggests that the most important considerations are whether there is mutuality of obligations and an obligation on the part of the contractor to do the work personally. If there is, then the court and/or HMRC are likely to find that the relationship is actually one of employer/employee.

2.2 **Agency Workers**

Some workers are employed or engaged by an employment agency which then supplies their services to the hirer. Although the hirer will owe certain statutory duties (e.g. duties under discrimination and health and safety legislation) it will not owe the agency worker many of the employment protection rights enjoyed by employees (but see the note below regarding the changes to be introduced when the Agency Workers Regulations 2010 come into force). Agency workers are generally used for temporary engagements although it is not uncommon for engagements to last for several months or even years. While it is possible that an agency worker may not be an employee of either the employment business or the hirer, case law has established that in some circumstances, an employment relationship could be found to exist between an agency worker and the hirer where it is necessary to give effect to the reality of the relationship (i.e. if the way the contract is performed is not consistent with agency arrangements). In these cases, agency workers may be able to claim employment rights directly against the hirer even if there is no contract between the agency worker and the hirer directly.

New legislation regarding agency workers, set out in the Agency Workers Regulations 2010 is due to come into force on 1 October 2011. Under the new regulations, agency workers will, upon completion of a 12 week qualifying period, be entitled to the same basic working and employment conditions (i.e. those relating to working time, overtime, breaks, rest period, night work, holidays and pay) as comparable workers doing broadly similar work in the same organisation.

2.3 **Employees**

The majority of workers in the UK are employees of the company to which they provide their services. Unlike in some EU countries, there is no legal distinction between blue collar workers, white collar workers and senior directors, other than whatever may be written into their employment contracts. The basic principles of the common law and statutory employment protection legislation apply to all employees regardless of their status. As long as they satisfy the relevant qualifying conditions, employees will benefit from greater statutory employment protection rights than independent contractors and agency workers. In particular, after one year’s service*, an employee will benefit from the right not to be unfairly dismissed. (*In effect the qualifying length of service required to claim unfair dismissal is actually 51 weeks and not one year. This is because the employee can count the statutory one week’s notice to which they are entitled under the Employment Rights Act 1996. Therefore, employers should not assume that they can dismiss without risk, an employee who has between 51 and 52 weeks’ continuous service.)

2.4 **Workers**

The idea of a separate legal category of ‘workers’ is a relatively new one in UK law. The concept derives from European law. In broad terms, a worker is someone who works under an employment contract, or some other contract under which they agree to provide services personally. In addition, to qualify as a worker, the organisation to which the individual is providing their services must not be a client/customer of their profession or business. So, for example, some independent contractors may qualify as workers. Workers enjoy fewer rights than employees, but still benefit from, for example, rights relating to the number of hours they work, the amount of annual leave they can take, and the amount they are paid.
3 EMPLOYMENT DISPUTES IN THE UK

There are three types of forum which can decide legal disputes between an employee/worker/etc and whoever ‘employs’ them: Employment Tribunals, the common law courts (High Court or County Court) and the arbitration scheme operated by a government body called the Advisory Conciliation & Arbitration Service (“ACAS”).

3.1 Employment Tribunals

These are specialist employment courts which hear the majority of disputes which arise between employers and the staff they engage. They deal mainly with claims brought under employment protection legislation such as unfair dismissal and discrimination claims. They also have jurisdiction to hear contractual claims (subject to a maximum award of £25,000) provided the claim arises or is outstanding on the termination of employment. Employment Tribunals usually comprise three members: a legally qualified chair and two lay members (one with a Trade Union background and one with a human resources/management background). Their decisions can be appealed to the Employment Appeals Tribunal, the Court of Appeal and finally the United Kingdom Supreme Court.

3.2 High Court/County Court

An employee who wishes to bring a contractual claim (such as for unpaid notice pay) may elect to pursue it in the common law courts, either the High Court or the County Court, instead of in an Employment Tribunal. In general, a claim may only be brought in the High Court if its value is more than £25,000. The process in the High Court and the County Court tends to be more formal and lengthy than in the Employment Tribunal, although the successful party can usually recover most of their costs from the unsuccessful party, which they cannot do as a matter of course in the Employment Tribunal.

3.3 ACAS Arbitration Scheme

This is a voluntary scheme which came into force on 21 May 2001 and is intended to provide a fast, non-legalistic and more cost-effective alternative to the Employment Tribunal. It is currently only available for the resolution of straightforward unfair dismissal complaints, and in relation to flexible working disputes. Both parties must agree to opt for the scheme. The other advantage is that the hearing is conducted in private before a single ACAS arbitrator. They can award exactly the same remedies as would be available in an Employment Tribunal.
## Business Immigration

1. **OVERVIEW**

1.1 General principles

1.2 Who requires permission to work?

2. **EMPLOYING ILLEGAL WORKERS**

2.1 Penalties

2.2 Race discrimination
Business Immigration

1 OVERVIEW

1.1 General principles
Certain categories of persons do not require permission to work in the UK (although they may still require a visa in some circumstances) – these include nationals of the European Economic Area ("EEA"), Commonwealth citizens with leave to enter or remain in the UK on the basis of recent UK ancestry, persons with indefinite leave to remain in the UK, Gibraltarians, and persons wishing to engage in certain specified occupations (e.g. representatives of overseas firms who are seeking to establish a UK branch or subsidiary).

1.2 Who requires permission to work?
Generally speaking, non-EEA nationals must obtain permission under the Points Based System to be able to take up employment in the UK as well as obtaining a visa. The Points Based System is administered by the UK Border Agency on behalf of the Home Office and comprises five different routes of entry into the UK for work and/or study (five “Tiers”). Tier 1 of the Points Based System relates to highly-skilled individuals, Tier 2 to skilled workers with a job offer, Tier 3 applies to low-skilled workers filling temporary shortages identified by the government, Tier 4 relates to students and Tier 5 to temporary workers and youth mobility schemes. To apply under Tiers 2 and 5, individuals must be sponsored in the UK.

Please refer to our Immigration Guide for further information regarding Business Immigration and the Points Based System.

2 EMPLOYING ILLEGAL WORKERS

2.1 Penalties
An employer that negligently employs someone who is not entitled to work in the UK is liable to a civil penalty (currently a fine of up to £10,000 in respect of each individual illegally employed).

An employer that knowingly employs someone who is not entitled to work in the UK will commit a criminal offence. The employer could be liable to a custodial sentence of up to two years and/or an unlimited fine.

An employer will have a statutory defence to the civil penalty (but not the criminal offence) if it has checked the original and kept a copy of one or more of a number of specified documents verifying the individual’s right to work in the UK (check the UK Border Agency website for a full list) before the commencement of employment. If the employee only has limited leave to remain in the UK, and they commenced employment on or after 28 February 2008, their documents should be checked every 12 months.

For further information please refer to our Immigration Guide.

2.2 Race discrimination
An employer who carries out checks on potential employees who look or sound foreign which are more rigorous than checks carried out on other employees may be found liable for unlawful race discrimination. Therefore, it is important that all applicants are treated in the same way. The Government has issued detailed guidance on the measures which employers are expected to take in order to comply with their obligations and to avoid unlawful race discrimination. This guidance is available from the UK Border Agency website.
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Contractual Terms

1 OVERVIEW
Although it is not mandatory to enter into a written contract of employment, in practice, most employees in the UK have a written contract. As a minimum, employers are obliged to give employees written particulars of the main terms and conditions of their employment. The contract will comprise both express and implied terms and may also incorporate terms contained in other documents, such as an employee handbook or a collective agreement. The contract does not have to be in a particular form – the terms may be contained in a letter although it is common for them to be incorporated into a formal contract. In practice, the more senior the employee, the more detailed their contract is likely to be.

2 EXPRESS TERMS
2.1 Statement of particulars
Section 1 of the Employment Rights Act 1996 requires employers to issue employees with written particulars of the main terms and conditions of their employment. These particulars have to be issued within two months of the commencement of the employee’s employment. Some employers treat the statement of particulars as the contract of employment. However, it is usual for the written particulars to be incorporated into a formal contract (in which case it is not necessary to provide a separate statement of particulars). The written particulars which should be given include the following:

(a) The name of the employer and of the employee;
(b) The employee’s job title or a description of the work they are employed to do;
(c) The employee’s place of work. If the employee works in various places, details of this must be given together with the address of the employer;
(d) The date on which the employment began and when the period of continuous employment is treated as having begun;
(e) The scale or rate of remuneration or method of calculating remuneration including the intervals at which it is paid (e.g. weekly or monthly);
(f) Terms and conditions relating to hours of work (e.g. start and finish times, overtime pay etc.);
(g) Terms and conditions relating to public holidays, annual leave entitlement, sickness absence and sick pay;
(h) Terms and conditions relating to pension schemes (including whether or not there is a contracting-out certificate in force relating to participation in the state pension scheme) (see Rights During Employment 4.1 for further details);
(i) If the employment is not intended to be permanent, the period for which it is expected to continue or, if the contract is for a fixed term, the date on which it will end;
(j) Details of any disciplinary rules and procedures applicable to the employee;
(k) Details of the person to whom the employee can apply if they are dissatisfied with any disciplinary decision or with any decision to dismiss them;
(l) Details of the person to whom the employee can apply for the purposes of redressing any grievance and how any such application should be made;
(m) The length of notice of termination required to be given by both the employer and employee;
(n) Details of any collective agreements which directly affect the employee’s terms and conditions; and
(o) The following details relating to any assignment outside the UK – length of the assignment, remuneration package (including details of the currency in which payment is to be made and any expatriate allowance) and any terms relating to returning to work in the UK.
Changes to any of the written particulars must be notified to employees within four weeks of the change having taken place.

If an employee has brought certain other proceedings before an Employment Tribunal and the employer is in breach of its duty to issue an employee with written particulars, or of its duty to notify the employee of changes to them, Tribunals will be required to award the employee compensation of between two and four weeks’ pay. (For these purposes, a “week’s pay” is currently capped at £380). Where the other proceedings are an unfair dismissal claim, this award will be included within the compensatory award and the usual upper limit on compensatory awards will apply.

2.2 Contract of employment

As mentioned above, instead of relying on the statement of particulars, it is common for employers to issue all their employees with formal contracts of employment. The advantage of this is that it enables the employer to cover all the relevant terms in more detail and thereby reduce the risk of a dispute arising out of any uncertainty or ambiguity. In addition to the matters listed above, it is common for a contract of employment to cover the following additional issues:

(a) Probationary period – contracts of employment often provide that the initial period of the contract (typically the first 3 months) will be on a probationary basis so that the employer can evaluate the suitability of the employee for the position. During this time, the notice of termination which either party is required to give will normally be shorter and the employee may not be entitled to certain benefits (such as membership of the employer’s pension scheme). The contract can provide for the probationary period to be extended if further time is required to evaluate the employee. It is unusual for senior executives to be subject to a probationary period;

(b) Benefits – in addition to basic salary, many employers offer additional benefits such as contributions to a pension scheme, a bonus or commission scheme, private health insurance, long term disability insurance, death-in-service insurance, a company car (or car allowance), gym membership and share options. Brief details of all of these would normally be included in the contract of employment with the exception of share options which are usually dealt with in a separate share option agreement;

(c) Confidentiality / Intellectual Property Rights – if the employee is likely to have access to the employer’s confidential information, it is advisable for the employment contract to include specific provisions identifying the information and providing that the employee must not use it for personal gain or disclose it to any unauthorised person at any time during their employment or after its termination. Further, if the employee’s work is likely to give rise to intellectual property rights (“IPR”) then the contract can include provisions requiring the employee to assign any rights to the employer. Alternatively, some employers require employees to enter into separate agreements dealing with confidential information and IPR;

(d) Termination – since most disputes between employers and employees arise on the termination of the relationship, it is often a good idea for the contract to specify the circumstances in which the employer will be entitled to terminate it without notice (such as gross misconduct or gross negligence). Further, many contracts give the employer the option of making a payment in lieu of notice and/or placing the employee on “garden leave” during any period of notice. A garden leave clause enables the employer to require the employee not to attend work or contact clients/other employees during their period of notice but to stay at home “on call”. It is often used to keep an employee out of the office but away from a competitor during the notice period; and
(e) **Post-termination restrictions** – if an employee’s access to the employer’s confidential information, customers and/or other employees is such that they would pose a risk to the business following the termination of their employment, it is sensible to include post-termination restrictions in the contract. The most common types of restriction are a ban on working for a competitor for a period of time and a prohibition on the solicitation of customers and employees. The courts will not enforce a post-termination restriction unless it is both reasonable and necessary to protect the interests of the business. The court will look at all aspects of the restraint including its duration, geographical coverage and the precise nature of the prohibited activities. If any part of the restriction is too wide, the whole clause may be declared void. As a general rule, the more senior the employee the more likely it is that a restriction will be considered reasonable. In normal circumstances, restraints lasting more than 12 months after termination are unlikely to be enforceable.

2.4 **Policies and procedures**

In addition to the contract of employment, many employers publish separate policies and procedures (which may or may not be incorporated into the contract) dealing with various aspects of the employment relationship. Typical policies include those concerning equal opportunities, harassment, health and safety, maternity and other family leave, data protection issues and email and internet use. Further, many employers have written procedures for dealing with matters such as employee grievances, breaches of the disciplinary rules and poor performance. These types of policies and procedures are often incorporated into an employee handbook which is issued to all staff at the start of their employment.

3 **IMPLIED TERMS**

In addition to the express terms, all UK employment contracts are subject to various implied terms which impose additional duties and obligations on both the employer and employee. For example, an employee will be subject to an implied obligation of fidelity and obedience, a duty to work with due diligence and care and an obligation not to use or disclose the employer’s trade secrets or confidential information. In some circumstances, senior employees (and, in particular, directors) may also be under a duty to disclose their own wrongdoing to their employer. The employer will, amongst other things, be under an implied duty not to destroy the relationship of trust and confidence between the employer and employee and to take care of the employee’s health and safety.

4 **VARYING TERMS**

Any changes to an employee’s contract require the employee’s consent. Typically, an employee would be asked to consent expressly, by confirming either orally or preferably in writing, that they agree to the changes. However, sometimes it may be possible to imply that an employee has consented if the employee continues to work for the employer for a significant period without protesting after a change has been made. If an employer makes significant changes to an employee’s contract to which the employee does not consent, then the employee may be able to resign and claim constructive dismissal (see Termination of Employment 3.2). Where an employer tries to make changes following a business transfer, these may be ineffective, even if the employee consents.
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Rights During Employment

1 OVERVIEW
The position under common law is that the parties to an employment contract are entitled to agree such terms as they wish. However, over time, various pieces of legislation have been introduced which require employers to observe certain minimum requirements in relation to the working conditions of their employees. In particular, regulations have been introduced regulating the number of hours employees can be required to work and providing for a minimum amount of annual leave, maternity leave, parental leave and other similar types of leave, and the right to take time off work to deal with emergencies involving dependants. In addition, legislation guarantees a minimum hourly rate for all workers aged 16 and over.

