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1.0 Contents

Welcome to the

Scottish Engineering Employment Guide

Our guide has once again reviewed the many aspects of Employment Law, and updated them where appropriate. While the information is correct at time of going to press, it should be used primarily as a guide, and we would encourage all members to call the Scottish Engineering Employee Relations team (who are available Monday – Friday) prior to embarking on any course of action.

Paul Sheerin
Chief Executive

The Employment Guide

In association with

HM Harper Macleod LLP

Chapter 1

Recruitment

1.0 Recruitment

1.1 Introduction

1.1.1 There are both practical and legal issues to consider when recruiting employees. Generally speaking, employers are entitled to employ who they want. However, this general principle is subject to some limitations which are set out below.

1.1.2 Employers should make sure that everyone involved in the recruitment and selection process is aware of good practice, the appropriate procedures to follow and possible legal pitfalls. These issues are dealt with in this chapter which should be read in conjunction with Chapter 6.

1.1.3 Employers have a legal responsibility to make sure that they do not discriminate in their recruitment and selection processes. It is unlawful to discriminate in recruitment and selection processes because of:

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

Whilst the legislation does not offer explicit protection to those who identify as intersex or non-binary (i.e. as a gender outside man or woman), the protected characteristic of gender reassignment offers some protection to those who are perceived to have this protected characteristic or are going through 'part of the process'. ACAS guidance also suggests that employers should treat employees (and potential employees) who are intersex, non-binary or otherwise gender non-conforming as if they were covered by the Equality Act 2010.

1.1.4 An employer does not discriminate if there is an occupational requirement for recruiting an individual from a specific group in relation to a particular job; for example, there may be occupational requirement for a female to fill the position of a live in care assistant at a home for teenage girls. There is no set list of circumstances in which occupational requirement will exist and employers should be very clear about the necessity for such a requirement before advertising a position. Employers must also consider each position individually as there may be some positions where there is occupational requirement, but this might not be the case for all roles. Where a recruitment decision is challenged, the onus is on the employer to establish that there was an occupational requirement. For more information on occupational requirements, see 6.9 Occupational requirements and other exceptions.

1.2 Job description and person specification

1.2.1 When recruiting staff, either to fill a vacancy or a newly established role, it is important to take the time to set out a clear definition of the job itself and the skills, knowledge and experience that potential candidates must have. There is no legal requirement on employers to have a job description or a person specification; however these are helpful to both the employer and to potential candidates.

1.2.2 Job description

This helps to clarify the scope of the work that the employer expects the successful candidate to undertake. A job description should include the job title and details of the main duties, tasks and responsibilities involved. It is also useful to outline where the job fits into the employer's organisational structure, including details of the line manager who will oversee the position and whether the employee will be responsible for other members of staff within the organisation.

1.2.3 Person specification

1.2.3.1 A person specification outlines the personal qualities and characteristics the employer is looking for. The person specification should include qualifications required and also the kind of knowledge, experience and skills that the employer is looking for. It is sensible to draw a distinction between experience and skills that are essential for the job and those that are desirable.

1.2.3.2 The personal qualities or characteristics should be directly related to the job. They must also be applied consistently to all applicants, irrespective of their race, sex etc. If requirements in relation to personal qualities or characteristics are not directly related to the job or are not applied to all groups in the same way, this could leave an employer vulnerable to discrimination claims. For example, in order to avoid any suggestion of discrimination on the grounds of age, words like 'young' or 'mature' should be avoided as should reference to required years of experience for the job.

1.3 Advertising vacancies

1.3.1 There are many different ways in which employers can advertise vacancies. It can be in newspapers, at a national or local level, or via the Internet. Some employers choose to use an employment agency. There are now specific rules governing the rights of employees or workers engaged through an employment agency. For further information see 2.9 Agency workers. Vacancies may be advertised in an organisation's internal publication. The method of advertising will depend on the type of potential candidates that the employer wants to reach and the budget available for recruitment.

1.3.2 An advertisement should ideally include:

- a basic description of the job;
- the essential and the desirable qualities for job applicants (from the person specification);
- a description of the organisation and the activities it undertakes;
- basic details of salary scale and other benefits etc.;
- job tenure (for example, whether the position involves a fixed term contract, maternity leave cover etc.);
- details of how applicants should apply and any deadline for applications;
- full name of employment business or agency;
- Proposed place of work, (for example is the role office based, hybrid working, or home based);
- Details of any training needed to carry out the role;
- Contact details of hiring manager/HR team for any questions about the role etc.

1.3.3 Misrepresentation

When advertising a vacancy, it is very important that the post is not misrepresented. Employers must take care when describing the job in order to avoid any subsequent disputes about the role once the successful candidate starts. The British Code of Advertising provides guidance on the form and content of advertisements. These should be 'legal, decent, honest and truthful'.

1.3.4 Job adverts and discrimination

An inappropriately worded job advertisement can result in an employer being liable for an act of discrimination. This can happen in two ways. Firstly, if for example a job advert specifically seeks a female or young applicant, then that advert potentially discriminates directly against males and older applicants, unless it can be shown that the employer has an occupational requirement for seeking female or young applicants. For further information on occupational requirements, please see paragraph 1.1.4.

A job advert can also discriminate even though it does not specifically seek to include or exclude certain types of applicant. There have been cases where it was found to be discriminatory because of age for an advert to contain the words 'dynamic' and 'energetic'. The court decided that this was a poorly-disguised attempt to seek applications from young people. The converse would also be true if, for example, an advert sought 'mature' or 'seasoned' candidates.

Employers often use recruitment agencies and it is unlawful for an employer to instruct such an agency to discriminate when advertising for candidates.

A full explanation of discrimination rules is beyond the scope of this chapter. For further guidance in relation to avoiding acts of discrimination, see Chapter 6.

The Equality and Human Rights Commission (EHRC) can take proceedings against those responsible for publishing discriminatory advertisements and seek a declaration that the advertisement was unlawful. It is also open to candidates to take legal action against an employer if the language used in an advertisement is discriminatory, provided they can show that their genuine desire to apply for the role.

If particular groups are under-represented in a particular employer's organisation, then it can be lawful but not mandatory for that employer to encourage applications from candidates from those particular groups. In those circumstances, the employer can lawfully include wording that positively encourages candidates from the under- represented groups to apply. Employers should take care before drafting adverts in this way to ensure that there is clear evidence of under-representation of the particular groups in the workforce.

1.3.5 Since 8 May 2016 there has been a ban on recruitment agencies and businesses from recruiting solely from other EEA countries without advertising in Great Britain.

1.3.6 Union membership

Employers are prohibited from refusing to offer employment to a candidate on the basis that the candidate is a member of a trade union, is unwilling to join or leave a trade union, or is unwilling to make payment in lieu of union subscriptions. If a job advert makes reference to such matters, then it is assumed that any unsuccessful candidate who cannot meet the requirement was refused the job for that reason. It is sensible then for employers not to mention union membership in job adverts.

1.4 Job application forms

1.4.1 Many employers choose to ask candidates to complete a job application form. The advantage of doing so is that the employer can decide what information candidates must provide and the information provided will be in a consistent format. This makes it easier to compare candidates' responses and to carry out an objective assessment of the candidates' suitability for the position.

1.4.2 All applications should be treated confidentially and circulated only to those who are involved in the recruitment process. To do otherwise would risk breaching the Data Protection Act (see 1.8 Data protection and 9.0 Data protection for further information on the Data Protection Act).

1.4.3 There are a number of issues that employers should consider when composing application forms.

1.4.4 Age

Employers should consider whether it is necessary to ask the applicant's age as doing so might lead to a suggestion of age discrimination.

1.4.5 Health

Except in the specific circumstances set out below, it is unlawful for employers to ask any job applicant about his or her disability or health until the applicant has been offered a job or has been included in a pool of successful candidates to be offered a job when a position becomes available.

This prohibition includes questions on application forms, pre-employment health questionnaires and also questions during an interview or subsequent selection process. Questions relating to previous sickness absence are likely to be regarded as questions that relate to disability or health.

The six situations where it is lawful for an employer to ask questions related to disability or health are:

- where reasonable adjustments are needed for the recruitment process;
- for the purposes of equal opportunities monitoring;
- implementation of positive action measures;
- where there is an occupational requirement for a person to have a particular protected characteristics for a job;
- national security;
- where the question enables an employer to identify whether a job applicant can carry out functions that are intrinsic to that job, with reasonable adjustments in place, as required.

This last exception gives employers some scope to ask health related questions at the recruitment stage. In practice, employers must assess whether there are any functions of a job which are so important and fundamental to be able to justify asking any such questions. For example, an employer may advertise a warehouse position which involves a great deal of manual handling. In these circumstances, certain questions relating to an applicant's physical mobility may be lawfully asked. However an employer should be careful about how any requirement is phrased.

1.4.6 Right to work in the UK

Employers have a legal duty under the Immigration, Asylum and Nationality Act 2006 to prevent illegal working and can meet this duty by checking whether a prospective employee requires permission to work in the UK.

All British citizens have full employment rights in the UK, as do those individuals with indefinite leave to remain in the UK. Some Commonwealth citizens have what is known as the "right to abode" in the UK which means they have rights to the same treatment as British citizens (but cannot hold a British passport). All other nationals will need permission to enter and stay in the UK and the type of immigration status they have will determine any restrictions on their right to take up employment.

With the UK having now left the European Union, the position for European Economic Area (EEA) and Swiss nationals has changed and the free movement of workers has ended. EEA and Swiss nationals resident in the UK before 31 December 2020 may have retained the right to live and work in the UK by applying for status under the EU Settlement Scheme (EUSS). Those EEA and Swiss nationals arriving in the UK since 1 January 2021 are subject to the UK immigration system and require permission to enter/remain in the UK.

For more detailed information on employment rights changes following Brexit, see 18.0 Brexit employment changes.

Individuals granted status under the EUSS will have permission to work in the UK. Those with pending applications (including late applications), who have been issued a certificate of application by the Home Office, will also have the right to work pending the outcome of their application. The Home Office Employer Checking Service can be used by employers to verify their right to work pending the outcome of the application.

Individuals who have come to the UK fleeing persecution and seeking asylum ("asylum seekers") normally do not have the right to work in the UK until their application has been accepted by the Home Office. Once their claim has been accepted asylum seekers will gain "refugee status". Refugees have full rights to work. If asylum seekers do not receive refugee status, the Home Office may still grant them "humanitarian protection", which will also entitle full rights to work. Refugees or those with humanitarian protection do not require sponsorship under the points based system.

Employers are liable to civil and criminal penalties (in extreme cases possibly imprisonment) if they employ someone who does not have permission to work in the UK. From 13 February 2024, fines of up to £60,000 per illegal worker can be imposed, though this is restricted to £45,000 per worker for a first offence. Furthermore, unlimited fines can be imposed on an employer who is found guilty of employing someone they knew or had 'reasonable cause to believe' they did not have the right to work in the UK. Provided an employer has carried out the necessary right to work checks, and repeated checks where applicable, it will have a defence if it subsequently discovered that it has employed an illegal migrant worker. An employer will not, however, be protected from civil and/or criminal sanctions in such circumstances where they have carried out the required checks but have knowingly employed someone who is an illegal worker

In certain circumstances, it will not be possible to carry out a right to work check as set out above. For example, where the employee has made an application for permission to stay in the UK and it is currently under consideration. In these circumstances, employers can make use of the Home Office Employer Checking Service to confirm an employee's ongoing right to work pending the outcome of their immigration application. If an employee as an ongoing right to work, the employer will receive a Positive Verification Notice (PVN) confirming their right to work. The PVN is valid for 6 months and a repeat right to work check should be carried out prior to the PVN expiring.

1.4.7 Discrimination considerations

It is important that employers avoid discrimination when carrying out the necessary checks on employees. The best way for employers to make sure that they do not discriminate is to treat all job applicants in the same way at each stage of their recruitment process.

Individuals are still protected from discrimination on grounds of their race so it is best practice to adopt a fair recruitment policy, whereby checks are conducted on all applicants.

The Home Office has produced both comprehensive and summary guidance for employers on preventing illegal working, the most recent document being "An Employer's Guide To Right To Work Checks" and this is available from their website. The guidance outlines the different ways in which right work checks can be conducted.

There are currently three ways an employer can conduct a valid right to work check:

1. Online right to work check

Online right to work checks are mandatory for biometric residence permit/ card (BRP/C) holders, frontier permit workers or those with an eVisa. It is no longer acceptable to carry out manual checks on these individuals. The employee will provide a share code to the employer which the employer can then use to verify the employee's right to work using the Home Office online right to work check. An employer using the online service must:

- Use the share code to check the employee's details online;
- check in person or via video call that any photograph of the employee on the online check is a true likeness of them and that the check confirms the individual has the right to work;
- Retain evidence of the online check for the duration of employment, plus two years afterwards.

2. Manual check

These are no longer permitted for BRP/C, frontier worker permit or eVisa holders but are required for employees who do not hold a BRP, BRC, frontier worker permit or eVisa. Manual checks are conducted as follows:

- Obtain original documents from the approved Home Office lists, e.g. passport, national identity card etc;
- Check the documents are genuine, belong to the applicant and that dates are accurate and/or have not expired, etc; and
- Copy all documents presented, which must be retained for the duration of employment and a period of 2 years after.

3. Using an Identity Service Provider (IDSP)

This is a new service and permits employers to use IDSPs to carry out the digital identity verification element of right to work checks using identity verification technology (IDVT). The use of IDSPs is only available for carrying out checks on British and Irish citizens who have a valid passport. The Home Office recommends the use of certified IDSP providers. The basic steps for using an IDSP are as follows:

- IDSP carries out digital identity verification
- The employer satisfies themselves the photograph and biometric details from the digital check are consistent with the individual presenting themselves for work (either in person or via video call);
- Retain a clear copy of the IDVT identity check output for the duration of employment and for two years thereafter.