2 HOURS OF WORK

2.1 Maximum working hours
The Working Time Regulations 1998 provide that employers must take all reasonable steps to ensure that workers do not work more than an average of 48 hours in each week. This average is taken over a reference period of 17 weeks (which is extended to 28 weeks for certain workers). Employers must maintain records for two years to show compliance with these provisions. Recent cases have suggested that time which a worker spends “on-call” may constitute working time, and therefore count towards the 48 hour limit, even if the individual is not doing any actual work at the time.

2.2 Opt-out agreements
Workers may opt out of the 48 hour weekly limit by written agreement. The opt-out agreement must give the worker the right to terminate it by giving no more than three months’ notice. Opt-out agreements must be entered into voluntarily and it is unlawful to victimise or dismiss a worker for refusing to sign an opt-out agreement. For example, it would be unlawful to require a prospective employee to enter into an opt-out agreement as a condition of offering them a position.

2.3 Night workers
Employers must also take all reasonable steps to ensure that the normal working hours of night workers do not exceed an average of eight hours in any 24 hour period over a 17 week reference period. Night workers must also be given the opportunity to undergo a free health assessment before they take up night work and thereafter at regular intervals. If a registered medical practitioner advises the employer that a worker is suffering from health problems connected to the night work, the employer is required, if possible, to transfer the worker to suitable day work.

2.4 Rest periods
Subject to certain exceptions, adult workers (i.e. those over the age of 18) are entitled to a rest period of at least 11 consecutive hours in each 24 hour working period. In addition, adult workers are normally entitled to an uninterrupted weekly rest period of at least 24 hours (which may be made up of two weekly rest periods of at least 24 hours in each 14 day period or a single rest period of at least 48 hours in each 14 day period). Finally, workers who work for at least six hours are entitled to a rest break away from their workstation. In the absence of a workforce or collective agreement specifying the duration, the rest break should be at least 20 minutes. Recent cases have suggested that time which a worker spends on-call does not amount to a rest break. In addition to these specific obligations, there is a general requirement that adequate work breaks should be offered to workers if the work pattern puts health and safety at risk, in particular because the work is monotonous or the work-rate is predetermined.

2.5 Exemptions
None of the above provisions applies to workers who can determine their own working hours or whose working time is not measured or predetermined (such as managing executives).
2.6 Young workers
Employers are required to take all reasonable steps to ensure that young workers (i.e. those aged over 15 but under 18) do not work more than eight hours a day or 40 hours a week. Unlike the 48 hour weekly limit which applies to adult workers, these limits are not averaged over a reference period. There is no provision for young workers to opt-out of the limits. Employers are also required to take all reasonable steps to ensure that young workers do not work between 10pm and 6am. Additionally, young workers are usually entitled to a minimum weekly rest period of 48 hours, minimum daily rest of 12 hours and a minimum 30 minute rest break after 4½ hours of continuous work.

3 SALARY AND BENEFITS
3.1 National Minimum Wage
Under the National Minimum Wage Act 1998, most workers, including home and piece workers, are entitled to a minimum gross hourly wage. The rate is usually increased annually, based on the recommendations of the Low Pay Commission. The rate for workers aged 22 and over is currently £5.80 per hour; for workers aged 18 to 21 it is £4.83 per hour and for workers aged 16-17 it is £3.57 per hour. This increased to £5.93 for adults, and increased to £4.92 for workers aged 18-21 and to £3.64 for workers aged 16-17 on 1 October 2010. Additionally, the adult rate is now extended to 21 year old workers as of October 2010. The hourly amount is calculated as an average over the relevant pay reference period, which is usually the actual pay period (i.e. usually one week or one month). The calculation of “pay” includes bonuses paid in the reference period, but does not include tips, or advances or loans made to the worker. As a general rule, the value of benefits in kind is not included for the purposes of calculating pay.

3.2 Itemised pay statements
All employees must be provided with an itemised pay statement at or before the time payment is made, setting out the gross amount of wages, the amounts of any deductions (such as for tax and national insurance contributions), the net wages payable and, where parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

3.3 Tax and Social Security Contributions
Under the Pay as You Earn system ("PAYE"), employers are required to deduct income tax direct from employees’ salaries and pay it monthly to HMRC. In addition, both employers and employees have to pay National Insurance Contributions ("NICs") on the cash remuneration paid to employees. The standard NICs for employees is 11% of the excess of their weekly cash remuneration over £110 (subject to a weekly earnings limit of £770). A 1% contribution is made by the employee in respect of their salary above £770 per week. The standard NICs for employers is 12.8% of the excess of the employee's total weekly cash remuneration over £110 (with no upper limit on weekly earnings). If the employer operates an occupational pension scheme which is contracted out of the state earnings related pension scheme, the contribution rates are lower. The various thresholds are reviewed annually, usually with effect from April.

3.4 Deductions from wages
Subject to certain exceptions (such as when the deduction is made to reimburse the employer for any overpayment of wages or expenses) no deduction from a worker's wages may be made unless either the deduction is required or permitted by a statutory or contractual provision or the worker has given their prior written consent to the deduction. Not only may sums wrongfully deducted be ordered to be repaid to the worker, but the employer may also lose the right to recover the sums which it was seeking to deduct. Therefore, it is advisable for an employee's contract to include a provision giving the employer the right to make deductions from wages in order to recover any sums due from the employee. This will be particularly relevant on termination of employment if the employee has taken more than their accrued holiday entitlement and the employer wishes to recover the excess from the employee by deducting it from their final salary payment.

3.5 Non-cash benefits
With the exception of pensions (see below) there is no statutory requirement for employers to provide non-cash benefits to employees. However, many contracts expressly provide for the provision of a number of benefits in addition to basic salary. Benefits that are commonly given to employees in the UK include private medical expenses insurance, long-term disability insurance (which is often called permanent health insurance), death in service benefit, a company car (or a car allowance) and participation in schemes such as a commission, bonus or profit-sharing scheme.
4 PENSIONS

4.1 Stakeholder pension schemes
Any employer who employs five or more employees and who does not already provide appropriate pension arrangements is required to designate a stakeholder pension scheme that employees can join if they want to. Although there is no obligation on the employer to make contributions into the scheme (unless it chooses to do so), arrangements must be made to enable an employee’s own contributions to be deducted directly from their earnings. If the employer is obliged to offer access to a stakeholder scheme it must consult with its employees about the choice of scheme. The chosen scheme must comply with certain minimum standards established by the Government and must be registered with the Pensions Regulator. After a scheme has been chosen, the employer must give its employees certain information about the scheme (such as the name and address of the pension provider).

4.2 Exemptions
An employer will be exempt from the requirement to designate a stakeholder pension scheme if:

(a) It employs fewer than five employees (an employer who previously employed fewer than five employees has three months in which to designate a scheme from the date on which it employs its fifth employee);

(b) It offers an occupational pension scheme which all staff can join within 12 months of starting at the company (excluding those who are under 18 or within 5 years of pensionable age); or

(c) It offers employees access to a personal pension scheme which is available to all employees over the age of 18 and which has no penalties for members who stop contributing or who transfer their pension. Further, the employer must make contributions of at least 3% of the employees’ basic pay and offer payroll deduction for employee contributions.

4.3 Employees who qualify
An employer who is obliged to designate a stakeholder pension scheme must provide access to it to all employees except those:

(a) who have been employed for less than three months;

(b) who either have joined or have chosen not to join the employer’s occupational pension scheme;

(c) who are unable to join the employer’s occupational pension scheme because they are under the age of 18 or who are within 5 years of pensionable age;

(d) who have continuously earned below the National Insurance lower earnings limit (currently £97 per week) for the last three months; or

(e) who are ineligible to make contributions because of HMRC restrictions (e.g. an employee who does not normally live in the UK).

5 HOLIDAYS

5.1 Public and bank holidays
Although employees do not currently have a statutory entitlement to paid leave for bank and public holidays, most employment contracts provide for this. In England, Wales and Scotland these holidays are: 1 January, 2 January (Scotland only), Good Friday, Easter Monday (except Scotland), the first Monday in May, Spring Bank Holiday (usually the last Monday in May), the August Bank Holiday (usually the last Monday in August), 25 and 26 December.

5.2 Minimum annual leave
Under the Working Time Regulations 1998, agency workers and employees have a statutory right to a minimum of 5.6 weeks’ annual paid holiday (28 days for a worker who works 5 days per week). Public and bank holidays may count towards this entitlement. During the worker’s first year of employment,
the right accrues on a pro rata basis. Since the Regulations set only the
minimum requirements, more generous provisions relating to annual leave
may be included in the contract of employment. The contract of employment
may set out the procedure to be followed when the employee wishes to take
annual leave. In the absence of any contractual provisions, the employee must
give notice of at least twice the period of leave they are proposing to take.
The employer may also require the employee to take all or part of their leave
on certain dates by giving them notice of that requirement. Where a worker's
employment is terminated and they have not taken all of their accrued minimum
leave entitlement, the employer must pay them in lieu of that untaken leave.
Equally, the contract of employment may include an obligation for the employee
to reimburse the employer if they have exceeded their accrued annual leave
entitlement.

5.3 Annual leave and sick leave
The House of Lords referred a case (Stringer and others v HMRC) to the
European Court of Justice for clarification about workers on long term sick leave
and their entitlement to annual leave under the Working Time Directive.

The European Court of Justice delivered its judgment on 20 January 2009. The
key points were that:
• Under the Working Time Directive, workers were (at that time) entitled to four
weeks' annual leave;
• A worker on sick leave for all or part of the annual leave year should be
entitled to any untaken annual leave when they return to work (which might
be in the next leave year);
• Alternatively, if a worker's employment is terminated before they have had
the opportunity to take their annual leave entitlement due to sickness, the
worker should receive payment in lieu at the normal rate of pay.

The case was referred back to the House of Lords to consider the Working
Time Regulations in light of this judgment. The House of Lords subsequently
confirmed that statutory holiday entitlement under the Working Time Regulations
should accrue during periods of sick leave, and that payments in lieu of untaken
statutory holiday on termination should not be affected by sickness absence.
As to when a worker on long term sick leave can take the leave to which they
are entitled, the parties seem to have agreed in this case that as the Working
Time Regulations do not permit the carry over of statutory leave from one year
to another, to give effect to the ECJ's judgement, the Working Time Regulations
must be interpreted as allowing workers on long term sick leave to take their
paid holiday entitlement during the sick leave.

In 2009, the European Court of Justice ruled on a further case involving sick pay
and annual leave (Pereda v Madrid Movilidad SA). In Pereda, it was held that
where a worker's pre-arranged holiday coincides with a period of sick leave,
the worker must be given the option of designating an alternative period for the
exercise of their holiday entitlement. This decision was subsequently applied by
the employment tribunal in Shah v First West Yorkshire Limited, in which it was
held that wording should be read into the Working Time Regulations to permit
holiday leave to be carried into the following holiday year in circumstances where
the employee had been prevented from taking such holiday leave as a result of
being off work sick.

6 SICK PAY

6.1 Statutory Sick Pay ("SSP")
All employees earning over the weekly lower earnings limit for National Insurance
Contributions (currently £97 per week) are entitled to receive SSP for days on
which they are unable to work due to sickness. The current maximum weekly
rate of SSP is £79.15 (rates are increased annually in April). The rules governing
payment of SSP are complex but the main ones are that:
(a) There is a maximum entitlement of 28 weeks of SSP in a three year period;
(b) An employee is not entitled to be paid SSP for the first three days of any
period of absence (unless it is a case of a recurring absence within a
specified timescale); and
(c) The employee must provide the employer with evidence of incapacity for
work (such as a self-certificate or a doctor's certificate).
6.2 Contractual Sick Pay
In view of the fact that the rate of SSP is usually much lower than most employees’ weekly salary, many employers operate contractual sick pay arrangements whereby employees are paid their full salary for a specified number of days’ sickness absence per year. Any contractual sick pay paid to an employee is set off against any SSP due for the same day. Therefore, where an employee is entitled to both SSP and contractual sick pay for the same day of absence, they will receive the higher of the two sums, but not both.

7 Maternity Leave
7.1 Time off for ante-natal care
All pregnant employees are entitled to paid time off to keep appointments for ante-natal care made on medical advice. Except in the case of the first appointment, the employer can require the employee to produce a medical certificate confirming that she is pregnant together with a document showing that the appointment has been made.

7.2 Maternity Leave
All pregnant employees (regardless of length of service) must take two weeks’ maternity leave starting on the day childbirth occurs. Employees are however entitled to 26 weeks’ Ordinary Maternity Leave (“OML”) which can be taken at any time from the 11th week before the expected week of childbirth (“EWC”), followed by a further 26 weeks’ Additional Maternity Leave (“AML”), which must start immediately after the end of the OML. All contractual benefits except wages or salary continue to be payable throughout OML and AML. For special rules relating to bonuses, see 7.6 below.

In order to qualify for maternity leave, an employee must notify her employer by the end of the 15th week before her EWC, unless this is not reasonably practicable. If the employee wishes to change her mind about when she wants to take her maternity leave, she must give her employer at least 28 days’ notice. Maternity leave is automatically triggered if an employee is absent from work for a pregnancy-related illness during the four weeks immediately before her EWC.

7.3 Maternity Pay
Employees who have at least 26 weeks’ continuous service up to the “qualifying week” (which is the 15th week before the EWC) are entitled to up to a total of 39 weeks’ Statutory Maternity Pay (“SMP”). SMP for the first six weeks is paid at 90% of the employee’s normal weekly earnings (calculated as an average of her actual earnings over the eight week period prior to the qualifying week, including any bonuses received during that period). The remaining 33 weeks are paid at a flat rate which is set by the Government. That rate is £124.88 from 4 April 2010 (or 90% of the employee’s normal weekly earnings if lower), with any rate increases taking place annually in April. An employer can recover from the Government either 92% or 104.5% plus compensation (depending on the amount of National Insurance Contributions paid during the relevant tax year) of SMP paid by setting it off against the National Insurance Contributions which it sends to HMRC each month. Plans to increase the statutory maternity pay period to 52 weeks in the future have been postponed indefinitely.