1.4.8 Criminal convictions

Employers should only ask for information about criminal convictions if the type of job they are recruiting for justifies seeking this information. The Rehabilitation of Offenders Act 1974 allows individuals who have been convicted of certain offences to treat these as spent after specified periods of time. Refusing to employ someone because they have a spent criminal conviction is a criminal offence. Application forms should make it clear that applicants do not need to provide details of convictions that are spent under the 1974 Act, unless the job is covered by the Exceptions Order to the 1974 Act.

1.4.9 Disabled applicants

Depending on the nature of the disability, it may be necessary for an employer to make provisions to accept applications by alternative means; for example, allowing blind candidates to submit applications via audiotape or CD disc. Such a step may be regarded as a reasonable adjustment by a prospective employer to facilitate applications from disabled candidates. For further information, see 6.4.10 Duty to make reasonable adjustments.

1.5 Interviews

1.5.1 After considering the applications, employers normally draw up a list of candidates they wish to interview. It is important when drawing up a list of candidates not to discriminate against applicants on any of the grounds listed in paragraph 1.1.3. Where possible, it is good practice to have more than one person involved in compiling the list of candidates in order to avoid the possibility of bias and to make sure that the short list is drawn up fairly, although in smaller businesses this is not always possible.

1.5.2 Conducting the interview

Employers should give thought in advance to the structure and content of the interview. It can be useful to make up a list of questions that are to be asked of the candidates. It is sensible to take detailed notes of what is said at interviews and to keep these. It is important to remember that, if a candidate later claims that he or she has been discriminated against, he or she could ask for disclosure of copies of notes that were taken during the interview. Legible and detailed interview notes can be of great assistance to an employer in defending a discrimination claim.

As part of its defence the employer may be called upon to show that the reason for the rejection of the candidate was for a reason other than protected characteristics such as age, gender, religion, etc. Detailed notes which record an analysis of the applicant's skills, qualifications and responses to the interview questions can be very important in persuading a tribunal that the reasons for refusal were not discriminatory.

The considerations that must be taken into account in relation to advertisements (see 1.3 Advertising vacancies) have to be borne in mind during the interview process. It is important to make sure that staff who are responsible for conducting interviews understand the requirements of the job, qualifications and characteristics that are sought. This should enable them to reach decisions on the basis of the merits and suitability of the candidate, thus avoiding discrimination claims.

1.5.3 False information provided by applicant

If a successful job applicant provides information to the prospective employer during the recruitment and selection process, either in writing or orally, that the applicant knows to be false, that may entitle the employer to dismiss that individual at a later stage as and when that false information comes to light. A distinction is however drawn between circumstances where a candidate may have exaggerated abilities or experience from situations where deliberately dishonest and misleading responses have been given to the employer either on the application form, CV or at interview. For example, where a successful candidate falsely states that he or she has a particular qualification (which is an essential part or is important for the job role) then the employer is likely to be justified in dismissing that successful candidate. On the other hand, if an applicant has exaggerated the amount of experience he or she has in a particular process, task or skill that is not a material component of the job, then that is unlikely to justify dismissal if the employer subsequently discovers that the employee is less skilled in that area than he or she had made out during the recruitment process.

For further information and guidance on disciplinary procedures and unfair dismissal rules, please see Chapter 11 and Chapter 12.

1.5.4 Reasonable adjustments for disabled candidates

There are a wide range of reasonable adjustments that an employer may be required to make to allow a disabled applicant to attend an interview or other type of selection event, for example:

- using accessible premises;
- providing a reader or interpreter;
- changing procedures for tests or assessments;
- allowing the candidate to be accompanied by someone who can support him or her at the interview.

For a fuller explanation of the obligation to make reasonable adjustments under the Equality Act, see 6.4.10 Duty to make reasonable adjustments.

1.5.5 Other methods of selection

As well as interviews, employers sometimes use other ways of selecting candidates. These might include practical tests if the position involves manual skills. Psychometric tests are used to assess aspects of personality and intelligence, for example problem solving, decision-making and confidence. Employers should decide whether this sort of testing is really relevant to the vacancy they want to fill and should also consider the cost of carrying out and analysing these tests weighed against the possible benefits.

1.6 Offer of employment

1.6.1 Once an employer has made its decision, it is important that a written offer of employment is made to the successful candidate without delay. Where the employer requires to convey the offer urgently in order to secure that particular candidate it may be appropriate to make the offer of employment verbally by telephone. If an employer makes an offer by telephone it should ensure that all relevant parts of the offer are conveyed to the successful candidate. It is sensible for an employer making such an offer to make a note of the content of the telephone conversation and follow up the call with a written offer as soon as possible. The successful candidate will in all probability have to serve out a period of notice of termination of employment with his or her current employer which inevitably delays the commencement of the new employment. Employees tend to be understandably reluctant to give notice to their existing employer before they have a firm written offer of employment.

1.6.2 Sometimes an employee is available to start right away. When an employer's need is such that it wishes to accept the employee's offer of an immediate start, that employer should nevertheless make it clear to the employee that ongoing employment will be conditional upon satisfactory references being obtained and terms and conditions of employment being agreed.

1.6.3 Make up of job offer

Employers should write to a successful candidate setting out the fact that he or she has been successful, together with the main terms and conditions on which the employment offer is made. It is common for employers to set out job role, start date, salary, other benefits, holidays and notice period in the body of the offer letter. It is also best practice for the employer to attach to the offer letter a statement of terms and conditions of employment which the employee will be expected to agree to (see 2.2.1 Introduction).

The offer letter should also refer to any other documents or policies which will form part of the contract of employment, and ideally copies of such documents should be attached to the offer letter. The offer letter should request that the employee signs and dates the terms and conditions of employment and returns those prior to the commencement of the employment. The offer letter should make it clear that the employment is subject to satisfactory references being obtained.

Where possible, the offer letter should stipulate the intended start date. This is not always possible due to uncertainty about whether or not the prospective employee will be asked to work his or her notice with the current employer, and if so for what period.

A clear and complete job offer, together with accompanying contractual documents, helps avoid dispute between employee and employer in relation to contractual terms once the relationship has begun. It is better for both parties that the applicable contractual terms are clarified before the relationship begins.

1.6.4 Conditions of employment

It is sensible for employers to make offers of employment conditional upon satisfactory references and other matters such as security clearance or proof of the right to work in the UK. If an offer of employment is made subject to such conditions, then the offer must make that clear.

1.7 References

1.7.1 It is important in the recruitment process for employers to take up references from candidates' previous employers. Many employers seek a reference not only from the previous employer but from another employer or other person who can speak to the character of the applicant.

1.7.2 Some prospective employers issue pro forma reference requests which pose a number of specific questions in relation to the prospective employee's ability, absence record and conduct. It should be noted, however, that former employers cannot be compelled to provide any form of reference for a former employee, let alone complete a pro forma reference request. Increasingly, employers restrict references to basic statements of employment dates, job title and reason for leaving, rather than making any qualitative comment on the former employee.

1.7.3 If an employer chooses to give a reference for a former employee then it must bear in mind that in drafting the reference it owes a duty of care to the recipient of the reference to ensure that the reference is factually true and accurate and not in any way misleading. The employer owes a similar duty of care to the subject of the reference.

1.7.4 Job offer subject to references

It is common for employers to make offers of employment to prospective employees subject to obtaining satisfactory references. If an employer decides to withdraw a job offer on the basis of a reference, that employer should ensure that in doing so it does not contravene the discrimination rules. For example, if a reference discloses that a prospective employee has a history of poor attendance as a result of depression and the prospective employer withdraws the offer on that basis, it may be open to the prospective employee to raise a claim under the Equality Act.

1.8 Data protection

Chapter 9 covers Data Protection obligations in detail. The Data Protection Act 2018 applies to information collected by an employer in the course of the recruitment and selection process. The Information Commissioner has published the Employment Practices Data Protection Code to encourage good practice in the storage and processing of data obtained during recruitment and selection. There is also a Quick Guide to the Code and both are available on the Information Commissioner's Office website. Applicants must be made aware of what information relating to them the employer collects or retains and what this will be used for.

Employers should:

- ensure that all staff involved in recruitment and selection are aware that Data Protection rules apply and that they must handle personal information appropriately;
- make sure that they do not collect more personal information than is necessary. It is a breach of Data Protection rules to collect personal information that is irrelevant or excessive;
- keep all personal information obtained secure and not disclose this to third parties without the applicant's consent;
- make it clear to the applicant if it intends to check the information that has been provided. The applicant should be told how this will be done and what information will be checked; and
- only keep information obtained during the recruitment process for as long as there is a clear business need to do so. For example the employer may have been impressed by the candidate but did not have enough vacancies to make an offer of employment. The employer may wish to keep this applicant's details on file in case another suitable vacancy arises.

1.9 Induction

1.9.1 An effective induction programme helps the employee to settle quickly and become an effective member of staff as soon as possible. Some employers send induction information to new employees before they take up their new role. This means that they can take time to consider this information before starting work.

1.9.2 The format of induction programmes varies from employer to employer and will depend on the size of the organisation and the nature of the job but there are some basic points that all employers should cover:

- health and safety procedures in relation to the job and, if necessary, training in this area should be provided at the induction stage. New employees should be made aware of any particular health and safety requirements, for example, the need to wear protective clothing;
- new employees should be given the opportunity to meet the staff they will be working with, as well as their line manager, or any other member of staff to whom they will be expected to report;
- new employees should be shown round their place of work so that they know where all the facilities are; and
- there should be an explanation of the new employee's terms and conditions and the requirements of the job; and
- equal opportunities training.

1.10 Recruitment complaints

A recruitment and selection policy should include a procedure for handling complaints. Notes should always be kept during the recruitment process, especially about decisions that have been made and the reasons behind those decisions. These notes are likely to be important if there is an allegation that there has been discrimination during the recruitment procedure.

1.11 Useful websites

Business Gateway
bgateway.com

ACAS
acas.org.uk

CIPD
cipd.co.uk

Home Office UK Visas and Immigration
gov.uk/government/organisations/uk-visas-and-immigration

Equality and Human Rights Commission
equalityhumanrights.com

Information Commissioner's Office
ico.gov.uk
itspublicknowledge.info/home/ScottishInformationCommissioner.aspx
emplaw.co.uk

GOV.UK – right to work checks guide
gov.uk/government/publications/right-to-work-checks-employers-guide

Chapter 2

Contracts of employment

2.0 Contracts of employment

2.1 Introduction

2.1.1 A contract of employment is a legally enforceable agreement between an employer and an employee. It does not have to be in writing to be enforceable. It is advisable to record contractual terms in writing so both parties are clear about their rights and obligations.

2.1.2 The terms and conditions of a contract of employment can be express or implied. Express terms are those that have been explicitly agreed, either in writing or orally. An implied term is one which has not been explicitly agreed but in view of the nature of the relationship and the way of working, can be deemed to form part of the contract. See 2.5 Implied terms for a detailed analysis of implied terms.

2.1.3 Contracts of employment can be contained in a single document or, in some instances, they can be made up of a number of documents. Employers sometimes incorporate separate bonus schemes, policies and procedures. Some employers incorporate the employee handbook into the contract of employment. It is essential for the sake of clarity of understanding of both parties that it is agreed explicitly which documents have contractual effect. Employers can put in place a whole range of policies, none of which have actual contractual effect. It is sensible for an employer to assess which documents it wishes to have contractual effect. It is not wise simply to incorporate an employee handbook wholesale into a contract of employment. Employee handbooks contain not only obligations on employees but they also potentially contain a number of onerous obligations on employers.

2.2 Forming a Contract of Employment

2.2.1 Introduction

A contract of employment is binding once an individual accepts an offer of employment. The offer and acceptance can be written or oral. It is advisable to provide a prospective employee with a written offer of employment to ensure that both parties are clear about the main terms and conditions that will apply. An employer can do this in a formal letter and request that the employee confirm acceptance of the offer in writing. Written offers of employment typically contain the main terms of agreement but are rarely exhaustive in respect of all contractual matters. It is sensible for employers to enclose with an offer letter, a statement of main terms and conditions of employment so that the employee is aware at an early stage of the contractual provisions which he or she is being asked to accept. If the main terms of employment are acceptable to the employee, it is unlikely that the detail contained in the statement of terms and conditions of employment will change his or her mind about entering into the employment relationship, however, it is best practice for these matters to be clarified at an early stage. The employee should be asked to confirm in writing that the main terms and the additional statement of terms and conditions of employment are acceptable.

2.2.2 Conditions of Acceptance

In some situations, an employer may want to consider making an offer of employment conditional to allow it to check academic qualifications or request references from a previous employer. If an offer of employment is conditional, this must be clearly stated. This offer should also spell out that if an individual does not meet any specified conditions then the offer of employment would be deemed to be withdrawn. A problem can arise if the employee is allowed to start work before the conditions are met because then the matter of notice and other contractual considerations may emerge. This can be addressed by carefully wording any conditional offer of employment particularly where the individual is going to start work before all the conditions are met.

2.2.3 Incorporated Terms

2.2.3.1 General

Certain terms and conditions may be incorporated into an employee's contract of employment. These are terms which are not necessarily specified in the contractual documents but are contained within another document. For example, certain terms of a collective agreement with a Trade Union are often incorporated into a contract of employment.

2.2.3.2 Collective or national agreements

2.2.3.2.1 If an employer has entered into a collective agreement with a Trade Union (whether directly or through an employers' association), it should consider whether any of the terms contained within the collective agreement do or should form part of an employee's contract of employment. If an employer decides that there are terms which should be incorporated into the terms and conditions of employment then it should expressly state that in the contract of employment. It is very difficult for an employer to rely upon or enforce a term of a collective agreement if it has not been directly or expressly incorporated into an employee's contract of employment.

2.2.3.2.2 The same issues arise when an employer is a party to a national agreement for a particular industry. If there are terms and conditions within a national agreement that an employer wishes to incorporate into an employee's contract of employment, this should be stated in the contract of employment.

2.2.3.2.3 In the absence of any express provision, it will be difficult for an employer to enforce any term in either a collective agreement or national agreement against an employee. Confusion can easily arise regarding the incorporation of these terms and it is essential that parties are clear about which terms are incorporated and which are not.