7.4 Rights on returning to work
If an employee intends to return to work at the expiry of her full maternity leave entitlement, no notice is required to be given. In contrast, an employee must give at least 8 weeks’ notice to her employer if she intends to return to work before the end of her full entitlement. An employee returning from OML is entitled to return to the same job that she had before taking maternity leave. An employee returning from AML is entitled to return to the same job unless it is not reasonably practicable for her to do so, in which case she must be offered suitable alternative employment. If a redundancy situation arises during an employee’s maternity leave, the employer must offer her a suitable alternative position if one is available (and she takes priority over any colleagues not on maternity leave) or the redundancy will be regarded as automatically unfair.
7.5 Contractual maternity rights
Many employers operate contractual maternity schemes which offer benefits over and above the statutory scheme. For example, employers may agree to continue to pay full salary for all or part of the maternity leave period. Some employers provide that any such enhanced contractual payments are repayable in the event that the employee does not return to work for a minimum period of time after the end of her maternity leave.

7.6 Bonuses during maternity leave
This is a complicated area. The general rule is that contractual bonuses can be pro-rated to exclude any entitlement while the employee is on maternity leave (other than the two week compulsory maternity leave period), whereas discretionary bonuses should be paid as normal.

8 PATERNITY LEAVE
8.1 Paternity Leave
Employees who
(i) expect to have responsibility for the child's upbringing,
(ii) are the biological father or the mother's husband or partner and
(iii) have completed 26 weeks' service by the 15th week before the baby is due, are entitled to two weeks' ordinary paternity leave. (Please see 8.4 for details of additional paternity leave).

Leave must be completed within 56 days of the date of childbirth (or, if the child is born early, within 56 days of the EWC). Employees earning over the weekly lower earnings limit for National Insurance Contributions (currently £95 per week) are entitled to Statutory Paternity Pay (SPP), which will be at the same rate as flat rate Statutory Maternity Pay, which is £124.88 from 4 April 2010 (see Rights During Employment 7.3). Employers can recover either 92% or 104.5%, plus compensation, of SPP paid (depending on the size of National Insurance Contributions paid during the relevant tax year). All contractual benefits except wages or salary continue throughout the paternity leave.

8.2 Procedure for taking Paternity Leave
Notice of the intention to take leave must be given to the employer by the end of the 15th week before the EWC unless this is not reasonably practicable. Employees may choose to take one or two consecutive weeks’ leave.

8.3 Rights on returning to work
Employees are entitled to return to the same job following paternity leave.

8.4 Additional paternity leave
The Additional Paternity Leave Regulations 2010 have now been published. These Regulations will affect parents of babies due on or after 3 April 2011, or in relation to adoption, parents who are notified of having been matched on or after 3 April 2011, and provide that eligible employees may take up to 26 weeks of additional paternity leave. The eligibility conditions for additional paternity leave mirror the conditions for existing paternity leave (which will become known as “ordinary paternity leave”), and additionally provide that the mother or adopter must have returned to work without exhausting their entitlement to maternity or adoption leave.

Additional paternity leave can be taken at any time from 20 weeks from the date of birth of the child or the date of placement (in the case of adoption) up until the child's first birthday. Eight weeks’ notice must be given by the employee of their intention to take additional paternity leave; the employer must then notify the employee of their right to take such leave within 28 days of receiving the request. The Additional Paternity Leave Regulations provide for a self-certification process, whereby both parents must provide certain information to the employer. The employer can then seek further information if it deems this necessary.

The provisions on terms and conditions of employment during additional paternity leave and the right to return to work mirror those which apply to an employee on additional maternity leave. While on additional paternity leave, employees will be entitled to statutory paternity pay, although this will be limited to the portion of statutory maternity pay not already claimed by the mother or adopter before their return to work.
9 ADOPTION LEAVE

9.1 Adoption Leave
To qualify for adoption leave, an employee must
(i) be newly matched with a child for adoption and
(ii) have completed 26 weeks’ service by the week in which they are notified
of the adoption.

Employees earning over the weekly lower earnings limit for National Insurance
Contributions are entitled to 26 weeks’ Ordinary Adoption Leave (“OAL”), plus
a further 26 weeks’ Additional Adoption Leave (“AAL”). Statutory Adoption Pay
(“SAP”) is payable for up to 39 weeks and is paid at the same rate as Statutory
Maternity Pay (see Rights During Employment 7.3). Employers can recover
either 92% or 104.5% plus compensation of SAP paid (depending on the size of
national insurance contributions paid during the relevant tax year). Employees
may start their leave either from the date of the child’s placement or up to 14 days
before the expected date of the placement. During OAL and AAL, all contractual
benefits except wages or salary continue to be payable.

9.2 Procedure for taking Adoption Leave
Employees must inform their employer of their intention to take adoption leave
within seven days of being notified that they have been matched for adoption,
unless this is not reasonably practicable. If an employee changes their mind
about when they wish to start adoption leave, they must give at least 28 days’
notice to their employer.

9.3 Rights on returning to work
Employees wishing to return to work before the end of their full adoption leave
must give their employer at least eight weeks’ notice. No notice is required if an
employee wishes to return at the end of their full adoption leave entitlement. An
employee returning from OAL is entitled to return to the same job that they had
before taking leave. An employee returning from AAL is entitled to return to the
same job unless it is not reasonably practicable to do so, in which case they
must be offered suitable alternative employment.

9.4 Interrelation with Paternity Leave
Only one member of a couple who adopt jointly may take adoption leave. The
equivalent of paternity leave may be available to the other, and paternity leave
may also be available to the partner of an individual who adopts a child but who
does not, themselves, adopt the child. There is no requirement for an employee
taking paternity leave to be the biological or adoptive father of the child so long
as they are the partner, male or female, of the mother or adoptive parent and
expect to have responsibility for bringing up the child. For further details, see
Rights During Employment 8 above.

10 PARENTAL LEAVE

10.1 Entitlement to Parental Leave
The Maternity and Parental Leave Regulations 1999 introduced a right for
parents of either sex who fulfil certain qualifying conditions to take up to 13
weeks’ unpaid parental leave per child for whom they have responsibility. In the
case of disabled children the period of leave to which parents are entitled is 18
weeks. The right is available to employees with over one year’s service and who
have parental responsibility for a child. The right to take parental leave normally
ends when the child is five, although special rules apply to disabled or adopted
children. Under the Regulations, the leave has to be taken for the purposes of
caring for a child.

10.2 Procedure for taking Parental Leave
The Regulations allow employers to agree with employees how and when
parental leave can be taken. In the absence of agreement, the Regulations
provide that employees must give at least 21 days’ notice of their intention to
take parental leave and that the leave can only be taken in blocks or multiples of
one week (unless the child is disabled). Unless otherwise agreed, an employee
cannot take more than four weeks’ leave in respect of an individual child in
any one year. The Regulations also allow employers to require an employee to
postpone taking leave by up to six months if the proposed timing of their leave
would cause undue disruption to the business.
10.3 Rights on returning to work
An employee who takes parental leave of four weeks or less is entitled to return to work to the same job on the same terms and conditions. If more than four weeks' leave is taken or if leave is taken immediately after Additional Maternity Leave, the employee must be permitted to return to the same job unless it is not reasonably practicable to do so, in which case they must be offered suitable alternative employment.

11 TIME OFF FOR DEPENDANTS

11.1 Entitlement to time off
All employees (regardless of length of service) are entitled to take “reasonable” unpaid time off work to deal with an emergency involving a dependant. The guidance issued by the Government suggests that, in most cases, one or two days will be sufficient to deal with a particular incident. The employee must tell the employer the reason for the absence and how long they expect to be absent “as soon as reasonably practicable”.

The right to take time off is limited to the following situations:

(a) To provide assistance when a dependant falls ill, gives birth or is injured or assaulted, or to make arrangements for the care of a dependant who falls ill or is injured;
(b) Following the death of a dependant;
(c) Because of the unexpected disruption or termination of care arrangements for a dependant; or
(d) To deal with an unexpected incident involving a child of the employee that occurs while the child is at school.

11.2 Definition of dependant
For the purposes of situation (b) above, a dependant is defined as a spouse, civil partner, child or parent of the employee or someone else living in the same house as part of the family (e.g. unmarried partners or step-children). For situation (a) the definition is widened to include anyone who reasonably relies on the employee for assistance or to arrange care if they are ill or injured. For situation (c) a dependant will also include anyone who reasonably relies on the employee to make arrangements for their care if care has been disrupted or terminated.

12 FLEXIBLE WORKING

12.1 Rights to request flexible working
Currently, those caring for (a) children aged sixteen and under, or disabled children under the age of 18, or (b) adults who need care and fall within the statutory definition (see Rights During Employment 12.3) may request flexible working, although the government has announced plans to extend this right to all employees. The right is available to individuals who have been continuously employed for 26 weeks and who have responsibility for the child's or adult's care. Employees are able to request a change to the hours they work or the times they are required to work and may also request that they work from home.

12.2 Procedure for requesting flexible working
An application must be made for the purpose of enabling the employee to care for the child/adult. An employee can only make one application a year. The employee must first make a written application to the employer, who must then arrange a meeting within 28 days. The employer must then write to the employee within 14 days of the meeting either agreeing to the new working arrangements or setting out clear business grounds as to why the application cannot be accepted. Arrangements can be agreed on a trial period basis. The grounds listed in the legislation include the burden of additional costs and any detrimental effect on the employer's ability to meet customer demand. It is important for the employer to have an audit trail supporting their given reasons. The employee may appeal against a decision within 14 days of being notified of it.
12.3 Adult carer

As mentioned in Rights During Employment 12.1 above, the right to request flexible working covers care for ‘qualifying adults’. Qualifying adults means: (a) the spouse, civil partner or partner of the employee, (b) a relative of the employee, for example parents (including adoptive, step parents and in-laws), guardians, siblings and children (including adoptive, full blood and half blood relations), grandparents, aunts and uncles, and (c) adults living at the same address as the employee.

13 UNION MEMBERSHIP

All employees have the right to join, or to refuse to join, a trade union. A decision of the European Court of Human Rights also confirmed that offering employees financial inducements to relinquish their trade union rights is contrary to the European Convention on Human Rights. If the trade union is recognised by the employer, and in some circumstances an employer is obliged to recognise a trade union (see Collective Rights 2), then the employee will have certain rights to take part in trade union activities. Employees are also protected from dismissal and action short of dismissal on the grounds of their membership, or non-membership, of a trade union (see Collective Rights 2.9 for more details).

14 DATA PROTECTION RIGHTS

14.1 Processing of personal data

The Data Protection Act 1998 requires that all employers must comply with certain data protection principles when processing personal data relating to their employees. Personal data is broadly defined to include any data from which a living individual can be identified. However, a Court of Appeal case has suggested that data must have “the person as its focus” or otherwise be “biographical in nature” in order to constitute personal data. Under the legislation, an employer is generally prohibited from processing an employee’s personal data unless the employee has consented or the employer needs to process the data either to perform its obligations under the contract of employment or to comply with any other legal obligation. In addition, when processing any personal data, an employer must comply with the other data protection principles in the legislation. These require employers to ensure that the personal data which they hold is accurate, kept secure, not kept for longer than is necessary, not excessive, only processed for certain specified purposes and not transferred to countries outside the EEA without adequate data protection safeguards.

14.2 Sensitive personal data

Stricter pre-conditions need to be satisfied before an employer can process “sensitive personal data” (i.e. information relating to an employee’s racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical/mental health or condition, sex life or criminal offences/proceedings involving the employee). Unless the employee has made the information public themselves or the employer needs to process sensitive personal data to comply with UK employment law, an employer will generally need to obtain the employee’s explicit consent to the processing. Since an employer is likely to need to process an employee’s sickness records (which will qualify as sensitive personal data) it is advisable to include a clause in the employment contract whereby the employee gives their express consent to such processing.

14.3 Information to be provided

Employers also need to provide or make available to employees certain information such as the purpose for which it will process any personal data and the name of any representative who processes employees’ data on the employer’s behalf (e.g. if the employer contracts out its payroll function, it will need to inform employees of the identity of the contractor). An employer could comply with this obligation to make the information available by including the relevant details in employees’ contracts or in the staff handbook or by posting it on the company’s intranet.
14.4 Employees’ right of access
On making a written request, an employee is entitled to be provided with a copy of the personal information which their employer holds about them (unless this would involve a disproportionate effort or is not possible). The employer can charge the employee a fee of not more than £10 and must respond to the request within 40 days. There are a number of exemptions from the duty to make information available. The exemptions most likely to be applicable in relation to access requests by employees are:

(a) References – an employee is not entitled to have access to any reference given in confidence by a current employer. However, they will be able to gain access to references received by that employer from a third party;

(b) Information identifying another individual – an employer need not provide information which would identify another individual unless that individual has consented or it is reasonable to dispense with their consent;

(c) Management forecasting information – personal data which is processed for the purposes of management forecasting or management planning cannot be accessed by employees if this would prejudice the conduct of the business (e.g. data relating to proposed pay reviews, redundancies or a possible take-over); or

(d) Information which may prejudice negotiations between the employer and employee – this would cover matters such as details relating to intended salary rises.

14.5 International transfer of data
The legislation prohibits an employer from transferring employees’ personal data to any country outside the EEA unless it has adequate data protection laws. Although the US does not have generally applicable federal laws on data protection for the private sector, it is permissible for data to be transferred to companies in the US which have adopted the “safe harbour” principles (which have been recognised by the European Commission as providing adequate protection). If an employer wishes to transfer data to a non-safe harbour US company or anywhere else outside the EEA (save for Argentina, Guernsey, the Isle of Man and Switzerland which have been approved as having adequate data protection laws, and to Canadian recipients subject to the Personal Information Protection and Electronic Documents Act), it must either require the organisation receiving the data to sign appropriate contractual undertakings or rely on one of the derogations in the legislation. The derogations most likely to be relevant to employment-related information are:

(a) The employee has given consent to the transfer;

(b) The transfer is necessary for the performance of the employment contract or for processing a job application from a prospective employee; or

(c) The transfer is necessary for the conclusion or performance of a contract between the employer and a third party which is entered into at the request of the employee or it is in the interests of the employee (e.g. for a contract between the employer and a company that provides certain employee benefits).

In view of the difficulties of establishing whether a particular country provides adequate protection or of showing that the data transfer is necessary for the purposes listed in (b) and (c) above, it is advisable for any company which may wish to transfer employee data outside the EEA either to obtain its employees’ consent by including an appropriate clause to that effect in the employment contract or to obtain appropriate contractual undertakings from the recipient of the data. The Commission has approved standard contractual clauses which will be regarded as providing adequate protection.

14.6 Code of Practice
A Code of Practice for employers has been published by the Information Commissioner’s Office and is published on its website (www.ico.gov.uk). Although the Code is not legally binding, it represents the views of the Information Commissioner on what organisations must do to ensure compliance with the Data Protection Act 1998. Part 1 deals with Recruitment and Selection, Part 2 deals with Records Management, Part 3 deals with Monitoring at Work and Part 4 deals with Medical Records.
15  DISCIPLINARY AND GRIEVANCE PROCEDURES

15.1 ACAS Code of Practice

When conducting disciplinaries and grievances, employers and employees must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. Whilst the Code is not legally binding, if an employer unreasonably fails to comply with the Code, Tribunals will have the power to increase any award that it makes by up to 25%, and if the employee has unreasonably failed to comply with the Code, the Tribunal has the power to reduce any award by up to 25%. The Code does not apply to redundancy dismissals or the non-renewal of a fixed term contract.

The Code recommends that all employers should draw up disciplinary rules together with a procedure for dealing with disciplinary issues.

It indicates that the employee should be provided with details of the allegations that have been made against them in advance of any disciplinary hearing and should be given the opportunity of challenging the allegations and evidence before a decision is taken. The Code also recommends that employees should be given a right of appeal against any decisions taken.

15.2 The right to be accompanied

All workers have the right to be accompanied by a colleague of their choice or by a suitably qualified trade union official when required or invited to attend certain disciplinary or grievance hearings. However, the right does not apply to meetings that are purely investigation meetings. The employee may be accompanied by a trade union official even if the employer does not recognise a trade union for collective bargaining purposes. If the person whom the worker wishes to accompany them is unavailable at the date set for the hearing, the worker is entitled to ask that the hearing be postponed to another reasonable date within five days of the date originally set. The accompanying person may consult with the employee and address the hearing, but may not answer questions on the employee’s behalf.

16  MONITORING/SURVEILLANCE

There is no right to privacy under UK common law. However, in recent years legislation has been introduced which has given employees some protection against unwarranted infringements into their private lives. In particular, the legislation introduces limitations on an employer’s ability to carry out monitoring of its employees’ email, internet and telephone use.

16.1 Privacy Rights

The Human Rights Act 1998 (“HRA”) is designed to give effect to the rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The HRA makes it unlawful for public authorities in the UK to act in a way which is incompatible with the Convention rights unless they are required to do so under primary legislation. Although the HRA is not directly enforceable against private sector employers, it will have an indirect effect on employers in the private sector because the courts and Employment Tribunals (being public bodies) will have to take the provisions of the HRA into account when reaching their decisions. In addition, the HRA requires the courts to interpret all legislation so as to be compatible with the European Convention so far as it is possible to do so. Among the rights protected by the HRA is the right to respect for private and family life, home and correspondence. This right could be infringed if an employer carries out monitoring or surveillance of its employees without giving prior warning that this may take place. Therefore, if an employee is dismissed as a result of evidence obtained through covert monitoring or surveillance, they may be able to argue that the Employment Tribunal should uphold their claim for unfair dismissal, and/or that this evidence should be inadmissible, on the grounds that rights under the HRA were infringed.
16.2 Interception of Communications
The Regulation of Investigatory Powers Act 2000 (“RIPA”) introduced both criminal and civil liability for “unlawful interception” of a communication on a telecommunications system (which may include a communication by telephone, fax, email or the internet). However, RIPA provides that employers will be able lawfully to intercept and monitor communications if there are reasonable grounds for believing that both the sender and the intended recipient consent to it or if the interception is authorised by the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. These Regulations allow an employer to intercept, monitor and (in limited situations) record communications relevant to the employer’s business for certain specified purposes such as to investigate or detect unauthorised use of the system by employees. However, to take advantage of this exemption, the employer must make “all reasonable efforts” to inform potential users of the system that interceptions may be made. Therefore, any employer who is likely to carry out any form of email, internet or telephone monitoring should warn its employees that this may take place. Such a warning is commonly included in a document setting out the employer’s policy on email, internet and telephone use.

16.3 Data Protection Act 1998
Although monitoring may be lawful under the legislation referred to above, employers will still need to comply with the provisions of the Data Protection Act 1998 when carrying out any monitoring. The Information Commissioner has published a Code of Practice setting out guidelines on the standards which employers should adopt to avoid breaching any of the principles set out in the Data Protection Act. The Code is available on the website of the Information Commissioner’s Office (www.ico.gov.uk). The Code recommends that employers refrain from carrying out monitoring or surveillance unless it is necessary to achieve a specific business purpose and that, in making this assessment, they should consult with employee representatives. Personal information should only be used for the purposes for which it was collected unless it would be in the employee’s interests to use it otherwise, or if it reveals information that no reasonable employer could be expected to ignore. The Code also recommends telling workers what monitoring is taking place and why (and reminding them of this periodically) unless covert monitoring is justified. It is recommended that covert monitoring should be limited to situations where criminal activity is suspected and the employer concludes that overt monitoring would prejudice the investigation.

17 HEALTH AND SAFETY

17.1 Duty to take care for safety of employees
An employer is under a duty to take reasonable care for the safety of its employees. This duty arises at common law and under the Health and Safety at Work Act 1974. Employers are also liable for health and safety breaches by their employees if these are committed in the course of their employment.

The employer’s duty is usually expressed as the obligation to:

(a) Provide a safe place of work;
(b) Provide a safe means of access to the place of work;
(c) Provide a safe system of work;
(d) Provide adequate equipment and materials;
(e) Employ competent fellow employees; and
(f) Protect employees from unnecessary risk of injury.

The application of the general duty to a wide range of specific situations (covering, for example, electricity at work, computer screens and use of alcohol and drugs) is set out in an extensive body of regulations.
17.2 Stress claims
An employer’s duty to take reasonable care for the safety of its employees extends to preventing psychological, as well as physical, harm. However, recent cases have suggested that an employer will not be liable to a particular employee unless there are warning signs, such as the fact that:
(i) the employee is being overworked or is showing signs of stress in comparison to other employees in a similar position;
(ii) the employee has previously suffered psychological injury, such as a breakdown, as a result of overwork;
(iii) the employee has previously complained about the stress of their job; or
(iv) the employee has uncharacteristically been absent from work for prolonged periods.

If these warning signs do exist, employers should consider:
(i) giving the employee a sabbatical or transferring them to other work,
(ii) redistributing the work or providing extra help and/or
(iii) providing confidential counselling or buddying or mentoring services.

17.3 Health and Safety Policy Statement
Employers employing five or more employees must prepare (and revise where necessary) a written statement detailing their policy on health and safety at work and the arrangements for giving effect to it. The policy must be brought to the notice of all employees, for example by displaying it on an accessible notice board. Employees should also be given information on health, safety and welfare in the form of posters and leaflets published by the Health and Safety Executive.

17.4 Consultations with employees
Employers are obliged to consult with employees on health and safety matters. This consultation should be with union representatives or, in the case of non-unionised workers, with employees directly or with their elected representatives. This is dealt with in more detail at Collective Rights 3.2.

18 WHISTLEBLOWING

18.1 Right not to suffer detriment or be unfairly dismissed
Under the Public Interest Disclosure Act 1998 ("PIDA"), employees (and certain other workers) have the right to disclose information about alleged wrongdoings. Provided the disclosure qualifies as a "protected disclosure", then the employee has the right not to suffer any detriment as a result of making the disclosure. If the employee were dismissed, the dismissal would be automatically unfair.

18.2 Qualifying disclosures
To qualify as a "protected disclosure", the information disclosed must, in the reasonable belief of the worker making the disclosure, fall within one of a number of categories of wrongdoing listed in PIDA. The disclosure must also be made to one of the people listed in PIDA, although the disclosure can be made to another person if other requirements are satisfied.

(a) Information that can be disclosed. The information to which PIDA applies includes the fact that
(i) a criminal offence has been, is being or is likely to be committed,
(ii) a person has failed, is failing or is likely to fail to comply with a legal obligation to which they are subject,
(iii) the health and safety of any individual has been or is likely to be endangered,
(iv) a miscarriage of justice has occurred, is occurring or is likely to occur, or
(v) information indicative of any of the listed wrongdoings has been, is being or is likely to be concealed.

The Employment Appeal Tribunal has interpreted the wrongdoing of failing to comply with a legal obligation widely, finding that it covered breaches by a third party and breaches of the employment contract. Therefore, if an employee discloses (in accordance with the other requirements of PIDA) a breach of their employment contract, then they are likely to be protected from suffering a detriment or being unfairly dismissed.
(b) **Person to whom the information must be disclosed.** The categories listed in PIDA include:

(i) the individual’s employer, or, where the conduct relates to another person or to matters for which a person other than the employer is responsible, that other person;

(ii) the individual’s legal adviser in the course of obtaining legal advice; and

(iii) a large number of public bodies listed in the Public Interest Disclosure (Prescribed Persons) Order 1999 (as amended), such as the Health and Safety Executive in relation to health and safety matters, HMRC in relation to tax and similar matters, and the Pensions Regulator in relation to pension scheme matters.

The disclosure can also be made to other individuals if:

(a) the worker believes they will be subjected to a detriment if they make a disclosure to their employer or to one of the bodies listed in the Order;

(b) where there is no applicable public body listed in the Order to whom the worker can make the disclosure and they believe that the wrongdoing will be concealed if the disclosure is made to the employer; or

(c) the worker has previously made the same disclosure to their employer or to one of the bodies listed in the Order.

Where a worker makes a disclosure on this basis, it must be made in good faith and not for the purposes of personal gain, they must reasonably believe that the information and the allegations are correct and it must be reasonable for the disclosure to be made. Finally, where the wrongdoing is of an “exceptionally serious nature”, the worker can also make a disclosure to other individuals, provided that the disclosure is made in good faith and not for the purposes of personal gain, the worker reasonably believes that the information and the allegations are correct, and that it is reasonable for the disclosure to be made.

Regulations brought into force on 6 April 2010 give employment tribunals the power to forward a Tribunal claim form, or extracts from it, to an appropriate regulator where the claimant has consented or alleged in the claim that they have made a protected disclosure. The regulator will then be able to investigate the alleged malpractice. The claimant must give express consent by ticking a box on the ET1 (claim) form, which has been amended for this purpose.

19 **THE PROTECTION FROM HARASSMENT ACT 1997**

The Protection from Harassment Act 1997 was introduced originally to deal with stalkers. Under the Act, it is an offence for anyone to pursue a “course of conduct” which causes another person harassment, alarm or distress in circumstances where a reasonable person would feel harassed. “Course of conduct” excludes one-off incidents, so in order for the Act to apply there must be two or more incidents (but note that they do not have to amount to unlawful discrimination).

19.1 **Liability**

If convicted in the criminal courts of an offence under the Act, a harasser could face imprisonment, a fine and/or a restraining order. A person subject to harassment can also bring a claim in the civil courts for economic losses resulting from the harassment and money to compensate for anxiety caused by the harassment. They can also apply for an injunction to restrain the harasser from pursuing any conduct which amounts to harassment. Civil proceedings can be issued at any time up to six years from when the harassment occurred.

19.2 **Vicarious liability**

Employers can be held vicariously liable for acts committed by employees in the course of their employment. An employer will only be liable for civil acts and not criminal acts.

19.3 **Impact of the Act on the workplace**

The House of Lords has confirmed that where one employee is harassing or bullying another, and those acts are closely connected with the harasser’s ordinary work duties (e.g. a manager bullying a member of their team when issuing instructions or reviewing work), the employer could be held vicariously liable for those acts and be liable to pay compensation. Unlike discriminatory harassment claims, it will not be open to the employer to argue that they took all reasonable steps to prevent the harassment from happening.
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Termination of Employment

1 OVERVIEW

Dismissal can give rise to a number of different claims under UK law. The principal claims that may arise on termination of employment are:

(i) wrongful dismissal;
(ii) unfair dismissal;
(iii) a claim for a redundancy payment;
(iv) a claim arising out of a failure to give written reasons for dismissal; and
(v) a claim for discrimination on the grounds of sex, race, disability, sexual orientation, religion or belief or age (see Discrimination 1-11.8).

2 WRONGFUL DISMISSAL

2.1 Nature of claim

An employee will be able to bring a claim for breach of contract (commonly known as "wrongful dismissal") if their employer terminates their employment without either giving the appropriate period of notice specified in their contract of employment or making a payment in lieu of notice. Alternatively, a claim for wrongful dismissal may be brought if the employee is employed under a fixed term contract which is terminated prior to the expiry of the fixed term. This type of claim may be brought in either the common law courts (the High Court or County Court) or the Employment Tribunal. The Employment Tribunal can only make awards of compensation for breach of contract of up to £25,000. There is no limit in the common law courts.

2.2 Defences

The only defences available to the employer are either:

(i) that proper notice of termination (or payment in lieu of notice) has been given; or
(ii) that the employer was entitled to dismiss the employee without any notice.

The circumstances in which the employer is entitled to terminate without giving notice are sometimes set out in the contract of employment. If they are not set out in the contract, the employer will need to show that the employee's behaviour amounted to a fundamental breach of their obligations under the contract. Generally, it will be necessary to show that the employee was guilty of gross misconduct or gross negligence.

2.3 Compensation

If an employee is successful in bringing a wrongful dismissal claim, they will generally be entitled to compensation equal to the net value of the salary and benefits which they would have received had they been given their full period of notice. However, the employee will generally be under a common law duty to "mitigate their loss". This means that they must take reasonable steps to look for alternative employment. If they are successful in finding other work during the period which would have represented their notice period (or the unexpired portion of their fixed term contract), then they must give credit to their former employer for any earnings received during that period. If the employee fails to take reasonable steps to mitigate their loss, the Court may reduce their compensation accordingly. An employee may not be obliged to mitigate his or her loss for wrongful dismissal purposes where the contract includes an express right to make a payment in lieu of notice.

2.4 Damages for failure to follow disciplinary procedure

An employee may be entitled to claim additional compensation if the employer fails to follow a contractual disciplinary procedure before dismissing for misconduct or poor performance. If the employer dismisses the employee without following the disciplinary procedure, the employee may claim additional compensation equal to the value of their salary and benefits during the period which would have elapsed had the procedure been followed. To succeed with such a claim, the employee will need to establish that the disciplinary procedure forms part of their contractual terms. Therefore, it is currently possible to avoid liability for claims of this type by including a statement in the disciplinary procedure to the effect that it is not contractually binding.

2.5 Damages for failure to follow the ACAS Code of Practice

The employee may decide to bring a wrongful dismissal claim in the Employment Tribunal instead of the common law courts. Consequently, the Employment Tribunal will have a discretion to increase awards by up to 25% if an employer unreasonably fails to comply with the ACAS Code of Practice, or reduce awards by up to 25% if an employee unreasonably fails to comply with the ACAS Code of Practice.
2.6 Garden leave
As an alternative to dismissing an employee without notice, an employer may want to put the employee on garden leave. In this situation, the employer requires the employee not to attend work and/or not to contact other employees or clients/customers during their notice period, but to remain “on call”. However, unless there is an express clause in the employee’s contract, an employer may not be able to force the employee to go on garden leave. Case law has indicated that, in the absence of an express general power to suspend the employee, an employer may be under an implied duty to provide an employee with work if there is work to do and the employee is willing to do it, and if other factors (such as the need for the employee to practise their skills in order to maintain them) point towards this.