2.2.3.3 Other policies and procedures

Employers often have a number of additional policies and procedures which govern the employment relationship. Employers may incorporate such other policies and procedures into the contract of employment. If there are any particular policies or procedures that an employer wishes to incorporate, or alternatively make explicitly non-contractual, then this should be confirmed in writing.Even if an employer does not incorporate a policy or procedure by specific reference, it is still possible for an employee to argue that a particular policy or procedure is in fact contractually binding. The employee may be able to show the employment relationship has progressed in such a way that makes it clear that both parties have accepted the term as legally binding. This can be particularly important when it comes to policies such as bonus schemes which are not intended to be contractual rights.

2.3 Statement of employment particulars

2.3.1 Introduction

Employers are under a statutory duty to provide a written statement of particulars of employment on the first day of employment. Details relating to pensions, applicable collective agreements and training rights, can however be given later, in instalments and can be contained within a separate document.

The right to receive a written statement, previously enjoyed only by employees, has now been extended to cover all workers who were engaged by an employer on or after 6 April 2020. The statement has to contain the following:

- the names of the employer and the employee;
- the date when the employment began;
- the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period);
- the scale or rate of remuneration or method of calculating remuneration;
- the intervals at which remuneration is paid (weekly, monthly or other specified intervals);
- any terms and conditions relating to an employee's hours of work (including any terms and conditions relating to normal working hours);
- any terms and conditions relating to any of the following:
    - entitlement to holidays, including public holidays and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);
    - incapacity for work due to sickness or injury, including any provision for sick pay and whether there is a company sick pay scheme or SSP only, and pension contributions and details of any stakeholder or other pension schemes.

- whether or not a 'contracting-out certificate' exists for the employment;
- the length of notice of termination of employment which the employee is obliged to give and entitled to receive;
- the title of the job which the employee is employed to do or a brief description of the work for which they are employed to do;
- where the employment is not intended to be permanent, the period for which it is expected to continue (e.g. maternity leave cover) or, if it is for a fixed term, the date when it is to end;
- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;
- any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party to the agreement, the persons by whom they were made;
- in the event that the employee is required to work outside the UK for a period of more than one month:
    - the period for which he or she is required to work outside the UK;
    - the currency in which remuneration is to be paid while he or she is working outside the UK;
    - any additional remuneration payable and any benefits to be provided, because of the requirement to work outside the UK. Such benefits may be healthcare provision or schooling for children; and
    - any terms and conditions relating to the return to the UK including relocation or repatriation costs;
- applicable disciplinary rules or reference to the provisions of a document such as a policy specifying such rules, a copy of which should be reasonably accessible to the employee;
- disciplinary or grievance procedures applicable to employees or reference to a separate document containing such procedures, a copy of which should be reasonably accessible to the employee; and
- identification of the person to whom the employee can appeal if he or she is dissatisfied with any disciplinary or grievance decision, together with the manner in which such application or appeal should be made;
- specify working days;
- specify whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined;

- terms and conditions relating to sick pay;
- terms and conditions relating to any other paid leave;
- details of any other benefits offered;
- probationary period details, including conditions and duration;
- details of any training entitlement provided by the employer;
- any part of that training entitlement which is compulsory;
- particulars of any other compulsory training which the employer will not pay for.

Where certain aspects do not apply to a statement of particulars, this should be so stated. For example, if no training is to be offered then the written statement of particulars should include a statement to that effect.

2.3.2 Failure to give Statement of Particulars

Where a statement is not provided an employee/worker may raise a claim in an Employment Tribunal seeking a declaration of what particulars ought to have been issued. There is no time limit for such a claim except in circumstances where the employment relationship has ended. An employee/worker must raise a claim within 3 months of their effective date of termination of employment. Upon receiving a claim an Employment Tribunal can:

- confirm the particulars as included or referred to in the statement given by the employer;
- amend those particulars or substitute other particulars as the tribunal may determine to be appropriate.

An employee/worker may be able to claim compensation for an employer's failure to provide employment particulars.The Tribunal has the power to award between two and four weeks' pay to an employee where employer has failed to provide a written statement of particulars or a written statement of changes to those particulars where such a claim is brought as part of a wider Tribunal claim. An employer can extinguish liability for their failure to provide employment particulars so long as there is compliance before an employee raises a claim. Additionally, any dismissal of an employee for requesting a written statement, or bringing proceedings to enforce this right will be automatically unfair.

2.3.3 Illegal Contracts

If a contract for employing an individual is entered into illegally, or part of the terms are illegal, then it may not be enforceable by either party. A contract will likely be unenforceable where:

- it is entered into for the intention of committing an illegal act (e.g. it is agreed the employee is to be paid cash in hand without deduction of tax and national insurance);
- it is prevented by statute (e.g. the employee has no right to work in the UK); or
- it is a valid contract but is performed illegally (e.g. the contract states tax and national insurance will be deducted from pay, but the employee is paid cash in hand).

Illegality may also have implications for enforcement of certain statutory rights, such as unfair dismissal, which rely upon an employee being under a contract of employment. This can to a certain extent, depend on knowledge of the illegality. For example, an employer will still be liable for claims of unfair dismissal even in instances where an employee is later found to have been working illegally so long as the employee did not know they were participating in illegality. Conversely, if an employer erroneously dismisses an employee because they reasonably believe the employment is illegal, then the dismissal may be fair.

2.4 Express contractual terms

2.4.1 Introduction

2.4.1.1 Express terms are those which have been specifically agreed by parties either orally or in writing. Most employers have a standard style contract of employment. Employers should however bear in mind that the contractual relationship differs from employee to employee. It is important to consider the particular terms that are important in each contract and where necessary, adjust the standard contract accordingly. For example the more senior or critical to the business the employee is, the more important it may be to include restrictive covenants in the contract. Certain employees may be entitled to different contractual benefits such as a company car, entitlement to bonus etc. Other employees will not be entitled to such benefits. The contract should make it clear which benefits apply.

2.4.1.2 It is also important for any express term to be clear and unambiguous. For example, if an employer pays for training but wants to claw back the cost if the employee leaves, then that should be specified in the contract or in a separate document relating to the training. A general obligation to pay the cost of the training back is likely to lead to confusion and dispute at a later stage. The precise cost of the training should be specified and the precise repayment percentages that will be clawed back over time if the employee resigns should be expressed clearly.

2.4.1.3 It is not mandatory to set out the following matters in a contract of employment, however a prudent employer will do so:

- certain defined terms that may apply in the document;
- the right to make deductions from an employee's wages;
- the right to lay off or place an employee on short time working;
- confirmation of which benefits are discretionary as opposed to contractual;
- any documents or agreements that are incorporated into the contract;
- the right to vary the terms and conditions of an employee's contract of employment;
- the right to demote or suspend an employee without pay as a disciplinary sanction; and
- restrictive covenants.

2.4.2 Defined terms

It is essential that the meanings of certain important terms in a contract are spelled out clearly. An example is the term 'confidential information'. Most contracts contain a provision prohibiting the disclosure of confidential information. This term can be difficult to enforce if it is unclear what type of information is confidential. It means different things in different businesses and employees should not be left to decide for themselves what is and what is not confidential information. Employers should incorporate a clear definition of 'Confidential Information' into contracts. It may include information relating to products, services, finances, database, etc., or some other list of items, documents, types of data or information that it deems confidential.

2.4.3 Restrictive covenants

Employers need to consider what restrictions if any it may wish to impose on an employee after his or her employment has ended in order to protect its legitimate business interests. Such restrictions should be specified in writing in the contract. A restrictive covenant must not go beyond what is reasonably required to protect the employer's legitimate business interests. An employer will not be able to restrict an employee from competing in an area where it does not carry out any business or in an industry in which it does not compete. An employer should always seek further advice if it wishes to include restrictive covenants in a contract of employment. Covenants which are drafted too widely will be regarded as restraints of trade and therefore unenforceable. The Government has announced plans to restrict the duration of restrictive covenants to three months, though there has been no substantive progress on these changes coming into effect as yet.

2.4.4 Commencement/duration of employment

2.4.4.1 An employer should confirm an employee's start date and confirm whether or not it will take into consideration any employment with another company or previous employer as forming part of the employee's continuous employment.

2.4.4.2 If the contract of employment is for a fixed period, then this should also be stipulated in the contract. The termination date or event that will bring the fixed period to an end should be specified.

2.4.5 Probationary period

2.4.5.1 Prudent employers will insist on having an express term outlining the terms of any probationary period at the commencement of an employee's employment. This probationary period is an opportunity to assess the employee's suitability for the job.

2.4.5.2 The benefit of a probationary period is that it focuses the parties' minds at an early stage of employment to assess the suitability of the employee for the role taking account of how he or she has performed since commencing employment. It is also sensible to have an express term providing for the extension of the probationary period. Employers sometimes require a longer period in which to properly monitor and review the performance of an employee.

2.4.6 Place of work

2.4.6.1 An employer is under a legal duty to confirm where an employee is normally expected to work.

2.4.6.2 If an employee is required to work outwith the UK or travel for significant periods of time during employment, it is a legal requirement that this is stipulated in the contract. An employer must also exercise the term reasonably i.e. it should provide the employee with reasonable notice of where and when he or she will need to travel.

2.4.6.3 A mobility clause may also be used to require employees to relocate. Such clauses must be reasonable in the circumstances of the employment relationship. A mobility clause that purports to oblige a relatively junior employee to relocate anywhere in the UK is unlikely to be enforceable if the relocation involves moving from Aberdeen to Bristol for example.

2.4.6.4 In the aftermath of the Coronavirus pandemic many employers have decided to adopt some form of hybrid working permanently. In making a permanent shift to home or hybrid working, employers should ensure that their employment contracts are up to date and fit for this purpose and include provision for insurance, monitoring and data protection safeguards.

2.4.7 Training

2.4.7.1 Employers who invest in training rightly wish to reap the benefits of that training. They cannot do so if the employee leaves shortly after the training is completed. For this reason an employer who incurs significant costs for training may want to consider including an express term allowing it to recover all or part of the cost in the event that the employee resigns.

2.4.7.2 The clause should specify the cost of the training and the repayment provisions and should be agreed before the employee embarks upon the training. That way, both parties are clear about what has been agreed and what may be due and payable and when.

2.4.8 Pay and deductions from pay

2.4.8.1 An employer is legally obliged to confirm in writing an employee's rate of pay and when payment is made.

2.4.8.2 It is advisable for an employer to specify how it will claw back errors or overpayments of salary or wages. It is advisable for a contract of employment to have an express term reserving the right for the employer to make deductions from an employee's salary/wages in a range of specified circumstances. The express term should also stipulate that by signing the agreement or contract of employment, the employee is consenting to the employer making such specified deductions. An employer cannot use a broad blanket term to make deductions of wages. The contract should specify the particular reasons why deductions may be made.

2.4.9 Bonus

2.4.9.1 The amount of bonus paid and the conditions which have to be met before bonus is paid often change from year to year. In addition employers often wish to retain an element of discretion in the payment of bonuses. If an employer wishes to maintain a discretionary bonus scheme as opposed to one with contractual effect then this should be clearly stated in the contract of employment. It should also be stated clearly that the conditions and rules that apply to the discretionary bonus scheme may be changed at the employer's discretion from time to time. It is sensible also to state that the bonus scheme may be discontinued at the employer's discretion.

2.4.9.2 It is often the case that detailed conditions and rules of a bonus scheme are contained in a separate document. That document should also contain a statement in its introduction highlighting that the bonus scheme is operated on a discretionary and non-contractual basis.

2.4.9.3 Employers should however note that even if a bonus scheme is discretionary in nature, once it has confirmed to an employee the bonus payment to which he or she is entitled under that scheme, an obligation to pay that bonus has been created and payment cannot thereafter be withheld.

2.4.10 Short time working – lay off

Employers do not always know what is around the corner and so it may be important, depending on the nature of the employer's business, that the contract contains the right to lay off employees or require them to work reduced hours for a specific period of time, in the event of a downturn in business or other circumstances. In the absence of such an express term, an employer cannot lay-off or impose short term working without the risk of liability for breach of contract and constructive unfair dismissal. For further details on lay offs and short-time working see 13.11 Layoffs and short-time working.

2.4.11 Holiday entitlement

The contract should specify the number of days' holiday that can be taken in the particular holiday year. That can be expressed as a total number of holidays inclusive of public holidays. Alternatively, the contract can specify the number of holidays plus the specified number of public holidays. If holidays require to be reserved for a period of shut-down, the contract should state that. If employees are not permitted to take more than ten working days' holiday at any time, for example, that too should be specified clearly. If there are particular rules about when holidays can or cannot be taken, that too should be specified.

Employers should also consider including provisions dealing with the accrual of holidays during periods of sickness ie, whether the accrual relates to the minimum statutory entitlement and/or contractual holiday entitlement.

For further information on holiday pay and entitlement, see 5.13 Holidays.

2.4.12 Sickness, absence and sick pay

2.4.12.1 If an employer pays its staff full pay during any period of ill health absence, then that should be stated in the contract. The period of full pay and any conditions attached to the payment of full pay should also be set out. It is advisable to specify in the contract of employment what provisions apply if an employee is off sick. Statutory Sick Pay (SSP) rules apply which give all employees the right to receive some pay during a period of sickness absence. There are certain qualifying criteria such as appropriate certification (either self or medical depending on the length of absence). See 4.2.2 Short-term sickness absence monitoring procedures.

2.4.12.2 If an employer wishes to impose rules in relation to the reporting of ill health absence by employees then these rules should be specified clearly in the contract of employment. It is common, for example, for employers to impose a contractual obligation on employees to contact their line manager by no later than half an hour in advance of the contractual start time to advise of the absence.

2.4.13 Notice of termination

2.4.13.1 The contract should set out the respective contractual periods of notice. Employers should bear in mind that the statutory minimum period of notice supersedes any contractual period if the contractual period is less. Many employers simply adopt the statutory notice scheme which obliges employers to give one week's notice between one month and two years' service and thereafter one week per every full year of service up to a maximum of twelve weeks' notice. The length of notice for a period of service up to a month is not laid-down and therefore an employer should specify the applicable notice period, if any, during the first month of employment. The statutory scheme provides for employees to give notice of only one week and therefore it is essential that the contract specifies the period of notice to be given by the employee if he or she wishes to resign.

2.4.13.2 Employers may wish to have different periods of notice during the probationary period. Employers should also give thought as to whether or not they wish to reserve the right to pay in lieu of notice or to place employees on garden leave during periods of notice. If the garden leave provisions are incorporated into the contract the employer should give some consideration as to what conditions should apply to that period of garden leave.

2.4.13.3 Employers may wish to consider separate notice provisions for employees engaged on Fixed Term Contracts (see 2.7.8 Notice of Termination).

2.4.13.4 Employers should also make it clear when contractual notice provisions will not apply (e.g. in cases of gross misconduct). This should be contained in the contract or in a policy on Disciplinary procedure referred to in the contract. For more information see 11.6.4 Dismissal without notice.

2.4.14 Other employment

2.4.14.1 Although employees are under a general duty to act in the best interests of their employers, it is worth stating in a contract of employment that employees must devote their whole time and attention during their working hours to the business of the employer. It is also prudent to include a statement to the effect that the employee may not engage in any other employment or work of any kind outwith working hours without the prior written consent of the employer. This prevents employees working in other jobs at night and at the weekends to the extent that they become tired and unable to devote sufficient effort to their main employment.

Employers are also advised to include wording to the effect that employees are obliged to disclose to the employer details of any external activity whether employment or otherwise which activity may result in the employee having a conflict of interest with the employer's business.

2.4.15 Exclusivity clauses, which restrict staff from working with multiple employers, have been void and unenforceable in zero-hours contracts since 2015.

In December 2022 the scope of this limitation was extended to all low-paid workers (i.e. those workers whose net average weekly wages fall below or equivalent to the lower earnings limit, which is currently £123 a week) and make it automatically unfair for employees to be dismissed for a reason relating to a breach of an exclusivity term and create a right for workers not to be subjected to a detriment for a reason relating to a breach of an exclusivity term. Affected employees will not need two years' service to bring an unfair dismissal claim.

2.5 Implied terms

2.5.1 Introduction

There may be circumstances where rights or obligations have not been expressly agreed either in writing or orally, but which are nonetheless enforceable. Such terms are referred to as implied terms.

2.5.2 How are terms implied?

2.5.2.1 Terms may be implied in the following circumstances:

- where it is common in the relevant trade or area of work or so obvious that it must be taken to have been agreed by parties even though it was not expressly agreed;
- where it is necessary to imply a term in order to give 'business efficacy' to the contract i.e. to make the contract work; or
- where a term has been incorporated into an employee's contract of employment by custom and practice.

2.5.2.2 Other considerations that may be taken into account when deciding whether a term should be implied are:

- whether it is reasonable and equitable to imply the term;
- whether it is obvious that at the time the contract was made both parties would have agreed that the clause was part of the arrangement between them;
- whether the clause is capable of being clearly expressed; and
- does the clause contradict any express term?

2.5.3 Custom and Practice

2.5.3.1 Employer's conduct

It is possible for a term to become implied in a contract of employment because of the way in which an employer has conducted itself in the past. In these circumstances, an employee may be able to establish that a term is implied due to the custom and practice that has evolved during his or her employment or historically. An example of this is an employer who has maintained a discretionary enhanced redundancy payments scheme for a period of 10 years. That employer has had 5 separate rounds of redundancies over that 10-year period and has always paid enhanced redundancy payments based on the same criteria automatically and without consultation or negotiation with either the employees or trade union. The employees are well aware of the existence of the scheme. The employer has never failed or refused to pay the enhanced redundancy payment. Although a discretionary benefit will not become an implied term merely because it has been paid for a number of years, it is one of the factors which will be taken into account in determining whether the scheme has become a contractual term implied through custom and practice. In these circumstances, it would be highly likely that the employer's enhanced redundancy scheme would be regarded as a contractual term implied through custom and practice.

2.5.3.2 Trade or industry

If a term is regularly adopted in a particular industry or trade or in a particular area, an implied term may be created. Where the custom and practice is confined to a particular establishment rather than the entire industry, it must be proved in the manner set out above. If an employer is able to prove that a particular custom and practice is generally adopted within the entire industry, it is arguable that it will not matter if a particular individual is aware of the custom and practice so long as the term was 'so obvious that it goes without saying'.

Otherwise, before a party is able to rely on an implied term, he or she will have to show that it was reasonably assumed that the other party knew about the custom and the custom (or practice) is reasonable, well known and certain.

Other relevant factors in assessing whether a term is to be implied or not include:

- whether the term or policy was drawn to the attention of the employees;
- whether it was followed without exception for a substantial period;
- the number of occasions on which it was followed;

- whether payments were made automatically or after discussion or consideration;
- whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;
- whether the policy was adopted by agreement;
- whether employees had a reasonable expectation that the term or policy would apply;
- whether terms were incorporated in a written document; and
- whether the terms have been consistently applied.

2.5.4 Recognised and accepted implied terms

2.5.4.1 There are certain implied terms that have developed over the years which have now become accepted as part of all contracts of employment. There are also terms implied by statute (e.g, a term on 'equal pay', please see paragraph 3.4.1.2). These terms do not have to be proved, demonstrated or made out. They are regarded as being incorporated into all contracts of employment. They are broadly divided into implied duties owed by employees to employers and vice versa. This section will deal firstly with implied terms owed by employees to employers.

Employee's Implied Terms

2.5.4.2 Duty to provide a personal service

An employee must provide services to the employer personally rather than sub- contracting or substituting the services of another.

2.5.4.3 Duty to take reasonable care

An employee must take reasonable care of an employer's property. An employee is also under a duty to take reasonable care in the performance of his or her duties.

2.5.4.4 Duty to carry out reasonable and lawful instructions

Employees have a duty to carry out reasonable and lawful instructions given by their employer.

2.5.4.5 Duty to serve their employer faithfully and within the requirements of the contract

This duty of good faith or fidelity obliges an employee to act in the best interests of the employer and not to do anything which is, or might be perceived to be, prejudicial to the employer's interests.

This implied duty obliges the employee not to compete with, or work for competitors of, their employer even outside working hours. This restriction also extends to an employee's entitlement to solicit custom from any of the employer's customers or clients for personal gain. An employee may be in breach of his or her duty of fidelity if they are found to have attempted to divert any business opportunity from the employer to themselves or any third party.

2.5.4.6 Duty of confidentiality

An employer is entitled to treat certain types of document or information relating to its business as confidential. Employees should not disclose such information to any third party without the employer's express consent. It is sensible for employers to reinforce this implied term with a written express term which sets out what types of information are regarded as confidential.

2.5.5 Employer's Implied Terms

2.5.5.1 Duty of care - health and safety

Although there is an extensive statutory scheme placing numerous obligations on employers to safeguard the health and safety of employees, there is also an implied duty. Employers are under a general duty to take reasonable steps to protect employees from foreseeable risks of harm. Despite the extensive statutory scheme of health and safety rules, most personal injury actions raised by employees against their employers make reference to a breach by the employer of the implied duty of care.

A recent case in the High Court determined that health and safety rights extended to workers, and although there are no express "detriment" protections for workers complaining of health and safety concerns, or to be provided with PPE, the effect of the case law is that employers are obliged to treat workers in the same way as employees.

2.5.5.2 Duty of trust and confidence

In essence this term requires both the employer and the employee to treat each other fairly and reasonably. This is a mutual implied term rather than being owed by one party to the other. If either party breaches the duty of mutual trust and confidence, the other will be entitled to treat the contract as terminated. The generally accepted test for a breach of this term by an employer is that 'the employer shall not without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

It is important to note that there is a breach only where there is no reasonable and proper cause for the conduct. The conduct must be calculated or likely to destroy or seriously damage trust and confidence.

There is a limitless range of conduct on the part of both employers and employees which might breach the duty. Such a breach requires more than unreasonable behaviour on the part of the employer or employee. The behaviour must be so unreasonable as to destroy or seriously damage the employment relationship. A series of more minor breaches however, can result in the duty of mutual trust and confidence being breached.

2.5.5.3 Duty to exercise discretion reasonably

Some contracts contain express terms allowing the employer to use its discretion. For example, it is common for a bonus scheme to state that any bonus will be paid at the 'discretion of the employer'. An employer must always exercise its discretion in a manner which is not irrational, discriminatory or perverse. If an employer has identified a range of factors, which may affect the level of discretionary payment, it is sensible for those factors to be incorporated into the terms and conditions of the bonus scheme so that employees are aware of the various factors that may affect the level of payment.

2.5.5.4 Duty to provide employees with information

In some circumstances, there may be a duty to provide employees with information concerning their contractual or other rights. For example, if an ill employee resigns on the eve of obtaining eligibility under a health insurance scheme and the employer, aware of the impending eligibility, takes no steps to advise the employee, that may constitute a breach of the implied duty to provide information. This should not be confused with a blanket obligation on employers to provide legal advice to employees or to ensure that employees are familiar with the terms of their contract of employment and related policies. This implied term does not go that far. There are however certain circumstances such as the example set out above where an employer is expected to provide information to the employee in respect of a benefit or entitlement.

2.6 Varying terms and conditions of employment

2.6.1 Introduction

An employer may from time to time, want to vary the terms of the contract of employment in order to reflect the practical changes within its industry or its own requirements. The basic legal position is that any variation to a contract of employment can only be effected with the agreement of the employee. In practice minor variations can be brought in without any great resistance or dispute. On the other hand if an employer is seeking to change or vary a material term then a more involved process of consultation and negotiation may be required.

2.6.2 Varying a contractual term

Employers should consult with the employees before seeking to vary a contractual term. The employer should explain the nature of the proposed change and why the change is necessary. It is best practice to provide employees with written details of the proposed change and allow them a period of time to consider the change, ask appropriate questions and consider how it may affect them personally. Ideally employees should confirm their agreement to the variation in writing so there is no room for debate at any point in the future as to whether the change was actually agreed. Even if an employee had not confirmed his or her agreement to the change in writing the change may nevertheless take effect if the employee continues to work under the varied contract of employment without protest. In those circumstances the employee is deemed by his or her subsequent actions to have agreed to the variation even though there is no written evidence of that agreement. The employee is taken to have agreed the change by his or her acquiescence to it.

There are exceptions to this general principle. If the term varied is not a term regularly exercised by either party, then the mere fact that the employee continues to work under the varied contract of employment does not necessarily mean that the variation has been agreed. Take the example of restrictive covenants. Restrictive covenants only become active once the employment relationship has terminated. Accordingly, just because an employee has continued to work for several months after the imposition of restrictive covenants does not necessarily mean that the employee's silence implies consent. The employer should provide the employee with written notification of the change within a month of the change taking effect.

2.6.3 Consequences of imposing a change

There may be circumstances where the employer is unable to secure agreement but nonetheless feels obliged to bring about the change. What are the legal implications if an employer unilaterally imposes a contractual variation in the face of resistance or an outright refusal on the part of an employee? If the change is material in nature or the employer does not have a reasonable explanation for enforcing the change then the employee may resign and claim constructive dismissal or, depending on the circumstances, an unlawful deduction from wages. There is more control and certainty for the employer in ending the existing contract of employment coupled with an offer of re-engagement under the new (varied) contract but like any dismissal it is not without risk and the employer needs to be ready to show a potentially fair reason for the change and that it acted reasonably in coming to its decision. That is why it is important to be seen to try to reach agreement before imposing a change and why the employees should be clearly informed of the reasons for the change. Legal advice should be taken before adopting the dismiss and re-engage route. Employers should also note that the definition of 'consultation' for larger scale redundancies (see 13.3 The duty to consult) applies in these circumstances and the collective redundancy consultation rules and procedures should be followed. It should be noted however that not all enforced changes will entitle an employee to raise a claim of unfair dismissal.

Alternatively, the employee may continue to work under protest. The employee would have to make it clear to the employer that he or she has not agreed to the change and is working under protest. An employee cannot work under protest indefinitely. If the employee continues to work for a reasonably lengthy period after the change is in force without resigning then ultimately he or she will be regarded as having accepted the change. There is no set period after which the employee will be deemed to have accepted the change. Each case depends on its own facts and circumstances. The basic principle however is that an employee cannot work under protest indefinitely. If the protest was coupled with a claim (or repeated claims) for unlawful deduction that would be the clearest sign that the contract variation had not been accepted which is another reason for being very clear that the old contract has ended and a new one has begun.

2.6.4 Contractual terms permitting variation

An employer may have an express term in an employee's contract of employment specifically allowing it to make changes to the contract or to any working conditions. This does not give an employer an absolute right to make whatever changes it wishes. Any material change to a contract must still be made with the agreement of the employee. Employers can reserve the right to make changes to certain rules and policies however, it is best not to do this by way of a single broad term reserving the right to make contractual changes. A broad blanket term reserving the rights to make contractual changes would not, for example, entitle the employer to reduce an employee's basic salary or remove any other contractual benefits. If an employer wishes to reserve the right to make changes to particular contractual provisions then the right to make the change should be reserved in the particular part of the contract or policy in question. For example, an employer may reserve the right to make changes to a contractual sick pay scheme. If it wishes to do so, then it should incorporate wording into the sick pay scheme or policy itself, intimating that changes may be made from time to time at the discretion of the employer.

2.7 Fixed term contracts

2.7.1 Introduction

2.7.1.1 Employees may be employed under a fixed term contract. Fixed term contracts specify either a date on which the contract will begin and end or a specific event or occurrence which will bring it to an end. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the 'Fixed Term Regulations') provide a definition of a 'fixed term contract'. A fixed term contract is a contract of employment which terminates:

- on the expiry of a specific term;
- on the completion of a particular task; or
- on the occurrence or non-occurrence of another specific event (other than retirement)

2.7.2 The right not to be treated less favourably

A fixed term employee should not be treated less favourably by an employer in connection with:

- the terms and conditions of the contract offered;
- any period of service qualification relating to any benefit;
- the opportunity to receive training; or
- the opportunity to secure any permanent position with the employer.