3 UNFAIR DISMISSAL
3.1 Entitlement to claim
In most circumstances, only employees with one* or more year’s continuous employment with the same or an associated employer are entitled to bring claims for unfair dismissal. However, there are exceptions to this requirement. For example, an employee with less than one year’s service will be able to bring an unfair dismissal claim if the dismissal is for a reason related to the employee’s trade union membership/activities, is connected with pregnancy or maternity leave, is for a health and safety reason, is because the employee has brought a statutory claim against the employer (such as a claim for unlawful deduction of wages) or has made a protected disclosure (see Rights During Employment 18).

3.2 Constructive dismissal
Only employees who have been dismissed are entitled to bring a claim for unfair dismissal. However, if an employee resigns in response to a fundamental breach of their contract of employment by their employer, they will still be treated as having been dismissed. This is known as constructive dismissal. To establish a constructive dismissal, the employee will need to show that the employer has committed a serious breach of contract, that they resigned in response to that breach and that they did not waive the breach by delaying too long before resigning. Common examples of situations which could give rise to a claim for constructive dismissal are where an employer unilaterally reduces an employee’s remuneration package or changes their status.

3.3 Potentially fair reasons for dismissal
To defend a claim for unfair dismissal successfully, the employer will need to show not only that it had a fair reason for the dismissal but also that it followed a fair procedure before carrying it out. Dismissal procedures are examined at Termination of Employment 4.

As to the reason for dismissal, the legislation provides that there are only six potentially fair reasons, as follows:

(a) Misconduct;
(b) Poor performance / ill health;
(c) Redundancy;
(d) Because it would be illegal to continue to employ the individual in his current capacity (e.g. if a driver is disqualified from driving);
(e) Some other substantial reason justifying dismissal (e.g. if an employee refuses to accept a necessary change to their terms and conditions of employment); or
(f) Retirement (assuming that it takes place on or after retirement age), provided that the retirement is carried out in accordance with the “duty to consider” procedure. The retirement age will either be the default age of 65* or the company’s retirement age, although if the company’s retirement age is earlier than 65 this will need to be objectively justified.

(*In effect 51 weeks’ service will be sufficient – see Introduction 2.3.)

(*The Government has announced an intention to abolish the default retirement age in October 2011. Once this has occurred, it is likely that all retirement ages will need to be objectively justified.)
3.4 Remedies

If an unfair dismissal claim succeeds, the Tribunal has a choice of remedies. First, it can order the employer to reinstate the employee to their old position or re-engage them in a comparable position. Such an order will also require the employer to pay the employee’s lost earnings between the date of dismissal and the date when the order is complied with. However, in practice, reinstatement/re-engagement orders are rarely made and will only be made where the employee wants it, compliance with the order by the employer is practicable and there was no substantive contributory fault by the employee. Where no re-engagement/reinstatement order is made then a Tribunal will award compensation as follows:

(a) Basic Award – this is calculated in the same way as a statutory redundancy payment (see Termination of Employment 4.2) and is based on the employee’s age, salary and length of service. It is currently subject to a maximum of £11,400 (as of 1 February 2010). In some circumstances there is a minimum amount that is awarded as a basic award, for example, where the main reason for dismissal is because of the employee’s trade union membership, the basic award shall not be less than £4,700);

(b) Compensatory Award – this will be such amount as the Tribunal considers “just and equitable” having regard to the loss suffered by the employee as a consequence of the dismissal. In practice, it is calculated to equate to the employee’s loss of earnings arising out of the dismissal (including the value of any loss of benefits). If the employee has not found another job by the time of the Tribunal hearing, the Tribunal will calculate the compensatory award by estimating how long it will take the employee to find another job at a similar salary. The current maximum compensatory award that can be made for most unfair dismissal cases is £65,300 (as of 1 February 2010) and may include a sum in respect of loss of statutory rights, generally £250. This maximum amount for the basic and compensatory awards is reviewed each year by the Government with reference to the Retail Prices Index;

(c) Additional Award – in the rare cases where a reinstatement / re-engagement order is made and the employer unreasonably fails to comply with it, the Tribunal can award additional compensation of between 26 and 52 weeks’ pay. For these purposes, a “week’s pay” is currently capped at £380; or

(d) Deductions from Compensation - there are a number of grounds on which the Tribunal may reduce the amount of compensation awarded for unfair dismissal. For example, if the Tribunal considers that the employee was partly to blame for their dismissal, it may reduce the basic and compensatory awards by such proportion as it considers “just and equitable”. In appropriate circumstances (such as where the Tribunal is satisfied that the employee was guilty of gross misconduct but the employer failed to follow a fair dismissal procedure) the reduction may be as much as 100%. In addition, if the dismissal is found to be unfair only on procedural grounds, and the Tribunal concludes that there was a chance that the dismissal would have taken place even if a fair procedure had been followed, it may reduce the compensatory award to reflect this. For example, if it considers that there was a 50% chance that the employee would have been dismissed in any event, the compensatory award may be reduced by a similar percentage. A failure to follow an applicable disciplinary or grievance procedure could result in compensation being increased or reduced accordingly.

4 DISMISSAL PROCEDURES

A dismissal can be found to have been unfair purely on the grounds that it was handled unfairly (e.g. because the employer’s dismissal procedures were not implemented correctly). Therefore, before dismissing an employee who is eligible to bring a claim for unfair dismissal, it is important that an appropriate dismissal procedure is followed - simply following the ACAS code of practice does not necessarily make an unfair dismissal fair. The appropriate procedure will depend on the reason for dismissal. However, it is important to bear in mind that an employee who is unable to bring a claim for unfair dismissal (for example, because they have less than one year’s service) may still bring a claim for damages for breach of contract if the employer fails to follow a contractual disciplinary procedure before dismissing (see Termination of Employment 2.4).
4.1 Misconduct
If an employer is to dismiss an employee fairly on grounds of misconduct, it must operate a fair disciplinary procedure. This will always involve inviting the employee to a disciplinary interview and giving them an opportunity of answering the allegations made against them. The employee should be given advance notice of the disciplinary hearing and full details of the allegations against them as well as the opportunity of being accompanied by either a fellow employee of his choice or a trade union representative (see Rights During Employment 15.2).

In some circumstances, it may be appropriate to suspend the employee from work prior to the disciplinary hearing while an investigation into the allegations against them is carried out. Any such suspension should normally be paid. It will be unfair to dismiss an employee for a first offence, unless the incident is serious enough to constitute gross misconduct. In all other cases employees should normally be given warnings before dismissal. There is no specific legal requirement that a certain number of warnings must be given prior to dismissal, but it is common in the UK for employers to have the following stages to a disciplinary procedure:

(i) oral warning;
(ii) first written warning;
(iii) final written warning; and
(iv) dismissal.

Finally, all employees should be given the right to appeal against any disciplinary sanction.

4.2 Poor performance
The ACAS Code of Practice recommends that an employee should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been given. An exception to this is where the employee has been guilty of gross negligence (in which case it may be fair to dismiss without any prior warnings), although the employer should generally follow the relevant code of practice. In cases of poor performance, the employer will be expected to follow a procedure similar to the one described in Termination of Employment 4.1 above whereby the employee is given a series of warnings explaining the respects in which their performance is unsatisfactory, the improvement required and the time within which the improvement must be made. The consequences of failing to achieve the required standards within that timeframe should also be made clear. If appropriate, the employee should be given reasonable assistance (such as additional training) to help them achieve the required improvements. Consideration should also be given to whether the employee should be transferred to an alternative position. The employee should be given the opportunity of being accompanied by a fellow employee of their choice or a trade union representative at any meeting which could result in disciplinary action being taken, and be given the opportunity to appeal against any formal decisions taken.

4.3 Sickness
Before dismissing an employee for long-term sickness absence, the employer should investigate the current medical position by either sending the employee to a company nominated doctor or by obtaining a report from the employee’s own doctor. However, the employee’s consent to this will be required. If the medical evidence reveals that the employee will be unable to return to work within a reasonable period of time, it may be fair for the employer to dismiss. What is “reasonable” in this context will depend on the nature of the business and the employee’s position. For example, a small business will generally not be expected to tolerate as much sickness absence as a larger organisation might. However, before carrying out the dismissal, the employer should consult with the employee regarding the likelihood of the employee returning to work, the employer’s intention to dismiss and any alternatives to dismissal (e.g. it may be possible for the employee to return on a part-time basis or carry out different duties). Particular care should be taken if the employee’s condition is sufficiently serious to bring them within the definition of a person with a “disability” under the Disability Discrimination Act 1995. In these circumstances, the employer will be under an obligation to make “reasonable adjustments” to accommodate the employee’s disability (see Discrimination 6.2).
4.4 Retirement

The Equality Act 2010 – (see Discrimination 2) currently sets a default retirement age of 65. (Please note that the Government has announced an intention to abolish the default retirement age in October 2011. Once this has occurred, it is likely that all retirement ages – not just those below 65 – will need to be objectively justified).

Employers may nonetheless require employees to retire before reaching the age of 65, but only if they can show that this is objectively justified. To do so, an employer will have to provide real evidence that such a decision is a proportionate means of achieving a legitimate aim.

The circumstances under which retirement alone will be a fair reason for dismissing an employee are where the intended retirement date is on or after the employee’s 65th birthday, or on or after the employer’s fixed retirement age (provided that, if the fixed retirement age is below 65, it is objectively justified). In addition, at least six months in advance but no more than 12 months before the intended date of retirement, the employer should notify the employee in writing of (i) the date on which it is intended to retire them and (ii) their right to request not to retire on that date.

Should the employee wish to make a request to continue working beyond retirement, it should be made at least three months before the intended date of retirement. The employer must then consider any such request and this usually includes meeting with the employee, who may be accompanied by a colleague or trade union representative of their choice, to discuss the request within a reasonable period of receiving it. The employer must then inform the employee in writing of its decision as soon as is reasonably practicable. The employee’s employment cannot be terminated before the employer has informed them of its decision.

The employee has the right to appeal a refusal of a request or the acceptance of a request if the employer agrees to extend the employment, but for a period shorter than requested by the employee. The appeal must be made as soon as reasonably practicable after receiving notice of the decision and an appeal meeting must be held as soon as reasonably possible including, where necessary, after the retirement has taken effect.

Failure to notify the employee six months in advance of the intended retirement date may mean the employer is liable to pay compensation. In addition, the employer will still have an ongoing duty to notify the employee until two weeks before the retirement date. Failure to do so will make the dismissal automatically unfair. Even where the employer fails to notify the employee, the employee will retain the right to make a request not to retire up until dismissal. Should such a request be made, the employee must continue at least until the day after the employer notifies the employee of their decision on the request.

4.5 Redundancy

A dismissal on the grounds of redundancy may be found to be unfair either as a result of the manner in which employees were selected for redundancy or as a result of the procedure by which the redundancies were put into effect. Dealing with each of these in turn:

(a) Selection – redundancy selection will be automatically unfair if it is related to certain specified impermissible reasons (e.g. trade union activity, health and safety reasons, maternity-related reasons or reasons related to the employee’s activities as an employee representative). In any event, to avoid unfair dismissal liability, the employer will need to show that its selection criteria were fair and were reasonably applied in the particular circumstances. Selection based purely on the subjective judgment of a manager about who should be made redundant is unlikely to be considered a fair method of selection. Although it is permissible to take performance into account, it is important that this is used in conjunction with other objective criteria (such as attendance record, disciplinary record and qualifications). It is also important that the criteria used do not operate in a way which is directly or indirectly discriminatory against employees on grounds of their sex, sexual orientation, race, disability, age, religion or belief. For example, in some circumstances, the selection of part-time employees ahead of full-time employees for redundancy may constitute indirect sex discrimination. By the same token, practices such as ‘last in first out’ may fall foul of the age discrimination regime. Ideally, the selection criteria to be used should be agreed with the employees affected or their representatives before the selection process is carried out; and
(b) **Procedure** – the employer should give as much advance warning of the impending redundancies as is reasonable in the circumstances, and then consult with the individual employees and their representatives (if appropriate). Consideration should be given as to whether employees should be allowed the opportunity of volunteering for redundancy. It is important that no redundancies are confirmed until the period of consultation has been completed. During the period of consultation, the employer should hold meetings with the individuals affected to explain the basis for their selection, to allow the employees to challenge their selection and to investigate the possibility of offering the otherwise redundant employees any suitable available vacancies either within the company or within other group companies. The length of the consultation period will depend on the nature of the redundancy exercise and the number of employees affected. As a general rule of thumb, the period of consultation should last between two and four weeks, with at least two meetings taking place with each individual during that period.

In the event that the employer proposes to make 20 or more employees redundant at the same establishment within a period of 90 days or less, there are statutory obligations to collectively consult with representatives of the employees affected and minimum timescales that must be observed (see Collective Rights 3.3).

5 REDUNDANCY PAYMENTS

5.1 Redundancy situation

An employee will be deemed to be dismissed due to redundancy if the dismissal is because the employer closes the business at the location where the employee is employed (known as a “place of work redundancy”) or if it is because the employer needs fewer employees to carry out work of a particular kind (known as a “type of work redundancy”).

5.2 Statutory redundancy payment

An employee who is dismissed because of redundancy is entitled to receive either the period of notice of termination set out in their contract of employment or a payment in lieu of notice. In addition, if they have two or more complete years’ of service at the date of dismissal, they will also be entitled to a statutory redundancy payment. Statutory redundancy payments are calculated on a sliding scale based on the employee’s age, length of continuous service and salary. The payment is worked out as a specified multiple of a week’s gross pay for each complete year of service, as follows:

<table>
<thead>
<tr>
<th>For each complete year of service when an employee is aged</th>
<th>Multiplier of a week’s pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 or under</td>
<td>½</td>
</tr>
<tr>
<td>22-40</td>
<td>1</td>
</tr>
<tr>
<td>41 or above</td>
<td>1½</td>
</tr>
</tbody>
</table>

For the purposes of calculating statutory redundancy payments the amount of a week’s pay is currently capped at £380. In addition, only a maximum of 20 years’ service can be taken into account. Therefore, the maximum payment is currently £11,400 (as of 1 February 2010). Statutory redundancy payments may be paid without deducting tax provided that, taken together with other compensation paid in respect of the termination, the total payments to any one employee do not exceed £30,000.