2.7.3 Employer's defence

An employer may be able to justify less favourable treatment of a fixed term employee if it can demonstrate that the treatment is:

- to achieve a legitimate business objective;
- necessary to achieve that objective; and
- an appropriate way to achieve that objective.

In practice this is difficult to do. If an employer is considering treating fixed term employees differently from other employees, advice should be sought.

2.7.4 Complaint to an Employment Tribunal

An employee must lodge a claim within 3 months of the date of the alleged breach of the Fixed Term Regulations. A tribunal may consider a claim which is lodged outwith this period if it believes it is just and equitable to do so. If the employee wins the claim, the tribunal may do any of the following:

- make a declaration as to the rights of the employee;
- order an employer to pay compensation to the employee;
- recommend that the employer take action within a specified period that will reduce or remove the less favourable treatment.

Compensation awarded by an Employment Tribunal shall be based on what it deems just and equitable in the circumstances having regard to the breach by the employer and any loss that is attributable to that breach. There is no cap on compensation.

2.7.5 Successive Fixed Term Contracts

2.7.5.1 Where an employee has been employed under a fixed term contract or a series of fixed term contracts which when added together means that the employee has been employed on a fixed term basis for 4 years or more, that employee will be treated as a permanent employee. The date on which permanent status takes effect is either the date on which the fixed term contract was last renewed or the date on which the employee acquired 4 years continuous employment, whichever is the later.

2.7.5.2 An employer may enter into a collective agreement or work force agreement in order to modify the application of the Fixed Term Regulations to successive fixed term contracts. Such modification must be with a view to preventing abuse of fixed term contracts as a means to deprive employees of service-based employment rights. If an employer is considering entering into such an agreement, advice should be taken.

2.7.6 Written statement of variation

If an employee considers that he or she has become a permanent employee by virtue of successive fixed term contracts, he or she can request a statement from the employer confirming that the contract is no longer fixed term. An employer receiving such a request must provide the written statement to the employee within 21 days of receiving the request. In the statement, an employer may either confirm that the employee is no longer a fixed term employee and is now a permanent employee or provide a statement giving reasons why he or she is deemed to be employed on a fixed term contract.

2.7.7 Non-renewal of fixed term contract

The non-renewal of a fixed term contract is treated as a "dismissal" for unfair dismissal and in some cases redundancy purposes (including collective consultation purposes). Employers should recognise therefore that fixed term employees have the same protection from unfair dismissal and selection for redundancy as permanent employees with the same length of service. The non-renewal of a fixed term contract should always be handled with care.

2.7.8 Notice of Termination

As with any contract of employment, Fixed Term Contracts should contain details of the requirements of either party to give notice terminating the employment (see 2.4.13 Notice of termination). Employers should consider if notice is required at the expiry of the Fixed Term Contract or if notice is only necessary if either party decides to terminate the Fixed Term Contract early.

This should be handled with care and employers may wish to contact Scottish Engineering to seek legal advice.

2.8 Employment status

2.8.1 Employed or not?

2.8.1.1 The majority of employment related rights depend upon an individual actually being an employee. Certain rights apply to a wider category of individuals referred to as workers. It is important therefore for employers to know and indeed be able to establish who is employed and who is not. Whilst discrimination legislation applies to categories of individuals other than employees, rights such as unfair dismissal and redundancy are only available to people who are employees.

2.8.1.2 Circumstances sometime dictate that it is not possible to determine the true status at the outset of the relationship. Often, disputes over employment status only arise as and when the relationship ends, particularly if some form of claim might be possible depending on the individual's status. Employers should give careful consideration to the status of individuals it engages at the outset of the relationship to avoid such disputes.

2.8.2 Employee status

2.8.2.1 Employment status cannot be created simply by virtue of the fact that both parties believe or expressly agree that the relationship is one of employment. Similarly, parties cannot avoid employee status by simply agreeing that an individual is engaged on a self-employed basis. Whether or not an individual is employed depends on all of the relevant facts and circumstances. In particular, tribunals will look at the nature of the day-to-day relationship between parties to establish whether or not it bears the hallmarks of employment. Various factors require to be examined to determine whether or not an individual is an employee. The most important three factors are as follows:

- The extent to which the employer exercises control over the work done by individual, particularly how it is done and when it is done. The key question is to what extent does the individual rely on his or her own skills and ability to determine how he or she should work as opposed to being told by the employer?
- The employee must be obliged to carry out work for the employer and the employer must be required to provide work to the employee. In the absence of this, the relationship may not be one of employee and employer. This is known as mutuality of obligation.

- The right of an individual to provide a substitute. A contract of employment is a contract for personal service and the right to provide a substitute (provided that this is a legitimate right and is exercised) does not suggest a strictly personal relationship and therefore indicates that the individual is unlikely to be an employee. However, if the right to substitute is only used when the individual is unable to work, e.g. through illness, then that can still be consistent with personal service.

These are the key issues in assessing employee status but, in addition, there are a number of other relevant factors to consider such as:

- whether or not the individual provides his or her own tools or equipment;
- whether or not the individual bears any financial risk;
- the method of calculating the payment, i.e. whether it is by hourly rates or a set price for a job;
- whether the individual is seen as essentially part of the employer's organisation, e.g., are they included in distribution lists for company information or invited to Christmas parties, etc; and
- the extent to which it appears that the individual is in business for him or herself.

2.9 Agency workers

2.9.1 Introduction

2.9.1.1 There are broadly two ways in which employers typically engage individuals via an agency. The first is where an employer uses an agency to recruit an individual who is to be employed either permanently or temporarily by the employer itself, rather than the agency. The other scenario is where an employer engages with an employment agency who supplies the employer with the agency's own employees or workers to work under the employer's direction and supervision usually in order to meet temporary increases in demand. The agency in the first scenario is effectively a recruitment agency. This chapter is primarily concerned with the second scenario of an employment agency.

2.9.1.2 The engagement by employers of agency workers from employment agencies is now regulated by the Agency Workers Regulations 2010 (the 'Regulations') which came into effect on 1st October 2011. The Regulations apply to agency workers who are assigned to do temporary work through temporary work agencies. They are designed to protect agency workers and to give them the same basic employment and working conditions as if they had been recruited directly by the end user, employer or hirer, if and when they complete a qualifying period of 12 weeks in the same job. The Regulations also entitle agency workers to access certain facilities and information on job vacancies from the hirer from the first day in their assignment. The Regulations do not give an agency worker full employment protection rights, rather they principally provide protection in relation to terms and conditions of engagement.

2.9.2 Who do the regulations apply to?

2.9.2.1 The Regulations apply not only to an individual who is working as a temporary agency worker, but also the end user, or hirer, and the employment agency.

2.9.2.2 The Agency Worker

The Regulations are intended to cover those workers who are supplied by a temporary work agency (see 2.9.2.4 The Temporary Work Agency) to a hirer, such that the worker is under the direct control of the hirer, but does not become employed directly by the hirer. The worker must have a contract with the employment agency (either an employment contract or a contract to perform work personally). The Regulations apply therefore to persons who qualify as workers, as well as employees of the agency. One of the main difficulties that arises out of the definition of agency worker is that it covers some, but not all, self-employed persons. Guidance which accompanies the Regulations specifies that those who are "genuinely self-employed or employed on managed service contracts" are outwith the scope of the Regulations. The guidance, however, does not clarify what circumstances would constitute genuine self-employment. If you are in any doubt as to whether or not someone engaged through a temporary work agency is covered by the Regulations you should seek advice from Scottish Engineering.

2.9.2.3 The Regulations do not apply to:

- those who find work through a temporary work agency but who are in business on their own account (where there is a business to business relationship with the hirer who is a client or customer);
- individuals who work on a Managed Service Contract where the worker does not work under the direction and supervision of the host organisation;
- individuals working for in-house temporary staffing banks where a company employs its temporary workers direct;
- individuals who find direct employment with an employer through an employment agency;
- individuals on secondment or loan from one organisation to another;
- individuals providing services through their own company who manage themselves and can provide a substitute will usually fall outside the scope of the Regulations. However, simply putting earnings through a limited company for tax reasons will not be enough to avoid the application of the Regulations.

2.9.2.4 The Temporary Work Agency

The Regulations apply to temporary work agencies that provide temporary agency workers to a hirer. A temporary work agency is defined as:

"A person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of:

a. supplying individuals to work temporarily for and under the supervision and direction of hirers; or
b. paying for, or receiving or forwarding payment for, the services of individual who are supplied to work temporarily for and under the supervision and direction of hirers."

The agency worker must have a contractual relationship with the temporary work agency but not with the hirer. The agency can then contract with the hirer on the workers behalf. The worker, however, must work temporarily under the supervision and direction of the hirer. There may be more than one temporary work agency involved in the supply of the agency worker and each involved party will have to be careful to ensure that the flow of information as to the terms and conditions of employees with the hirer is shared between all parties in the chain of supply. This is because the party actually responsible for paying the temporary agency worker will need to know the employment information that relates to the agency worker to ensure that it complies with the Regulations.

2.9.2.4.1 The Hirer

The end user or hirer can be any "person" (including a company, partnership, sole trader and public body) which is engaged in economic activity (whether or not for profit) and which engages agency workers through a temporary work agency. For the Regulations to apply the hirer must be responsible for supervising and directing the temporary agency worker while the work is undertaken.

2.9.3 Day One Rights

2.9.3.1 Although agency workers do not gain access to the main rights provided by the Regulations until they have been engaged for a minimum qualifying period of 12 weeks, there are certain basic rights that they acquire on the first day of engagement. Those rights are access to the employer's facilities such as canteen or crèche and also the right to be provided with information about permanent employment vacancies which the hirer may have.

2.9.3.2 The agency worker is not entitled to access to all of the hirer's facilities, only to certain facilities including:

- Any staff common or waiting rooms;
- Crèche or other child care facilities;
- Canteen or other similar facilities;
- Transport services e.g. transport between sites but not company car allowances etc;
- Car parking;
- Vending machines;
- Prayer room;
- Toilet/shower facilities.

The list is non exhaustive and will depend on the types of facilities which the hirer offers. The right does not extend to off-site facilities or benefits in kind which are not provided directly by the hirer e.g. subsidised access to a gym or access to discounted goods. If the hirer wishes to provide access to those facilities then it can but it is under no obligation to do so.

2.9.3.3 Comparator

The right provided by the Regulations is to be given no less favourable access to facilities than that which a comparable employee has. This must be an actual comparable worker who is directly employed by the hirer. Both the agency worker and the comparable worker should be:

- Working for and under the supervision and direction of the hirer;
- Doing the same or broadly similar work; and
- Working at the same location, or if there is no one comparable at the same location, working in another location owned by the hirer.

If there is truly no comparable worker or employee then no comparison can be made and less favourable treatment can't be asserted by the worker.

2.9.3.4 Although the agency worker is entitled to access to collective facilities, that does not place him or her in a better position than the hirer's employees. For example, if the agency worker is entitled to access to a workplace crèche that entitlement will only be to join the waiting list if there is one, and not to be given the automatic right to skip to the front of the queue and gain immediate access.

2.9.3.5 Access to job vacancies information

From day one an agency worker also has the right to information on any relevant vacancies that the hirer may have. This is so the agency worker has the same opportunity to obtain permanent employment with the hirer as a comparable employee of the hirer.

For the purposes of information on job vacancies, the comparator must work at the same establishment. It is for the hirer to establish how it wishes to fulfil this obligation. It may be that it simply places an advertisement on a notice board which the agency worker has access to as it may not be appropriate to allow the agency worker access to the hirer's intranet system. The agency worker should however be told where to access information about vacancies.

Vacancies can be ring fenced by the hirer when they are needed for redeployment of the hirer's existing employees. This may occur if the hirer is making employees redundant. It is not uncommon for an employer to reduce the number of employees in one area and take on agency workers in another due to fluctuating demand for certain goods or services. In these circumstances the hirer will not be obliged to disclose the information about the vacancy to the agency worker.

Importantly, case law has recently confirmed that the right is for agency workers to be informed of vacancies; it does not give them a right to apply.

2.9.4 Rights after week twelve

2.9.4.1 Once an agency worker has been with the same hirer, in the same undertaking in the same role (whether by one or more assignments) for 12 continuous weeks then he or she is entitled to the same basic terms and conditions to which he or she would have been entitled had he or she been recruited to work directly for the hirer. It is not necessary for the agency worker to identify a comparator. If he or she can identify basic terms and conditions of employment offered by the hirer to its own employees but not to him or her, the Regulations have been breached. If, on the other hand, there are no relevant basic terms and conditions then there will be no need to compare and amend the conditions of the agency worker once the 12 weeks have passed.

2.9.4.2 After 12 weeks the agency worker is entitled to the relevant terms and conditions that are ordinarily included in the contract of a comparable employee of the hirer. One off contractual arrangements or conditions don't count. Relevant terms and conditions are terms and conditions relating to:

- Pay;
- Duration of working time;
- Night work;
- Rest periods;
- Rest breaks;
- Annual leave; and
- Paid time off for ante natal appointments and alternative work or pay where the pregnant employee is unable to continue an assignment due to health and safety reasons.

The obligation is a continuing obligation so if a comparable employee's pay is increased during an assignment then the agency worker's pay should also be increased. If the agency worker's terms and conditions are already comparable, or are in fact more favourable than a comparable employee's then there is no obligation to enhance the agency worker's terms.

2.9.4.3 Pay

The pay which an agency worker is entitled to is not defined in the Regulations. For the purposes of the Regulations, the term 'Pay' is not intended to cover certain incentives and rewards which are given to an employee to reward for long service. The BIS Guidance on the Regulations sets out what is included, and what is excluded, from 'pay' for the purposes of the Regulations:

Included in Pay:

- Basic pay, based on the annual salary that the agency worker would have received if recruited directly;
- Overtime pay, subject to any requirements regarding the number of qualifying hours;
- Shift or unsocial hours allowances or risk payments for hazardous duties;
- Payment for annual leave (any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate);
- Bonus or commission payments which are directly attributable to the amount or quality of the work done by the individual;
- Vouchers or stamps which have monetary value and which are not 'salary sacrifice schemes'.