5.3 Enhanced redundancy payments

Some employers operate enhanced redundancy payment schemes under which redundant employees receive payments in excess of the normal statutory redundancy payments. The calculation of such enhanced redundancy payments will vary from employer to employer. However, care must be taken to ensure that the arrangement does not fall foul of the age discrimination regime. This will not occur if the scheme involves:

(i) making the payment available to all employees, including those with less than two years’ service;
(ii) disregarding or increasing the statutory cap on a week’s pay;
(iii) enhancing the statutory multipliers or the total statutory redundancy payment by a factor greater than one; or
(iv) a combination of these approaches.

Genuine non-contractual payments can be made tax-free subject to the £30,000 threshold.
6 WRITTEN REASONS FOR DISMISSAL

An employee with one or more years’ continuous employment with the same or an associated employer is entitled to ask their employer to provide written reasons for dismissal. These written reasons have to be delivered within 14 days of the request and must be both adequate and accurate. A female employee (regardless of length of service) who is dismissed at any time whilst she is pregnant or on statutory maternity leave should be given written reasons for her dismissal automatically even though she may not have asked for them. The same right is held by any employee dismissed during statutory adoption leave. Failure to comply with this requirement renders the employer liable to pay compensation of two weeks’ pay.

7 SETTLING EMPLOYEES’ CLAIMS ON TERMINATION

If an employee is offered a payment which is more than their statutory and contractual entitlement on the termination of their employment, it is often advisable for the employer to make the offer conditional on the employee waiving all claims that they may have against the employer. Although it is possible for an employee to waive any contractual claims by simply signing an acknowledgment confirming that they are accepting the termination payment in full and final settlement of any such claims, the legislation provides that it is not possible to waive statutory claims (such as a claim for unfair dismissal) in this way. Instead, the only way in which statutory claims may be waived is if the waiver is contained in one of the following types of agreement:

7.1 Compromise agreements

This is the most common type of agreement entered into when an employee is offered an ex gratia payment on the termination of employment. Employers must take care when introducing the possibility of a compromise agreement. Case law suggests that an offer of a compromise agreement will not be treated as “off the record” (i.e. without prejudice) unless there was a pre-existing dispute between the parties. In order to be effective in settling statutory complaints, the compromise agreement should contain a brief factual description as to the circumstances leading up to the compromise agreement and also refer to the specific claims being compromised. Further, the waiver in this type of agreement will only be valid if the agreement complies with certain statutory requirements. The most important requirement is that the employee must take advice on the terms and effect of the agreement from an independent legal adviser (who must be identified in the agreement). In addition to the waiver of claims, it is possible to include a variety of other provisions such as a term requiring the employee to maintain confidentiality about the severance terms; a term prohibiting the employee from making critical or derogatory statements about the employer; a term requiring the employer to provide a reference in respect of the employee; and terms imposing restrictions on the activities which the employee can pursue after the termination of employment.

7.2 ACAS agreements

As an alternative to entering into a compromise agreement, it is possible to negotiate a settlement with the employee using a conciliation officer employed by the Advisory Conciliation and Arbitration Service (“ACAS”) who may then record the settlement in an agreement known as a “COT3 Agreement”. In practice, it is unusual for an ACAS conciliation officer to get involved in settlement negotiations unless the employee actually commences Employment Tribunal proceedings. Therefore, these types of agreement are generally only used if a settlement is achieved after an employee has brought legal proceedings.

8 ENFORCING POST-TERMINATION RESTRICTIONS

Following the termination of employment, there may be circumstances where an employer wants to enforce an ex-employee’s post-termination restrictions. In order for this to be possible, the obligations must be enforceable in principle (see Contractual Terms 2.2(e)) and the employer must not have committed any serious breaches of the employee’s contract. (If the employer has committed a serious breach of the employee’s contract, then the employee may no longer be bound by their obligations under the contract). Often the most effective way of enforcing post-termination restrictions will be for the employer to seek an injunction restraining the employee from breaching the restrictions. In deciding whether to grant an injunction, the court will consider:
(i) whether there is a triable issue (i.e. are the restrictions, in principle, enforceable and does the employee appear to be breaching them); and
(ii) whether the balance of convenience is in favour of granting an injunction (i.e. will the employer suffer more harm if the injunction is not granted than the employee will if it is granted).
## Discrimination

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1 OVERVIEW
Until October 2010, discrimination in the UK was dealt with by numerous pieces of anti-discrimination legislation. The Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Acts 1995 and 2005 and the Employment Equality (Age) Regulations 2006 prohibited discrimination on the grounds of sex, race, disability and age respectively. In addition, the Equal Pay Act 1970 (as amended) enabled an employee to claim equal pay with a comparable employee of the opposite sex. Further regulations introduced in 2003 and 2007 prevented discrimination on the grounds of both religion or belief and sexual orientation.

This legislation, which has governed so much in the workplace and beyond, has often been inconsistent and difficult to interpret. As of October 2010, all of this legislation is replaced by the Equality Act 2010.

In addition to the above, regulations were also introduced in 2000 prohibiting discrimination against part-time workers and in October 2002 prohibiting discrimination against workers employed on fixed term contracts. These regulations are unaffected by the Equality Act 2010.

In October 2007, the Commission for Equality and Human Rights came into existence. This is a public body which replaces the previous commissions for equal opportunities and aims to promote equality.

2 THE EQUALITY ACT 2010
2.1 Introduction
The Equality Act 2010 aims to harmonise and strengthen existing discrimination law. It brings together and re-states the various different pieces of existing discrimination legislation concerning sex, race, disability, marriage and civil partnership, sexual orientation, gender reassignment, pregnancy and maternity, religion or belief and age (now each to be referred to as “protected characteristics”), adopting a unified approach where appropriate.

The new coalition government confirmed in July 2010 that it would go ahead with the first phase of implementing the main provisions of the Act in October 2010, as originally planned by the previous government. However, some questions remain over the implementation of certain sections (namely those dealing with socio-economic duty, gender pay information and positive action), following earlier Conservative antipathy to those provisions.

2.2 Key changes introduced by the Equality Act 2010
As well as the changes to specific categories of discrimination, which we have summarised under the appropriate “protected characteristic” categories below, the Act introduces more general changes to discrimination law. The key changes of significance from an employment law perspective are:

2.2.1 Direct discrimination
The Act harmonises the definition of direct discrimination to cover “associative” and “perceptive” cases, replacing the phrase “on grounds of” with “because of”. This makes the definition of direct discrimination wide enough to cover, for example, if an employee was refused a job because he or she had a disabled child; this would be direct discrimination. The employer’s treatment of the claimant would be “because of” the protected characteristic of disability, albeit the child’s disability rather than the claimant’s.

2.2.2 Indirect discrimination
The Act harmonises the definition of indirect discrimination across all of the protected characteristics. The Act provides that an employer indirectly discriminates against an employee if it applies an unjustified provision, criterion or practice which has a disproportionate impact on persons with a particular protected characteristic.

2.2.3 Objective justification test
As the test of “objective justification” has, to date, been worded differently in the various discrimination legislation, leading to inconsistencies in application, the Act now harmonises the concept of justification in discrimination cases, where the behaviour in question must now be a “proportionate means of achieving a legitimate aim”.

2.2.4 Combined discrimination

The Act makes specific provision for claims of combined discrimination, based on a combination of no more than two protected characteristics. The Employment Tribunal will now therefore be able to make a global finding that someone has suffered discrimination on account of their falling into two disadvantaged groups, for example, a woman from an ethnic minority background, without her having to bring separate claims for each protected characteristic. Note that not all protected characteristics are covered by this new provision, as pregnancy/maternity and married/civil partner status will be excluded. The government is currently consulting on these rules and it is not clear when they will come into force.

2.2.5 Discriminating lawfully

The Act introduces an “occupational requirement” (OR) defence (formerly known as “genuine occupational requirement” (GOR)) across all protected characteristics, and remove the job-specific “genuine occupational qualifications” (GOQs) in sex, gender reassignment and race cases. It also extends the concept of positive action to allow employers to recruit or promote someone from an under-represented group, but only where they have a choice between two or more equally suitable candidates.

2.2.6 Enforcement

The Act strengthens enforcement of anti-discrimination laws by enabling Employment Tribunals to make recommendations to organisations they determine have broken the law, that benefit the wider workforce, rather than just the claimant. This is potentially a significant change although in reality the Employment Tribunal has no power to follow up whether any action has been taken in light of its recommendations. However, if that organisation comes before the Employment Tribunal again, any failure to implement recommendations will no doubt be taken into account.

2.2.7 Public bodies

The Act creates a duty on listed public bodies when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to: the need to eliminate conduct which the Act prohibits; the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and the need to foster good relations between people who share a relevant protected characteristic and people who do not. The practical effect is that listed public bodies will have to consider how their policies, programmes and service delivery will affect people with the protected characteristics. The Government is currently consulting on these rules and it is not clear when they will come into force.

3 SEX DISCRIMINATION

3.1 Direct discrimination

The Equality Act 2010 prohibits discrimination on the grounds of sex, marital status and the fact that someone has undergone or is intending to undergo gender reassignment. The legislation applies to employees, agency workers and independent contractors (as long as they contract personally to carry out the work) and it prohibits discrimination at every stage of the relationship, from the very beginning when vacancies are first advertised, through to dismissal. These obligations may also apply to certain acts occurring after the employment relationship comes to an end (for example the provision of references).

Sexual harassment is also expressly prohibited in the legislation. It is defined as unwanted conduct which is related to the sex of the complainant or of another person and which violates dignity or creates a hostile or offensive environment, regardless of whether the conduct itself is of a sexual nature. The motive and intention of the discriminator is irrelevant.

However, the legislation does not prohibit certain forms of discrimination where being a man or woman is an “occupational requirement” for the job in question. For example, discrimination will be permitted if the job needs to be carried out by a person of a particular sex to preserve decency or privacy or because the job requires a person of a particular sex to give it authenticity (e.g. an actress or model).
An employer is liable for acts of sex discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring.

The Equality Act 2010 harmonises the definition of harassment to cover “associative” and “perceptive” cases. The Act also makes employers potentially liable for harassment of its employees by people who are not employees of the employer, such as customers or clients. The employer will only be liable when harassment has occurred on at least two previous occasions, it is aware that the harassment has taken place, and it has not taken reasonable steps to prevent it from happening again.

### 3.2 Indirect discrimination

It is also unlawful for employers to indirectly discriminate on the grounds of sex by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular sex or marital status. This prohibition extends beyond written rules and regulations to unjustified “practices”. A common example of indirect sex discrimination is where an employer refuses to allow a working mother to work on a part-time basis (on the basis that a considerably smaller proportion of women are able to work full time as a result of child care commitments). Unless the employer is able to show objective justification for the requirement or condition (in this example, the requirement for the employee to work full-time), it may be found liable for indirect discrimination. This is in addition to any liability under the Flexible Working Regulations (see Rights During Employment 12) and may be so even if any of the business reasons in those regulations apply.

### 3.3 Victimisation

The legislation also prohibits an employer from treating any person less favourably because that person has raised a discrimination complaint in good faith or has assisted another in doing so. For example, dismissing an employee who has brought a discrimination claim or who gives evidence at an Employment Tribunal in support of a discrimination claim brought by a colleague will amount to unlawful victimisation. The Equality Act 2010 removes the requirement for a comparator in victimisation cases.

### 3.4 Positive discrimination

In general, acts of positive sex discrimination are unlawful under UK law. However, positive discrimination by an employer in favour of men or women in affording access to training or in giving encouragement to apply for particular work is permitted if, at any time within the preceding 12 months, there were either no persons of the sex in question doing that work or the number of persons of that sex doing the work was comparatively small.

### 3.5 Remedies

Claims for sex discrimination may be made to an Employment Tribunal up to three months after the date of the alleged discriminatory act. Unlike claims for unfair dismissal, an individual does not need to have a minimum period of qualifying service to be eligible to bring a claim and if the complaint relates to the recruitment process it can be made by someone who has never actually been employed. In deciding whether to bring a claim, an individual may issue a questionnaire in the prescribed form. Provided certain time limits are complied with, the questionnaire and the employer’s responses to it may be admissible in evidence before an Employment Tribunal.

Once an individual has shown that apparently discriminatory conduct has taken place, the employer must provide an adequate explanation for it. If it does not do so, the Employment Tribunal must uphold the claim of discrimination (unless, in the case of indirect discrimination, the employer can justify the conduct).

If a claim is upheld, the Employment Tribunal may make an award of compensation, a declaration of the claimant’s rights and/or make a recommendation that the employer takes action to eliminate the discriminatory practice in question. Any award of compensation will cover not only the financial losses caused by the discrimination but also an award for “injury to feelings” which, in exceptional cases, may include aggravated damages. There is no upper limit on the amount of damages that can be awarded, although the Court of Appeal has in the past issued guidelines on the amount which should be awarded for injury to feelings, which should not normally exceed £30,000.
The Commission for Equality and Human Rights also has powers to carry out formal investigations into allegations of discriminatory practices and may issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period.

4 EQUAL PAY

4.1 Equal Pay claims
The Equality Act 2010 provides for equal pay between men and women in the same employment by giving the woman (or man) the right to equality in the terms of their contract of employment where they are employed on like work to that of an employee of the opposite sex, or work rated as equivalent to them or work of equal value to them. The employer can defeat a claim for equal pay by proving that the difference between the contractual terms is genuinely due to a material factor other than sex. The arguments adopted in such claims can be complex and detailed information on equal pay is available from the Commission for Equality and Human Rights.

4.2 Remedies
An individual is able to bring an equal pay claim to an Employment Tribunal at any time up to six months after leaving the employment to which the claim relates. If the claim is successful, equal pay is achieved by raising the pay of the claimant to that of the relevant comparator. This means that any beneficial term which is in the comparator's contract but is missing from the claimant's contract is to be treated as if it is in their contract and/or any term in the claimant's contract which is less favourable than the same term in the comparator's contract is improved so that it is as good. The Employment Tribunal also has the power to award compensation for the financial losses suffered by a claimant in the six years prior to the date on which the claim is lodged. Employees can submit a questionnaire to assist them in deciding whether or not they have a valid claim.

4.3 Equal pay and the Equality Act 2010
Several key changes to equal pay have been introduced by the Equality Act 2010. The Act:

- Introduces explicit provisions on indirect discrimination in equal pay cases;
- Provides for the possibility of direct sex discrimination claims in respect of pay based on hypothetical comparators;
- Limits the enforceability of contractual “pay secrecy” clauses - the Act makes it unlawful for employers to prevent or restrict employees from having a discussion to establish if differences in pay exist that are related to protected characteristics. It also makes terms of the contract of employment that require pay secrecy unenforceable because of these discussions. However, an employer can require their employees to keep pay rates confidential from some people outside the workplace, for example a competitor organisation; and
- Introduces a power to require large employers to report on their gender pay gap (although it is not clear when this power will come into force).