Excluded from Pay:

- Occupational sick pay (statutory sick pay is included);
- Occupational pensions (although agency workers will be covered by new automatic pension enrolment which is being phased in from October 2012 for further information on auto-enrolment see 19.3 Auto Enrolment);
- Occupational maternity, paternity or adoption pay (this does not affect any statutory entitlement);
- Redundancy pay (statutory or contractual);
- Notice pay;
- Payment for time off for trade union duties;
- Guarantee payments as they apply to directly recruited staff if laid off;
- Advances in pay or loans e.g. for season tickets;
- Expenses such as accommodation and travel expenses;
- Payments or rewards linked to financial participation schemes such as share ownership schemes;
- Overtime or similar payments where the agency worker has not fulfilled the qualifying conditions required of someone directly recruited;

- The majority of benefits in kind given to someone as a reward for long service or as an incentive;
- Any payments which require an eligibility period of employment/ service, if not met by the agency worker or if the agency is no longer on assignment when the bonus is paid;
- Bonuses which are not directly linked to the contribution of the individual e.g. a flat rate bonus given to all recruits to encourage loyalty/long service;
- Additional discretionary non contractual bonuses (as long as those payments have not been made with such regularity that they have become a contractual term due to custom and practice).

2.9.4.4 Bonuses

The key question with bonuses or incentive payments is whether they are directly attributable to the amount and quality of the work done by the agency worker. Bonus payments will be outside the scope of the Regulations if they are not directly attributable to amount or quality of work. In addition it must be remembered that the entitlement is not to the same bonus as the directly recruited worker rather it is to the same opportunity to earn a bonus, subject to personal performance.

The agency worker may require to be assessed during his assignment in order to identify whether his or her performance qualifies for a bonus. A hirer will not have to follow the same performance appraisal system for the agency work than it uses for directly recruited employees. A shorter modified process can be used. All that is required is that the agency worker is assessed for bonus purposes. The temporary work agency may be able to use existing appraisal or feedback systems to measure an agency worker's performance.

2.9.4.5 Continuity of assignment: the 12 week qualifying period

The agency worker must have completed 12 calendar weeks in the same role, with the same hirer before he or she is entitled to the same basic working and employment conditions. A week can start on any day and need not be from a Monday to Sunday. It does not matter how many hours an agency worker works in any given week.

Continuity will be broken if:

- The agency worker begins a new and substantially different role with the same hirer;
- The agency worker starts a new role with a new hirer;

- There is a break of more than six calendar weeks between assignments with the same hirer.

Continuity will not be broken but instead will be 'paused' by:

- A break between assignments which consists of less than six weeks;
- Any break between assignments of up to 28 weeks which occurs due to incapacity for work because of sickness or injury;
- Any break between assignments taken for the purposes of annual leave;
- Any break between assignments of up to 28 weeks for the agency worker to undertake jury duty;
- A break between assignments caused by strike, lock out or other industrial action at the hirers establishment;
- A break between assignments caused by a planned shutdown (e.g. Christmas).

Continuity will not be broken or paused and the clock will continue to tick if:

- The break is due to pregnancy, maternity or childbirth which take place during pregnancy or for up to 26 weeks after childbirth;
- The agency worker takes maternity, adoption or paternity leave.

2.9.4.6 Anti-Avoidance Measures

The Regulations contain anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the 12 week qualifying period. This gives an agency worker the right to equal treatment if a structure of assignments develops, within either the hirer or between that hirer and a connected business, which is intended to prevent the worker from acquiring equal rights. Tribunals may make an additional award of up to £5,000 where a hirer and/or agency are found to have breached this provision.

2.9.5 Agency workers: information requests

2.9.5.1 An agency worker has the right to request written information. This is because he or she needs to be able to get sufficient information to decide if there has been a breach of the Regulations. If the agency worker believes that his or her right to equal treatment has been infringed then he or she can make a written request to the temporary work agency for a written statement containing information relating to the treatment in question. Within 28 days of receiving a request the temporary work agency must provide a written statement setting out relevant information relating to the basic working and employment conditions of the employees of the hirer. The work agency must also confirm the factors which were considered when determining the basic working and employment conditions which applied to the agency worker at the time which the breach is alleged to have taken place.

2.9.5.2 If, within 30 days of making that request, the temporary work agency has not yet provided that information then the agency worker can write to the hirer to request the information. The hirer will then have 28 days to provide the information. If the agency worker believes that day one rights have been breached then he or she should make a written request for information directly to the hirer. The hirer will have 28 days to provide the information. A tribunal will be able to draw adverse inferences if any party fails to provide requested information. An agency worker will not be penalised for bringing a claim without first requesting the information.

2.9.6 Remedies for breach of the regulations

2.9.6.1 An agency worker can bring a claim in an Employment Tribunal for breach of the Regulations. A tribunal will not consider a complaint under the Regulations unless it is brought within 3 months of the actual breach of the Regulations although a tribunal will also be able to accept a claim out of time if it considers that it is just and equitable to do so.

2.9.6.2 The claims which can be brought before a tribunal include:

- The right not to be dismissed on prescribed grounds, e.g. for making allegations, giving evidence, asserting rights or bringing proceedings under or in connection with the Agency Workers Regulations. There is no qualifying time period for this right;
- The right not to be subjected to detriment on prescribed grounds, e.g. for making allegations, giving evidence, asserting rights or bringing proceedings under or in connection with the Agency Workers Regulations. Such a claim may be brought against the Temporary Workers Agency or the hirer. No qualifying period is expressed to apply.
- A claim that the equal treatment rights have been infringed. This is subject to a 12 week qualifying period.
- A claim that rights of access to employment or facilities have been breached. There is no qualifying period for these rights.
- In respect of permanent contracts providing pay between assignments, a claim that there has been a breach of the term in such a contract. No qualifying term is expressed to apply.
- A claim that the agency or hirer has unreasonably refused a woman paid time off for antenatal care. This is subject to a 12 week qualifying period.
- A claim that the agency or hirer has failed to pay an agency worker remuneration where the supply of her work to a hirer is ended on maternity grounds. This is subject to a 12 week qualifying period.

2.9.6.3 The temporary work agency will be responsible for any breaches of rights in relation to an agency worker's basic working and employment conditions to the extent that it is responsible for the infringement. The temporary work agency will have a defence if it took 'reasonable steps' to obtain information from the hirer and acted reasonably in determining the basic working and employment conditions after the qualifying period and for the remainder of the assignment. If the temporary work agency can establish this defence then liability will fall on the hirer.

Chapter 3

Pay and benefits

3.0 Pay and benefits

3.1 Introduction

3.1.1 Payment in return for personal service is the core of the employment relationship. Pay details must be set out in the contract of employment.

3.1.2 Employers should also note that the level and frequency of pay are regulated by a number of statutory provisions. For example, an employee's pay must not be less than the National Minimum Wage (please see 3.3 The National Minimum Wage). The Equality Act prohibits differences in pay by reason of gender. Those provisions are analysed in detail in 3.4 Equal pay. In addition an employee should not receive less pay than a colleague on the basis of one of the protected characteristics set out in 6.4 The protected characteristics.

3.1.3 This chapter will also consider the issues surrounding deduction from wages and in particular the circumstances in which an employer may make deductions from an employee's wage.

3.2 Written particulars of pay

The Employment Rights Act stipulates that employers must provide employees with particular information about pay. This information is:

- the rate of pay or the method by which it is calculated;
- the frequency of payment;
- method of payment; and
- entitlement to holiday pay.

From 6 April 2020 the statement must also contain information about the number of hours that have been worked in situations where an employee's rate of pay varies as a consequence of the time worked. Furthermore, the introduction of this change coincides with the extension of the right to receive written particulars of pay to workers as well as employees.

3.3 The National Minimum Wage

3.3.1 General

Workers have the right to be paid not less than the National Minimum Wage as set from time to time. This protection is extended to a wider range of individuals than employees. See paragraph 3.3.2.2. A worker's right to be paid the National Minimum Wage (NMW) is governed by the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015. The legislation is extremely prescriptive and complicated and this section will set out the main provisions of the NMW. Helpful guidance can also be found on the Department for Business Innovation and Skills website or the Pay and Work Rights Helpline.

3.3.2 Who is entitled to the National Minimum Wage?

3.3.2.1 Workers as defined in the Working Time Regulations (See 5.2 Meaning of worker who is covered by the Regulations) are entitled to be paid the National Minimum Wage by their employer. In order to qualify for protection individuals must:

- work ordinarily in the United Kingdom under a contract of engagement or employment; and
- have ceased to be of compulsory school age.

3.3.2.2 The NMW legislation also applies to:

- agency workers;
- apprentices;
- foreign workers (subject to the individual having the right to work in the UK);
- piece workers;
- agricultural workers (agricultural workers are covered by the minimum wage set by the relevant agricultural wage laws rather than NMW legislation noted above however, no agricultural worker can be paid less than the NMW. In most cases, agricultural workers are paid more than the NMW because the agriculture wage legislation provides for higher hourly rates);
- commission workers;
- home workers;
- off shore workers;
- those in European social fund programmes;
- trainees or workers on a period of probation;
- those working abroad if they usually work in the UK but are temporarily working outside the UK; and
- individuals taking part in a government employment scheme. Sometimes workers taking part in government schemes are paid benefits or expenses instead of the NMW.

3.3.2.3 The following categories of workers are not entitled to protection under the NMW legislation:

- volunteers: If however the relationship resembles a contract of employment or a worker's contract, the individual may still be entitled to the NMW. It is advisable to seek further legal advice before deciding how much to pay a volunteer if it is to be less than the NMW;
- voluntary workers: These are individuals who have employment contracts or a contract to perform work or provide services to a charity, voluntary organisation, an associated fundraising body or statutory body. In these circumstances, a voluntary worker may receive no more than limited expenses actually incurred in the performance of his or her duties. Volunteer workers of this kind are not entitled to the NMW if;
    - (i) they receive no monetary payment other than reimbursement of expenses actually incurred in the performance of their duties. For this purpose, expenses (other than accommodation expenses) that are reasonably incurred to allow the voluntary worker to perform their duties are to be regarded as actually incurred in the performance of duties and
    - (ii) they receive no benefit in kind other than reasonable subsistence or accommodation;
- those participating in work experience: If the worker is a student doing work experience as part of higher or further education, he or she will not be entitled to the NMW;
- apprentices: If the worker is an apprentice under the age of 19, or aged over 19 but in their first year of apprenticeship he or she will not be entitled to be paid the NMW;
- company directors who are office holders only: However, if a director also has an employment contract or a worker's contract, he or she is entitled to the NMW for the work that he or she carries out under that contract. It is unlikely in reality that a company director would receive a salary less than the NMW;
- members of the employer's family: If a worker is a family member of the employer and lives in the employer's household to help run a family business, the individual will not be entitled to receive the NMW;
- Members of the armed forces;
- Shore fishermen; and
- Prisoners.

3.3.3 Current National Minimum Wage rates

Currently (from 1 April 2024), the NMW rates are:

- £11.44 per hour for workers aged 21 and over (the National Living Wage);
- £8.60 per hour for workers aged 18-20;
- £6.40 per hour for workers under 18;
- £6.40 per hour for apprentices under 19 or in the first year of apprenticeship.

The rates are reviewed annually.

3.3.4 The National Living Wage

On 6 April 2016, the Government introduced the National Living Wage (NLW) for workers aged 25 and above. From April 2021, the age threshold for the NLW was lowered from 25 to 23 and from April 2024 it has been lowered further to 21. Wages for younger workers continue to be subject to the National Minimum Wage.

The NLW is not to be confused with the Living Wage which is a voluntary arrangement whereby employers agree to pay a rate for lower paid workers which is set independently each year by the Living Wage Foundation. The 2024/2025 rates for the National Living Wage is £11.44 an hour in the UK meanwhile, the current rates for the Real Living Wage are £12.00 an hour in the UK, with a rate of £13.15 for London.

Adoption of the Living Wage forms part of the Scottish Business Pledge, a voluntary initiative for businesses to adopt principles of fairness, equality, opportunity and innovation within the workplace. For more information visit www.scottishbusinesspledge.scot

3.3.5 The Pay Reference Period

A worker must be paid, on average, no less than the NMW during each pay reference period. The pay reference period is the period of time that a worker is paid for. If a worker is paid weekly, the relevant pay reference period is one week. If however, a worker is paid quarterly (or any period that is longer than one month), the pay reference period (for the purposes of calculation of the NMW), will be one month. The NMW legislation specifically states that the pay reference period shall be a month unless the worker is paid wages or salary for a shorter period than a month.

3.3.6 What payments are used to calculate the National Minimum Wage?

3.3.6.1 The payment used for the calculation must be the gross figure (i.e. without any deductions of tax and national insurance contributions).

3.3.6.2 The National Minimum Wage calculation should include all payments paid by the employer to the worker in the pay reference period. This may include any incentive pay e.g. sales commission or performance related pay scheme and bonuses.

3.3.6.3 It should also include any payments made to the worker in the following reference period which relate to the previous pay reference period. For example, if a worker is paid commission based on the targets reached in any particular month, but the commission is not paid until the following month, the amount paid in the following month is used to calculate the NMW for the pay reference period it was earned in (rather than actually paid).

3.3.6.4 Payments paid by the employer to a worker later than the end of the following pay reference period in respect of work done in the relevant pay reference period count towards the calculation of wages. This particular type of work will also have to fulfil the following criteria:

- the worker is under an obligation to complete a record of the amount of work done;
- the worker is not entitled to payment until the completed record has been submitted to the employer; and
- the worker has failed to submit the record before the fourth working day before the end of that following pay reference period, provided that the payment is paid in either the pay reference period in which the record is submitted to the employer or the pay reference period after that.

3.3.6.5 Accommodation Costs

Where an employer has provided a worker with living accommodation during a pay reference period, but is not entitled to make any deduction or receive any payment for providing the accommodation, it can take into account a set daily rate of £9.99 for each day (£69.93 per week) it provides the accommodation to the worker for the purposes of calculating the NMW.