5 RACE DISCRIMINATION

5.1 Direct discrimination
The Equality Act 2010 prohibits discrimination on the grounds of colour, race, nationality or ethnic or national origin. The Equality Act 2010 introduces a power for the government to provide specifically that the definition of “race” includes “caste”.

The main provisions of the legislation mirror the corresponding provisions relating to sex discrimination. In particular, there are provisions prohibiting direct discrimination, indirect discrimination, discrimination by way of victimisation and positive discrimination. The “occupational requirement” defence is also available in prescribed circumstances such as where a person of a particular racial group is required to carry out a job for reasons of authenticity.
Racial harassment occurs where, on grounds of race or ethnic or national origin, a person engages in unwanted conduct which has the purpose or effect of violating another person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

An employer is liable for acts of race discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring. In practice this means equal opportunities/diversity training for all staff and a well-published and comprehensive policy. Under the Equality Act 2010, the employer is now also potentially liable for racial harassment of staff by third parties, such as contractors and customers.

5.2 Indirect discrimination

It is unlawful for an employer to discriminate indirectly by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular race or ethnic or national origin when compared to other persons. For example, it may be indirectly discriminatory to insist that a job applicant must be a fluent Japanese speaker unless it can be demonstrated that this is an important requirement of the job (on the basis that a considerably smaller proportion of non-Japanese people will be able to satisfy the requirement of being fluent in Japanese).

5.3 Remedies

The procedure for bringing a claim for race discrimination and the remedies that are available are very similar to those applicable to sex discrimination (i.e. a declaratory order, an award of compensation or a recommendation that remedial action is taken). In addition, the Commission for Equality and Human Rights has powers to carry out investigations into alleged discriminatory practices and to issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period. The most recent Code of Practice can be found on the Commission’s website.

6 DISABILITY DISCRIMINATION

6.1 Definition of disability

Under the Equality Act 2010, it is unlawful for any employer to discriminate against current or prospective workers for a reason related to a past or present disability. A person will have a disability for the purposes of the legislation if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out day to day activities.

The effect of an impairment will generally be regarded as “long-term” if its effect has lasted or is likely to last for at least 12 months. People with mental impairments are not required to have an impairment which is “clinically well-recognised”, and people living with HIV, MS or cancer will automatically qualify as disabled without the need to show any adverse effect on their normal day-to-day activities.

Before the changes introduced by the Equality Act 2010, the impairment had to affect one or more of a number of specified physical or mental faculties (such as mobility, manual dexterity, co-ordination, etc). However, this list has been removed under the Equality Act 2010, leaving tribunals to make a common-sense decision about whether or not a particular impairment has a substantial effect on day-to-day activities. The intention of the change is to make it easier for someone to show that they have difficulty carrying out their day to day activities, and therefore that they come under the definition of ‘disabled person’.
6.2 Employers’ duties

The legislation imposes a duty on employers not to treat disabled workers or job applicants less favourably for a reason related to their disability. In certain cases, the employer can defend the position if the less favourable treatment is justified. In addition, employers must make reasonable adjustments to their premises or employment arrangements if they substantially disadvantage a disabled worker or job applicant, unless the employer does not know, and cannot reasonably be expected to know, that the worker/applicant is disabled (note this is becoming increasingly difficult for employers to rely on). The sort of adjustments that an employer may be expected to make include making alterations to premises, allocating certain duties to other employees, altering working hours, allowing additional absence for treatment and acquiring or making changes to equipment to accommodate the specific needs of the disabled worker. To determine whether it is reasonable to make a particular adjustment, a number of factors can be taken into account, including how much the adjustment will cost, the financial resources of the employer, how easy it is to make the adjustment and how much it will improve the situation.

6.3 Remedies

The remedies available for disability discrimination are the same as those for sex and race discrimination (see Discrimination 3.5 and 5.3). In addition, the Equality and Human Rights Commission has a variety of powers including the power to undertake formal investigations and issue non-discrimination notices. The most recent Codes of Practice, which reflect best practice, can be downloaded from its website at www.equalityhumanrights.com

6.4 Disability discrimination and the Equality Act 2010

Some of the most significant changes introduced by the Equality Act 2010 affect disability discrimination. These can be summarised as:

- **Discrimination by association and perception:** the Act extends the law on direct discrimination to include discrimination by association (e.g. workers who care for a family member who is disabled) and perception to disability;

- **Proportionate means of achieving a legitimate aim:** employers will be prohibited from discriminating against a disabled person by treating them unfavourably where that treatment is “not a proportionate means of achieving a legitimate aim”. Previously, employers only had to show that the treatment was “justified”;

- **Discrimination arising from a disability:** the Act introduces a new form of disability discrimination – discrimination “arising from” a disability, which replaces disability-related discrimination. This sidesteps the effects of the House of Lords’ decision in the case of London Borough of Lewisham v Malcolm and dispenses with any need for a comparator. It simply requires that the claimant has been treated “unfavourably because of something arising in consequence” of their disability. For this type of discrimination to occur, the employer has to know, or reasonably be expected to know, that the employee has the disability in question;

- **Indirect discrimination:** the Act aligns the concept of indirect discrimination relating to disability with that in other discrimination legislation; and

- **Pre-employment health questionnaires:** the Act outlaws employers’ pre-employment health enquiries other than in very limited circumstances, such as where the employer needs to check whether a candidate can perform an “intrinsic function” of the job, e.g. heavy lifting. Employers will now only be able to ask health questions upon making a job offer, and not before. Both written and oral questions are outlawed by the provision. The burden of proof in such cases will be reversed, meaning that the employer will be assumed to have discriminated, unless it can show there was another reason for non-recruitment. We therefore recommend employers urgently review any pre-employment questions and, unless they are job specific or otherwise exempt, withdraw them.
7 SEXUAL ORIENTATION DISCRIMINATION

7.1 Employers’ duties
It is unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of their actual or perceived sexual orientation, that is, the fact that they are heterosexual, homosexual or bisexual (or are perceived to be). Direct and indirect discrimination is defined in similar terms as under the sex and race legislation considered above. It is now also unlawful to subject an individual to harassment or victimisation due to their sexual orientation, or perceived sexual orientation, and in certain circumstances these obligations continue once the employment relationship has ended. There are very limited exceptions contained in the legislation for cases where there is a genuine occupational requirement for the employee/worker to be of a particular sexual orientation in order to perform the work. ACAS has published useful guidance on the Regulations on its website at www.acas.org.uk.

7.2 Gender reassignment
The Equality Act 2010 removes the requirement that individuals need to be under medical supervision to be protected by the gender reassignment provisions. The Act also extends protection for transsexual people, someone who is “proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex”.

7.3 Remedies
Claims for discrimination or harassment on the grounds of sexual orientation can be made to an Employment Tribunal up to three months from the date of the alleged discriminatory act. As with other anti-discrimination legislation, no minimum period of service is required before a claim can be made and remedies are very similar to those applicable for sex and race discrimination. The Regulations also provide for a questionnaire procedure which may be used by an individual before deciding whether to bring a claim.

7.4 Civil Partnership Act 2004
Since 5 December 2005, same sex couples have been able to register a civil partnership which gives them similar rights to married couples. Civil partners are entitled to have equal treatment to married couples in a wide range of legal matters. Employers need to watch out for this where, for example, any benefits are dependant on the individual being ‘married’.

8 DISCRIMINATION ON THE GROUNDS OF RELIGION OR BELIEF

8.1 Definition of Religion or Belief
It is unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of religion or belief. Religion or belief for the purposes of the legislation means any religion, religious belief or philosophical belief. This does not include any philosophical or political belief (unless it is equivalent to religious belief – such as Rastafarianism). Case law has indicated that a belief must, amongst other things, be more than an opinion, must be worthy of respect in a democratic society and must have a similar status to a religious belief in order to be protected. As with sexual orientation legislation, individuals are also protected from being subjected to harassment or victimisation, and continue to enjoy certain protection after the employment relationship ends. Discrimination may be permissible in certain limited circumstances, where there is an occupational requirement for the job to be performed by an individual with a particular religion or belief. ACAS has published useful guidance on the Regulations on its website.

8.2 Remedies
The procedure for bringing claims (including the ability to issue a questionnaire in deciding whether to bring proceedings) and the remedies available are similar to those available for complaints of sexual orientation discrimination.
9 PART-TIME WORKERS

9.1 Employers’ duties
Part-time workers have a right not to be treated less favourably than comparable full-time workers unless the treatment can be justified on objective grounds. In particular, part-timers should receive the same pay and benefits (such as pension, sick pay, maternity pay, parental leave, holidays and share options) as comparable full-timers, calculated on a pro-rata basis, unless there is objective justification for the different treatment. An individual who previously worked full-time who returns part-time after a period of absence (such as sickness or maternity leave) should not be treated less favourably (e.g. in terms of rate of pay and benefits) than they were treated before the period of absence. These Regulations do not give an individual a right to demand part-time work, although an unjustified refusal to allow a woman to work part-time may amount to indirect sex discrimination (see Discrimination 3.2).

However, applications for part-time work can be made under the Flexible Working legislation (see Rights During Employment 12).

9.2 What is part-time?
The legislation does not specify that an individual must work less than a certain number of hours per week to qualify for protection. Instead, the Regulations provide that a part-time worker is anyone who is not a full-time worker, having regard to the employer’s custom and practice in relation to workers engaged under the same type of contract.

9.3 Remedies
If a part-time worker considers that they may have been treated less favourably, they may request that the employer provides a written statement within 21 days giving reasons for the treatment. In addition, a part-timer who considers that their employer has acted in breach of the Regulations may present a claim to an Employment Tribunal. If an individual succeeds with a claim, the Employment Tribunal may make a declaration as to the rights of the individual and/or recommend that the employer take remedial action and/or make an award of compensation. Any award of compensation will be what the Employment Tribunal considers “just and equitable” having regard to the infringement and the loss suffered by the individual (such as expenses incurred in consequence of the infringement and the value of any benefit the individual has lost as a result of the infringement). There is no limit to the compensation that may be awarded.

10 FIXED-TERM EMPLOYEES

10.1 Employers’ duties
Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, fixed-term employees have a right not to be treated less favourably than comparable permanent employees unless the treatment can be justified on objective grounds. The Regulations closely follow those protecting part-time workers described above, and require employers to offer fixed-term employees (i) pay and pensions at least as favourable as that of permanent employees; (ii) equal training opportunities; and (iii) access to employment benefits after the same period of employment as permanent employees. However, unlike the rules applicable to part-time workers, these Regulations specifically provide that a less favourable term in a fixed-term employee’s contract will be justified if the overall package is no less favourable. In addition, employers must inform fixed-term employees of any available vacancies to enable them to apply for permanent positions. The Regulations also prevent fixed-term employees (on contracts signed extended or renewed after the Regulations came into force on 1 October 2002) from waiving their right to a redundancy payment.

10.2 What is a fixed-term employee?
Unlike the Regulations protecting part-time workers, these Regulations apply only to employees. Agency workers are specifically excluded. A fixed-term employee is an employee whose contract of employment is for a specific term or which terminates upon the completion of a specified task or upon the occurrence (or non-occurrence) of a specific event. The Regulations provide that an employee will normally be considered a permanent employee after they have been continuously employed on successive fixed-term contracts for four years unless the continued use of a fixed-term contract can be objectively justified.
10.3 Who is a comparable permanent employee?
A comparable permanent employee is an individual employed at the same establishment to do broadly similar work as the fixed-term employee. If there is no employee doing similar work at the same establishment, the fixed-term employee may compare themselves to such an employee at another of the employer’s establishments.

10.4 Remedies
As with the Part-Time Workers Regulations, if a fixed-term employee considers that they may have been treated less favourably than a permanent employee, they may request that their employer provide a written statement within 21 days giving reasons for the treatment. In addition, they may present a claim, to an Employment Tribunal. If an individual succeeds with a claim, the Employment Tribunal may make a declaration as to the rights of the employee and/or recommend that the employer takes remedial action and/or make an award of compensation. Any award of compensation should be what the Employment Tribunal considers “just and equitable” having regard to the infringement and the loss suffered by the individual. There is no limit on the compensation that may be awarded.

11 AGE DISCRIMINATION
11.1 General principle
The Equality Act 2010 protects all employees, as well as contractors, directors, former employees and job applicants, from unlawful age discrimination while they are under the employer’s normal retirement age. Some of the provisions provide protection beyond retirement age.

11.2 Definition of ‘age’
Age means any age, so younger workers are protected as well as older workers, and discrimination on grounds of apparent age is also specifically covered; which is likely to result in some interesting cases in the future.

11.3 Justification of age discrimination
Unlike other forms of discrimination, any age discrimination (including direct discrimination) may be objectively justified if the employer can show that it has a legitimate (non-discriminatory) aim and that what it is doing is a proportionate means of achieving that aim. There are also various things which are currently expressly exempt from the legislation, such as compulsory retirement after the age of 65 (provided various safeguards have been met).

11.4 Key provisions
The Regulations provide specifically for the following:

(a) At present, there is a default retirement age of 65, with any lower age having to be objectively justified – however, the coalition government has committed to phasing out the default retirement age “(DRA)”. It has set out its proposals, and consultation on these is currently underway. The government intends to abolish the DRA as follows:

   • 6 April 2011: transitional arrangements to phase out the DRA and all associated statutory retirement procedures (including the “duty to consider” and “right to request” procedures) will begin. No new notifications of retirement under the DRA can be issued by employers after this date. The ability for employers to give short notice of retirement of 2 weeks, will be abolished;
   • 1 October 2011: the DRA and the statutory retirement procedures (set out at Termination of Employment 4.4) will be abolished. Once this has occurred, it is likely that all retirement ages – not just those below 65 – will need to be objectively justified;

(b) All employees to be given at least six months’ (but no more than one year’s) notice of retirement together with confirmation of their right to ask not to retire (which in effect means that contractual retirement clauses are obsolete). The retirement procedures are discussed in more detail at Termination of Employment 4.4.
(c) Service-related benefits may be applied for up to five years’ service, after that they will have to be justified;

(d) Removal of upper age limits on the right to claim redundancy pay and unfair dismissal, which means that anyone who is forced to retire will have a forum in which to bring a claim; and

(e) Age limits for claiming benefits such as SSP and SMP are abolished (although advances in reproductive medicine are required to make the latter useful!).

11.5 Pensions
The Regulations contain detailed provisions explaining what is and what is not permitted in relation to the provision of pension benefits, the detail of which is outside the scope of this guide.