3.3.7 Excluded payments

Employers should not take account of the following payments when calculating the NMW:

- allowances;
- amounts paid by way of a service charge, tip, gratuity or cover charge;
- loans;
- advances of wages;
- pension payments;
- retirement or loss of office lump sums;
- redundancy payments;
- reward under staff suggestion schemes;
- premiums pay i.e. for working at special times, for example overtime or on bank holidays;
- allowances on top of a worker's basic pay, for example for working unsociable hours, in dangerous conditions, on call etc;
- benefits in kind (except accommodation) such as meals, fuel, child care vouchers; and
- there are also a number of deductions that may be made by an employer or payments made by a worker to the employer that are excluded e.g. expenditure incurred in connection with the work, expenses and refunds incurred for work, deductions for training costs etc.

3.3.8 Working time

3.3.8.1 The NMW calculation is concerned with the average hourly rate an employee is paid. Employers also need to identify the 'working time' applicable in addition to the pay reference period and the amount that counts towards the calculation (as discussed above). For the purposes of the NMW, there are four different categories of work and they are; time work; salaried-hours worked; output work; and unmeasured work. These are explained below:

3.3.8.2 Time work

3.3.8.2.1 Time work is the work that a worker is paid for under his or her contract where the amount of pay is calculated with reference to the amount of time worked. Usually a worker whose pay goes up or down depending on the actual hours that he/she works is likely to be on 'time work'.

3.3.8.2.2 Workers must be paid the NMW for hours spent at work or when they are required to be available for work either at work or nearby except where the worker is at home and is entitled to be at home. A recent Supreme Court case has ruled that sleep time does not count as working time. Instead workers on sleep-in shifts are entitled to have their hours counted for NMW purposes only when they are "awake for the purposes of working" (when the worker is present and awake to work, that time will count). Recent case law has stated that the following factors are potentially relevant to consider in assessing whether a person is working:

- The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present (whether sleeping or not).
- The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift and face a disciplinary procedure if he or she slips away to do something else.
- The degree of responsibility undertaken by the worker may be relevant: the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in premises to provide security where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.
- The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

Working time in such situations is a complex and developing area of law; specific advice should be sought from Scottish Engineering if any question arises.

3.3.8.2.3 Tea breaks, lunch hours, or time off for any other reason are usually excluded from the calculation of the NMW. A worker may still be entitled to be paid for such breaks if the contract provides for paid breaks however, for the purpose of calculation of the NMW, the time spent on such breaks is usually ignored.

3.3.8.2.4 Travelling time is also counted as time worked unless:

- the travelling is incidental to the duties carried out in the course of time work, the time work is not assignment work and the travelling time is time when a worker would not otherwise be working;
- travelling is between the worker's home, or an address where he or she is temporarily residing other than for the purposes of performing work, and the place of work or where an assignment is carried out.

3.3.8.2.5 If a worker attends training approved by his or her employer during normal working hours or he or she is travelling (when they would otherwise be working) to receive such training or the training is taking place at the normal place of work, time spent on those activities shall be treated as time work.

3.3.8.2.6 Summary – hours that do not count for time workers:

- travelling between home and work;
- absences from work;
- rest breaks;
- holiday, sick leave, maternity/paternity/ adoption leave; and
- industrial action.
- Sleeping time

3.3.8.3 Salaried hours of work

3.3.8.3.1 Salaried hours are hours carried out under a contract where the worker is not entitled to payment in excess of the salary other than a performance bonus.

3.3.8.3.2 It is usual for a worker's contract to stipulate a set number of hours that are required to be worked (e.g. 35 hours per week) and in return a salary will be paid regardless of the actual number of hours worked.

3.3.8.3.3 Salaried hour workers also include workers who only work part of the year but are entitled to an annual salary paid in instalments during the whole year. For example, cleaning or catering staff in schools are often paid a regular weekly or monthly amount throughout the year, although they work in term time only.

3.3.8.3.4 Salaried hours work is calculated in much the same way as a time worker and takes into account time i.e.:

- when employees are at work and required to be at work;
- when employees are on standby or on call;
- when employees are near their place of work;
- when employees are travelling on business; and
- when employees are training or travelling to training.

3.3.8.3.5 The main difference between time workers and salaried hours workers is that most hours of absence are counted as hours worked for a salaried-hours worker if he or she is paid normal salary when absent. Therefore, rest breaks, lunch breaks, holidays, sickness absence or maternity/paternity leave are counted if these periods form part of the worker's basic hours under the contract. If those periods of absence do not form part of a worker's contract, then they are not included in a calculation of the time worked.

3.3.8.4 Work output

3.3.8.4.1 Output work, like piece work, is paid by items made or tasks completed. Output work is not time work and is not dependent on the number of hours fixed by an employer. For example, any work that is paid depending on the number of sales a worker achieves or once a particular product is made, is output work.

3.3.8.4.2 Workers who are rated as output workers for the NMW can be paid in one of two ways:

- the NMW for every hour worked; or
- a fair piece rate for each item produced or task performed.

3.3.8.5 Rated output work

Rated output work is work that relates to a type of piece in question 'the subject piece' or the type of task in question 'the subject task' when the worker does not have any set hours in the contract.

3.3.8.5.1 Main hourly output rate

An employer will have to determine the main hourly output rate for any particular subject piece or subject task.

3.3.8.5.2 The main hourly output rate is the average number of:

- subject pieces or fractions of a subject piece, produced in an hour by a worker; or

- subject tasks, or fractions of a subject task, performed in an hour by a worker.

3.3.8.5.3 In order to determine the main hourly output rate, the employer must:

- conduct a satisfactory test that calculates the speed of a group of workers who produce the same subject piece or perform the same subject task (or a sample of those workers), and then divide the total number of subject pieces or subject tasks (or the fraction of the subject piece or subject task) that all the workers in the group have produced or performed per hour during the period of the test; or
- make a satisfactory estimate of the average speed that a particular piece will take to make or a particular task will take to complete in an hour. In order for this to be a satisfactory estimate, the employer can take into consideration the rate at which other output workers produce pieces or perform tasks that are reasonably similar to the pieces or tasks of the worker in question.

3.3.8.5.4 The worker's assessed hourly rate is calculated by reference to 120% of the main hourly output rate. Therefore, if the piece or task had a main hourly output rate of 1 hour, the worker would be regarded as taking 1 hour 12 minutes to do the same task or piece.

3.3.8.5.5 It would not be fair to choose a sample of the fastest workers or a mixture of average fast workers. It is also advisable to conduct regular tests in order to make sure that the mean hourly rate is current and accurate.

3.3.8.6 Conditions of notice for rated output workers

Employers are also required to give notice to a rated output worker before the beginning of any pay reference period. The notice must contain the following information:

- that the notice is being given to inform him or her that the employer is complying with the NMW legislation and that he or she is treated as a rated output worker for the production of a subject piece or performance of a subject task during the pay reference period;
- that for the purposes of determining the period of time the worker will be treated as working, the employer has conducted a test or, where applicable, made an estimate of the average speed at which workers employed by the employer to produce a subject piece or perform the subject task, as appropriate;
- the main hourly output rate of the subject piece or task;

- the rate to be paid to the worker for the production of a single subject piece or the performance of a single subject task;
- the telephone number of the NMW helpline, which must be identified as being the NMW helpline number.

3.3.8.7 Unmeasured work

3.3.8.7.1 Unmeasured work is work that is not time work, salaried hours work or output work. Essentially, unmeasured work is when a worker has a particular task to do but does not have any set time to do it in but is nevertheless required to work when needed or when work is available.

3.3.8.7.2 The hours of unmeasured work can be determined in one of two ways:

- by calculating the average daily number of hours specified in a daily average agreement between the worker and the employer; or
- by recording every hour actually worked by the worker.

3.3.8.7.3 If there is a daily average agreement between a worker and an employer, it should be made before the beginning of any pay reference period and should determine the average daily number of hours the worker is likely to spend in carrying out their duties under the contract to do unmeasured work on whatever days he or she is available to carry out those duties for the entire duration of the contract. The employer must be able to show that the average daily number of hours determined is a realistic average. If an employer does not enter into a daily average agreement then it must record the hours actually worked by the worker during the pay reference period and base any NMW calculation on those hours.

3.3.9 How to calculate the National Minimum Wage

Generally speaking, the NMW should be calculated by adding the total number of payments that count in the pay reference period (A) and making any relevant deductions (B). Once the relevant deductions have been made, the total sum should be divided by the number of hours of work that count in the pay reference period (C). Once that figure has been calculated, it should be compared for the rate of the NMW that applied to the worker concerned.

Formula

$$\frac{A - B}{C} \geq NMW$$

3.3.10 Records to be kept by the employer

3.3.10.1 Employers must keep records that establish that they are paying their workers at a rate at least equal to the NMW. This information should be able to be produced in a single document. If there are any other agreements that have been entered into with a worker, a copy of those agreements should also be kept for the purposes of the NMW.

3.3.10.2 If the employer has given notice to a worker in relation to rated output work, a copy of that agreement must also be kept. These records must be kept by an employer for a period of 3 years beginning with the first day of the pay reference period immediately following the date the record relates to. The records can be kept on a computer and although the NMW Regulations do not specify what records have to be kept, it is best practice to keep detailed records that can demonstrate that the NMW is being paid, especially for those workers who are perhaps receiving an amount that is close to the national minimum.

3.3.10.3 If an employer fails to pay a worker the NMW, the worker will have 6 years in England and 5 years in Scotland to bring a claim in the civil courts and therefore, it is advisable for employers to retain records for that period of time rather than the 3 years stipulated in the legislation.

3.3.11 Enforcement by HMRC

An officer of HMRC may issue a notice to an employer where it is believed there has been a failure to pay the national minimum wage. This notice will require the payment of the arrears with respect to that failure.

Furthermore, the notice will require the employer to pay a financial penalty to the Secretary of State. The penalty will be a minimum of £100 and maximum of £20,000 per worker who has been underpaid. The penalty is reduced by 50% if paid within 14 days.

Employers who fail to pay can also be named publicly and banned from being a company director for up to 15 years.

3.3.12 Criminal offences

There are 6 criminal offences under the National Minimum Wage Act 1998 and these are:

- if the employer refuses or lawfully neglects to pay the worker for any pay reference period at a rate at least equal to the NMW;
- if a person fails to keep mandatory records;
- if a person makes, or knowingly causes or allows to be made, any false information on any records held;
- if a person produces or furnishes, or knowingly causes or allows to be produced or furnished, any record or information which he or she knows to be false;
- if a person intentionally delays or obstructs a compliance officer; or
- if a person refuses or neglects to answer any questions or produce documents for the compliance officer.

3.3.13 Dismissal and detriment

It will be automatically unfair if an employer dismisses a worker for a reason connected with any attempt by that worker to exercise rights under the NMW legislation, or because it thinks that he or she will exercise those rights. Workers are also protected from being subjected to any detriment on the same grounds.

3.4 Equal pay

3.4.1 General

3.4.1.1 6.0 Equal opportunities outlines the general principles of discrimination law. However, it is worth highlighting that those principles apply equally to how and what an employer pays its employees. Employers cannot implement pay practices or provide benefits to employees that directly or indirectly discriminate on the grounds of any of the protected characteristics (see 6.4 The protected characteristics)

3.4.1.2 The Equality Act, however, provides particular protection in relation to pay differentials arising as a result of gender issues. The Equality Act provides for equal pay between women and men in the same employment. A breach of the Act is a form of discrimination. The Act provides for equal pay by inserting an implied 'Equality Clause' into every contract of employment giving a woman the right to equality in the terms of her contract where she is employed on:

- like work to that of a male comparator i.e. the same or similar work;
- work that has been rated as equivalent to that of a male comparator under a recognised and valid job evaluation scheme; or
- work of equal value to that of a male comparator.

3.4.1.3 A woman who is able to show that she is being paid unequally to a man, and who fulfils one of the above specified criteria, can pursue a claim before an Employment Tribunal for equality of terms and back pay for a period of up to five years (six in England and Wales). However, the employer will be able to defend the claim where it is able to successfully demonstrate that there is a 'material factor' which is not the difference of sex and which explains the pay differential. Further information on the material factor defence is set out at 3.4.9 Material factor defence.

3.4.1.4 This summary of the Equality Act 2010 assumes that the person claiming equal pay is a woman, although the legislation applies equally to pay discrimination against men.

3.4.2 Questionnaires

3.4.2.1 Pay systems in the UK are often shrouded in secrecy and one of the main difficulties that employees face in deciding whether or not to bring an equal pay claim is the lack of transparency within pay structures. In recognition of this problem, there was statutory provision which enabled employees who believed that they might be receiving unequal pay to establish some key facts by using a statutory questionnaire procedure before deciding whether to pursue a case before a tribunal.

In order to reduce the burden on employers, the Government abolished the Statutory Questionnaire system on 6 April 2014. For claims before that, the procedure is unchanged. Post 6 April 2014, employees can use a more informal process to request information. Employees should now: identify comparators; explain why those comparators are doing equal work to theirs; and ask further questions such as how pay is determined. These should be submitted to the employer in writing. Employers should respond in a reasonable time and state whether they agree that there is a pay discrepancy and what will be done to rectify this or challenging the selection of comparators or justifying the discrepancies in accordance with the statutory provisions outlined earlier. ACAS have produced guidance on the new informal procedure which can be found on their website.

3.4.3 What is 'pay'?

3.4.3.1 The Equality Clause which the Act refers to operates in relation to all terms of an employment contract, whether strictly concerned with pay or not. On that basis, the Equality Act can be invoked in relation to a wide variety of contractual terms including salary, commission, bonus payments, holiday entitlement and guaranteed overtime working. It has been established before the courts that a woman is entitled to be treated not less favourably than a man in respect of each individual provision of her contract, regardless of whether her contract as a whole could be said to be no less favourable than his. On that basis, an employment tribunal applies a term by term comparison.