11.6 Redundancy payments
There is no longer a minimum or maximum age to qualify for a statutory redundancy payment, but the age-related multipliers will continue to apply. The Department for Business Innovation and Skills (“BIS”) (formerly the Department for Business Enterprise and Regulatory Reform and prior to that, the DTI) has produced a ready reckoner which is available on its website. Enhanced contractual redundancy schemes which mirror the statutory scheme will be exempt from the legislation; others will have to be objectively justified.

11.7 Insured benefits
Cutting off insured benefits after a certain age is unlikely to be capable of objective justification.

11.8 Where can I get more information?
More information about this new legislation is available on the following website: www.businesslink.gov.uk
1 OVERVIEW

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") contain far-reaching rules for the protection of employees’ rights on the transfer of businesses.

The purpose of TUPE (which replaced the previous version of the regulations which were introduced in the 1980s) is to give effect to the UK’s obligations under EC law to implement EC Council Directive 77/187 (otherwise known as the “Acquired Rights Directive”) which is designed to provide protection to employees when the business in which they work is sold or transferred.

TUPE applies in the event that a business or undertaking is transferred from one party to another or in the event that there is a change in the party providing a service, provided that the applicable conditions and requirements are met.

If TUPE applies, the employees will transfer automatically together with associated liabilities. TUPE gives rise to certain obligations to inform and consult and to provide employment information, for which there are penalties for non-compliance.

Employees are also afforded enhanced protection in the event that they are dismissed or an attempt is made to vary their terms and conditions of employment in connection with a TUPE transfer.

Any agreement to exclude or limit the application of TUPE is invalid. TUPE applies by operation of law, notwithstanding any agreement to the contrary in any commercial arrangements.

That said, it is usually possible to deal with or avoid some of the implications of an application of TUPE, whether by procuring that employees object to a transfer or enter into compromise agreements, or otherwise by virtue of a commercial agreement between the parties which deals with the potential costs and expenses which arise.

Further explanation is set out in our separate guide “Employment implications of business transfers and service provision changes.”
## Collective Rights

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Collective Rights

1 OVERVIEW
There is presently much legislation in place regarding collective rights of employees, including compulsory recognition rights for trade unions and various forms of collective consultation (even where a trade union is not recognised).

2 TRADE UNION RECOGNITION
2.1 Compulsory recognition rights
The compulsory recognition rights introduced by the Employment Relations Act 1999, as updated by the Employment Relations Act 2004, and set out in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 apply as follows:

(a) To employers which (together with associated employers) employ 21 or more workers; and

(b) Where:
(i) there is no collective agreement already in force under which the union is recognised to conduct collective bargaining; and
(ii) there are no competing applications for recognition by other union(s), unless the unions can show that they will co-operate and act together on behalf of all workers if granted recognition.

2.2 Request for recognition
A union seeking recognition must first make a written recognition request to the employer identifying the bargaining unit (i.e. the group of employees within the company for which the union is seeking recognition for collective bargaining purposes). If the parties reach agreement within ten working days then the union is deemed to be recognised. If the employer does not accept the request but agrees to negotiate then the parties have a further 20 day period in which to reach agreement. However, if the employer either rejects or fails to respond to the recognition request (or if negotiations break down within the further 20 day period) then the union may make an application to a body called the Central Arbitration Committee (“CAC”) to decide on the appropriate bargaining unit and whether the union has the support of the majority of workers within that unit.

2.3 Applications to the CAC
If an application is made to the CAC, the union will have to demonstrate that its application is “admissible” by showing that at least 10% of the individuals in the bargaining unit are union members and that at least 50% of the workers within that bargaining unit are likely to favour recognition.

2.4 Procedure for agreeing bargaining units
If the criteria are fulfilled and the CAC accepts the application, it must try to assist the parties to agree the appropriate bargaining unit within 20 days. In the absence of agreement, the CAC must decide on the appropriate bargaining unit. Paragraph 19B of Schedule A1 requires the CAC to take account of the need for the bargaining unit to be compatible with effective management, and other factors such as existing arrangements and the views of the employer.

2.5 CAC declarations
Exactly what happens next depends upon whether the recognised bargaining unit is the same as the proposed bargaining unit. However, ultimately the CAC will issue a declaration that the union is recognised if it is satisfied that at least 50% of the individuals in the bargaining unit are members of the union. If it has reason to believe that a significant number of individuals in the bargaining unit do not want the union to conduct collective bargaining on their behalf the CAC will arrange a secret ballot in which the workers will be asked whether they want the union to be recognised.

2.6 Ballot in support of recognition
If a ballot is held and union recognition is supported by a majority of workers voting and at least 40% of the workers within the bargaining unit, then the CAC will issue a declaration that the union is recognised for collective bargaining purposes.
2.7 **Negotiation of recognition agreement**

Once a declaration of recognition has been made, the parties will have 30 days in which to negotiate a recognition agreement. If no agreement is reached the parties may apply to the CAC for assistance. If no agreement is reached after a further 20 days then the CAC must specify the method by which the parties will conduct collective bargaining.

2.8 **Rights of Trade Union officials**

An employer must allow the trade union’s workplace representatives to take reasonable paid time off work to carry out their trade union duties (provided those duties are for certain specified purposes) and to undergo training in respect of those duties (provided that the training is approved by either the relevant trade union or the Trades Union Congress). If a trade union representative considers that they have been unreasonably refused paid time off, they may present a claim to an Employment Tribunal.

2.9 **Rights of Trade Union members**

Members of a trade union recognised by their employer are entitled to take unpaid time off work during working hours to take part in trade union activities (other than industrial action). In addition, the dismissal of an employee on the grounds of being a trade union member or for taking part in trade union activities is automatically unfair. Action short of dismissal on the grounds of either trade union membership or activity will enable the employee to bring a claim for compensation to an Employment Tribunal. Employees are similarly protected from dismissal and action short of dismissal on the grounds that they are not a member of a trade union or are refusing (or proposing to refuse) to become or remain a member.

3 **CONSULTATION ON COLLECTIVE REDUNDANCIES**

3.1 **Consultation obligations**

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or fewer, it must consult “appropriate representatives” of the employees concerned.

3.2 **Representatives**

Appropriate representatives will be either representatives of an independent trade union recognised by the employer or, if the employer does not recognise a trade union, representatives that have been elected by the affected employees.

3.3 **Timescales for consultation**

Where these obligations arise, employers are required to commence the consultation process “in good time” and, in any event, in accordance with the following timescales:

(a) Where it is proposed that 100 or more employees are to be made redundant at a single establishment within 90 days or less - at least 90 days before the first dismissal takes effect; or

(b) Where it is proposed that between 20 and 99 employees are to be made redundant at a single establishment within 90 days or less - at least 30 days before the first dismissal takes effect.

The purpose of consulting is to explore ways of (a) avoiding the redundancy dismissals; (b) reducing the numbers to be dismissed; and (c) mitigating the consequences of the dismissals. The consultation must be undertaken with a view to reaching agreement, although it is possible that agreement may not be reached on some issues. Notice of dismissal should not be issued until the appropriate representatives have been properly consulted and the public authority has been notified (see Collective Rights 3.6 below for details).
3.4 Information to be provided

The legislation provides that, for the purposes of the consultation, the employer shall disclose in writing the following information to the appropriate representatives:

(a) The reasons for the proposed redundancies;

(b) The numbers and descriptions of employees whom it is proposed to make redundant, and the total number of such employees employed at the establishment in question;

(c) The proposed method of selecting employees for redundancy; and

(d) The proposed method of putting the redundancies into effect, including the timescale and the proposed method of calculating the redundancy payments.

The obligations to inform and consult appropriate representatives arise in relation to each separate establishment at which redundancies are to be made. Therefore where a redundancy programme is likely to affect more than one establishment, the consultation and information obligations apply separately to each such establishment.

3.5 Penalty for failure to inform and consult

Where an employer has failed to comply with its obligations to inform and consult appropriate representatives, and cannot demonstrate that there were special circumstances justifying such non-compliance (such as an unforeseen collapse of the business), an Employment Tribunal may order the employer to pay a protective award in respect of every employee who has been affected by the failure. The protective award will be what the Employment Tribunal considers to be just and equitable (subject to a maximum of 90 days’ pay per employee affected). Although when determining the level of award to make the Employment Tribunal will often work from a starting point of the full 90 days’ pay, recent case law suggests that there is now more willingness to consider mitigating factors in carrying out this assessment.

3.6 Obligations to notify BIS

Employers also have an obligation to complete a Form HR1 and send it to BIS in advance of collective redundancies. The advance notification periods are the same as the minimum consultation periods referred to in Collective Rights 3.3 above and notification should be received before redundancy notices are issued.

3.7 Failure to notify BIS

While BIS must be notified in advance about collective redundancies, there is no requirement to obtain the permission of BIS in order for the redundancies to be put into effect. However, failure to notify BIS is a criminal offence and may lead to a fine.

4 CONSULTATION ON BUSINESS TRANSFERS

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006, an employer will be under an obligation to provide certain information to “appropriate representatives” prior to a business transfer and, in certain circumstances, will be obliged to enter into consultation with those representatives. These obligations are dealt with in more detail at Business Transfers 1 and in our separate guide “Employment implications of business transfer and service provision changes.”

5 CONSULTATION ON HEALTH AND SAFETY ISSUES

5.1 Health and safety representatives

Recognised trade unions have the right to appoint safety representatives from amongst the workforce at a particular establishment. These representatives have wide-ranging functions relating to all health and safety matters. The trade union may also require the employer to establish a committee for the purposes of overseeing health and safety matters.
5.2 Consultation with employee representatives
If a trade union is not recognised, an employer is obliged to consult with employees directly or with their elected representatives on health and safety matters. Elected representatives are entitled to time off with pay for training and to carry out their duties and are protected against dismissal and victimisation.

6 EUROPEAN WORKS COUNCILS
6.1 Obligations on employers
The Transnational Information and Consultation of Employees Regulations 1999 implemented the European Works Council Directive in the UK. These Regulations provide that a multinational company which employs at least 1000 employees across the EEA member states and at least 150 employees in each of two member states may be required to establish a European Works Council (“EWC”) or other suitable procedures for consulting its employees about matters of transnational concern.

6.2 Procedure for establishment
The process of establishing an EWC may be triggered by management on its own initiative or by a written request by at least 100 employees (or their representatives) from two or more member states.

6.3 Representatives
The employees are represented in the negotiations by a “special negotiating body” (“SNB”) which consists of representatives of employees from all the EEA member states in which the business has operations. The number of representatives for each member state is determined by whatever formula applies in the legislation of the member state where the business’s central management is located.

6.4 The default model
If management refuses to negotiate within six months of receiving a valid request to establish an EWC, or if the parties fail to conclude an agreement on transnational information and consultation procedures within three years, an EWC must be set up in accordance with the statutory default model. This model sets out requirements concerning the size, establishment and operation of the EWC and list topics on which the EWC has the right to be informed and consulted (which includes the economic and financial situation of the business, its likely development, probable employment trends, the introduction of new working methods and substantial organisational change).

6.5 Exempt employers
The Regulations do not apply to employers who put an EWC agreement (which satisfies the relevant conditions) in place voluntarily prior to either 22 September 1996 or 15 December 1999, depending on whether the employer was subject to the original Directive or not.

7 NATIONAL WORKS COUNCILS
7.1 Obligations on employers
The Information and Consultation Directive imposes obligations on employers to inform and consult staff representatives on various aspects of their businesses and management, even where a trade union is not recognised by the employer. These obligations currently apply to all employers with 50 or more employees in their undertaking.

7.2 Definition of “undertaking”
For these purposes, an “undertaking” is “a private or public undertaking carrying on an economic activity in the UK, whether or not operating for gain”. This covers most employers.

7.3 Information and Consultation Agreement
The requirement to inform and consult will not apply automatically. Unless the employer agrees to enter into an information and consultation agreement (“ICA”) voluntarily, it will be triggered only if the employer receives a valid request made by at least 10% of the employees of the undertaking (subject to a minimum of 15 and a maximum of 2500 employees).
7.4 **Effect of valid request**
Once a valid request has been made, the employer must, as soon as reasonably practicable initiate negotiations for an ICA (which includes making arrangements for its employees to appoint or elect negotiating representatives).

7.5 **Duration of negotiations**
Negotiations regarding the ICA must be completed within six months (or such longer period as may be agreed with the employee representatives).

7.6 **Conditions for valid ICA**
A negotiated ICA (or entered into on a voluntary basis by the employer) will not be valid unless it:

(a) Sets out the circumstances in which the employer must inform and consult its employees;

(b) Is in writing, dated and covers all the employees in the undertaking;

(c) Is approved by 50% or more of all employees (or all the negotiating representatives); and

(d) Is signed on behalf of the employer and either:
   (i) provides for the appointment or election of representatives to whom the undertaking must supply information and with whom the employer must consult; or
   (ii) provides that the employer will provide information directly to its employees and consult with them directly. This criterion enables employers to avoid the appointment of representatives but instead to inform and consult employees directly via company networks, such as an intranet.

7.7 **The default model**
If an ICA is not concluded by the end of the six month period, then the standard default model will apply (unless agreement is reached during the intervening period).

7.8 **Requirements under the default model**
The standard default model (which will usually form the basis of the negotiation with the employee representatives) obliges the employer to put in place one elected representative for every 50 employees (provided that there are always at least two and not more than 25 representatives) and to provide the representatives with information on:

(a) Recent and probable developments in the employer’s activities or economic situation. This includes an obligation on the employer to provide a “state of the nation” report from time to time;

(b) Probable development of employment including threats to employment. This covers issues such as planned use of temporary workers or consultants and the possibility of redundancies; and

(c) Decisions likely to lead to substantial changes in work organisation or contractual relations. This covers strategic and investment decisions that could have consequences in relation to work organisation or contractual relations e.g. outsourcing arrangements or the introduction of new technology on site.

7.9 **Additional requirements**
The information above must be given in such a time and manner that will, amongst other things, enable the representatives to conduct an adequate study, and, if necessary, prepare for consultation. In addition to providing the representatives with information, the employer must consult with representatives about the matters referred to in paragraphs (b) and (c). In the case of information referred to in paragraph (c), the consultation must be undertaken “with a view to reaching agreement on decisions within the scope of the employer’s powers.”
7.10 Complaints

The CAC will deal with any complaints concerning a failure to comply with a negotiated agreement or the default model. If such a complaint is well founded, the CAC may make a declaration to that effect, and an order requiring the defaulting party to take appropriate action. If the employer does not do so, an application may be made to the Employment Appeal Tribunal ("EAT") for a penalty notice to be issued. There is a maximum penalty of £75,000.

The EAT does not, however, have the power to order any form of injunctive relief to prevent an employer from taking a certain course of action.
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