3.4.3.2 In contrast to contractual benefits, non contractual benefits are not covered by the equal pay rules and any complaint relating to a disparity of treatment in relation to such benefits would have to be made on the basis of less favourable treatment under the sex discrimination provisions of the Equality Act.

3.4.4 The need for comparators

3.4.4.1 In order for a woman to get a claim off the ground, it will be necessary for her to be able to identify a male comparator employed on like work, work rated as equivalent or work of equal value. The comparator identified by the employee must be in the 'same employment' as her. This means that the comparator must be employed by the female employee's employer or an associated employer at the same establishment or at different establishments in Great Britain which include that one and within which common terms and conditions of employment are observed.

3.4.4.2 It has been established that the comparator need not be in the same employment at the same time as the female employee and so it is open to a woman to compare her pay with that of a male predecessor in the same job. In theory, there is no limit to how far into the past a woman may delve to find a predecessor who was more highly paid, although it is important to remember that there is a five year limitation period (six in England and Wales) on the amount of back pay that can be awarded.

3.4.5 Like work

There is a statutory definition of what constitutes like work and this broadly describes that a woman is to be regarded as employed on like work with a man if, but only if, her work and his is of the same or a broadly similar nature and the differences (if any) between the things she does and the things he does are not of practical importance in relation to the terms of their work. A tribunal will generally try to avoid a minute examination of detail and trivial differences in the work performed that are not likely to be reflected in the terms and conditions of employment. In that sense, 'like work' cases are usually easy to identify.

3.4.6 Work rated as equivalent

3.4.6.1 A woman can also choose as her comparator a male colleague employed in work rated as equivalent to hers. The definition of work rated as equivalent makes it clear that this is limited to situations where the woman's job and that of her proposed comparator have been given an equal value under a Job Evaluation Scheme.

A Job Evaluation Scheme involves assessing the relative value of the jobs within an organisation. There are several reasons why an employer might wish to introduce job evaluation, including:

- to establish pay equality within the organisation;
- to ensure that it provides equal pay for men and women for equal work;
- to assist career management by clarifying possible progression rates;
- to support and complement other human resource initiatives such as performance management; or
- to benchmark salaries and benefits, either nationally or internationally.

3.4.6.2 For the purposes of an Equal Pay claim, Employment Tribunals have held that a Job Evaluation Scheme will only be valid in the circumstances where it is thorough in its analysis and capable of impartial application. There are Job Evaluation Scheme experts who specialise in this area and the technical analysis required to make a Job Evaluation Scheme valid can be quite substantial. If an employer is thinking of carrying out a Job Evaluation Scheme, specialist advice should be sought.

3.4.7 Equal value claims

The Equal Value provisions, are, at first glance, a third and residual category which allows a comparison to be made between different jobs even though the work is not like work or work rated as equivalent. Broadly put, a job is of equal value to a separate and different job if it can be shown (usually following a job evaluation exercise) that weighing and applying a score to the tasks, skills, responsibilities, qualifications required etc the two roles have an equal value. These cases are notoriously complex and there are separate procedures for these cases as compared with other equal pay claims.

3.4.8 Equal pay procedure

The potential scope of an equal pay claim is easily underestimated both by employers and employees. As can be seen from the paragraph above on equal value claims the comparison need not be between two employees on like or even similar work but can be between two jobs that may be entirely different. Often the only thing that the claimant and the comparator have in common is the identity of their employer. For this reason, evidential difficulties are often encountered and the tribunal system can take considerable time to resolve these claims.

3.4.9 Material factor defence

3.4.9.1 Once a woman has shown that she is employed on like work, work rated as equivalent or work of equal value to that done by a more highly paid male comparator, there is a presumption that the difference in treatment is discriminatory.

3.4.9.2 It follows that if the employer is not able to advance a successful defence then this will lead to the woman reaping the benefit of the deemed equality clause and her contractual terms will be modified so that they are in line with those of the male comparator. However, an employer can challenge this outcome and defeat the equal pay claim by showing that any pay differential is due to a material factor that has nothing to do with gender.

3.4.9.3 In order for an employer's material factor defence to succeed, it will need to demonstrate that the reason for the pay differential is:

- a material factor, i.e., that the reason is significant, relevant and caused a variation;
- not due to sex discrimination, whether direct or indirect; and
- was in existence throughout the period during which there was a difference in pay.

3.4.9.4 An employer who satisfies the above requirements will not then need to justify the variation in pay any further. However, where there is evidence that the genuine material factor is tainted by sex discrimination, the employer's defence will only succeed if the difference in pay is objectively justifiable.

3.4.9.5 There are a number of potential material factor defences that employers have attempted to rely upon with varying degrees of success to defeat equal pay claims. Some examples of material factor defences are market forces, skills, qualifications and historical reasons.

3.4.9.6 An employee will be able to challenge the material factor defence where it is tainted by sex discrimination and tribunals have ruled that a pay system may be tainted by sex discrimination where there is direct sex discrimination, indirect discrimination or where relevant and sufficiently compelling statistics demonstrate that women suffer a detrimental impact when compared with men.

3.4.10 Equal pay resources and audit tool kit

3.4.10.1 The Equality and Human Rights Commission has produced a Code of Practice on Equal Pay. The Code can be used in evidence in any proceedings under the sex discrimination or equal pay rules before a tribunal. Whilst the code is not actually law itself tribunals may take into account an employer's failure to act on any of the Code's provisions. In practice any employer who departs from the Code runs the risk of an adverse ruling.

3.4.10.2 At the heart of the Code is a recommendation that employers carry out a pay systems review or audit involving comparing the pay of protected groups who are doing equal work and investigating the causes of any pay gaps by gender.

3.4.10.3 The thrust of the Equality and Human Rights Commission guidance is that the employers who promote equality of opportunity among their workforce can draw on a wider pool of talent and experience and create an environment where employees are valued and supported and appreciate each of their colleagues' contribution to the workplace. In contrast, a climate where unlawful discrimination is fostered, condoned or ignored cannot provide these benefits. The guidance is accessible via the Internet (equalityhumanrights.com) and provides a useful resource for consideration of Equal Pay audits.

3.4.11 Gender Pay Gap Reporting

Since 6th April 2017 employers with 250 or more relevant employees fall within the scope of new regulations requiring reports to be published on "gender pay gap" within a business. The gender pay gap differs from equal pay as it is concerned with the differences in the average pay between men and women over a period of time, no matter what their role is. Organisations with a higher level of men in senior jobs and women in junior roles (or vice versa) are more likely to have a discernible gender pay gap.

The regulations require the employer to take a snapshot of data each year on 5th April provided that at that date they have 250 or more employees. For the purposes of the regulations, "workers" are included in those to be monitored. The information regarding relevant employees within the employer's organisation is intended to highlight any general differences and encourage employers to focus on narrowing any gap. Information will include data on:

- Differences in mean hourly rates between full pay males and females;
- Differences in median hourly rates between full pay males and females;

- Differences in mean bonus pay between males and females;
- Differences in median bonus pay between males and females;
- Percentages of males and females paid a bonus in preceding 12 months;
- Percentages of males and females in the lower, lower middle, upper middle and upper quartile pay bands.

"Mean" is the average of the group and "median" is the mid-point value. The "hourly rate of pay" is determined according to a process set out within the regulations, which is as follows:

Step 1
Identify all amounts of ordinary pay and bonus pay paid to the employee during the relevant pay period.

Step 2
Where an amount identified under Step 1 is an amount of ordinary pay, exclude any amount that would normally fall to be paid in a different pay period.

Step 3
Where an amount identified under Step 1 is an amount of bonus pay, and is paid in respect of a period ("the bonus period") which is not the same length as the relevant pay period, divide the amount by the length of the bonus period (in days) and multiply it by the length of the relevant pay period (in days).

Step 4
Add together the amounts identified under Step 1 (as adjusted, where necessary, under Steps 2 and 3).

Step 5
Multiply the amount found under Step 4 by the appropriate multiplier. The multiplier is 7 divided by the number of days in the pay period. Keep in mind that the regulations specify that where pay periods are calculated in months, a month is treated as having 30.44 days, and where pay periods are calculated as a year, a year is treated as having 365.25 days.

Step 6
Divide the amount found under Step 5 by the number of working hours in a week for that employee.

Once the necessary collation and processing of data has occurred, the information must be published by the employer on a searchable website, signed by a director of the employer and it must also be published on a government website no later than 4th April the following year. Although there is no requirement for employers to support the figures with a narrative report, a narrative commentary can be made and where a gap exists, employers would usually benefit from doing so. Employers will be required to keep their gender pay figures online for three years in order to show the progress made.

3.4.12 Increased risk of claims

The introduction of gender pay gap reporting will of itself not result in direct liability for equal pay claims. However, the exposure of pay rates and presented as figures compared between genders will expose private sector employers to more intense scrutiny than which they may have previously experienced. Whereas equal pay cases have historically been focussed upon the public sector, recent high profile cases against supermarkets show that claims against private sector employers are on the increase. When taken into consideration with the recent abolition of employment tribunal fees (see 6.7 Harassment), employers in the private sector should be wary of the changing climate and contemplate taking all necessary action to reduce risk going forwards.

3.5 Part-time workers

3.5.1 Introduction

3.5.1.1 Part-time workers also have the right not to be treated less favourably than an employer would treat a comparable full-time worker. This protection is provided for under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the 'Part Time Regulations')

3.5.2 What is the protection?

3.5.2.1 A part-time worker should not be treated less favourably:

- in relation to the terms of his or her contract; or
- by being subjected to any other detriment by any act, or deliberate failure to act, of the employer.

3.5.2.2 This only applies if the treatment is on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds. In determining whether a part-time worker is treated less favourably, the treatment must be compared to that of a full-time worker by using the 'pro rata' principle.

3.5.3 What is the 'pro rata' principle?

This means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker should receive or will be entitled to receive no less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full time worker. The weekly hours are the number of hours a worker is required to work under the contract of employment in a week in which they have not been absent from work and do not work any overtime or, where the number of such hours varies according to a cycle, the average number of those hours.

3.5.4 Comparable full-time worker

A comparable full-time worker is someone who is:

- employed by the same employer under the same type of contract; and
- engaged in the same or broadly similar work when taking into consideration the worker's level of qualification, skills and experience required.

3.5.5 Overtime

A part-time worker who is paid less for overtime than a full-time worker will not be considered to be treated less favourably when the total number of hours worked by the part-time worker does not exceed the number of hours the comparable full-time worker is required to work.

3.5.6 Workers becoming part-time

If a full-time worker's contract is terminated or varied to the extent that he or she will thereafter continue to work under a new or varied contract on a part-time basis, he or she too is protected from less favourable treatment. The same protection is also afforded to workers who return to part-time work within a period of 12 months of absence. Therefore, those workers are entitled to the same terms as they had as a full-time worker before their period of absence, unless the employer can objectively justify treating them otherwise.

3.5.7 Written statements

3.5.7.1 If a worker believes that an employer has treated him or her less favourably, he or she is entitled to request a written statement of particulars giving reasons for such treatment. The employer will then be under a duty to provide this statement within 21 days of receipt of the worker's request.

3.5.7.2 The written statement is admissible as evidence in any proceedings and if it appears to a tribunal that the employer has deliberately, and without reasonable excuse, omitted to provide a written statement or that the statement is evasive or equivocal, it may draw a negative inference. One inference may be that the employer has infringed the workers right in question.

3.5.8 Dismissal and detriment

It is unlawful to dismiss a worker or to subject him or her to a detriment on the basis that he or she:

- brought proceedings against the employer;
- requested from the employer a written statement of reasons for less favourable treatment;
- gave evidence or information in connection with any proceedings brought by a worker under the Part Time Regulations;
- did anything under the Part Time Regulations in relation to the employer or any other person;
- alleged the employer has infringed the Part Time Regulations;
- refused (or proposed to refuse) to forgo a right conferred on him or her by the Part Time Regulations; or
- that the employer believes or suspects that the worker has done or intends to do any of the above.

3.5.9 Worker's right to make a claim under the Part Time Regulations

3.5.9.1 A worker has the right to raise a claim to an Employment Tribunal within 3 months of the date of dismissal or the detrimental act. If a tribunal finds that the complaint is well founded, it shall, if it considers it just and equitable:

- make a declaration as to the rights of the worker and the employer in relation to the worker's complaint;
- order the employer to pay compensation to the worker; or
- recommend that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances, that will prevent or take away the adverse effect complained of by the worker.

3.5.9.2 A tribunal can also award compensation for any loss that the worker has incurred as a result of the employer's infringement. This may include expenses and loss of benefits incurred by the worker. A worker will not however be entitled to any compensation in relation to injury to feelings.

3.5.9.3 If the infringement is caused or contributed to by any act of the worker, compensation may be reduced to reflect the contributory fault.

3.5.9.4 If an employer fails, without reasonable justification, to comply with the recommendation made by a tribunal, the tribunal may, if it thinks it is just and equitable to do so, increase the amount of compensation to be paid by the employer to the worker or make an order to that effect.

3.5.10 Indirect sex discrimination and part-time workers

As it is the case that the majority of part-time workers are women, employers need to ensure that their terms and conditions of employment are not only compliant with the Part Time Regulations, but that pay practices, criteria or provisions are not indirectly discriminatory by adversely affecting part-time workers more so than full- time workers.

3.6 Deductions from wages

3.6.10.1 Workers are afforded legal protection against unlawful deductions from wages. Employers must therefore be aware of what deductions can be made and in what circumstances they are permitted.

3.6.1 Who is a worker?

3.6.1.1 A worker is someone who has entered into or works under a contract of employment or any other contract, whether expressed, implied and (if it is expressed) whether oral or in writing, and undertakes to do or personally perform work or services for another party to the contract. The other party to the contract cannot be a client or customer of any profession or business undertaking carried on by the individual in order to be classed as a 'worker'.

Recent appellate cases have tended to favour establishing worker status more readily to individuals who have been designated as self-employed within contracts and for tax purposes. The tribunals and courts have focused on identifying the true nature of the relationship in practice, as opposed to focussing on the written word of the contractual documentation, which remains relevant but not determinative of the question of status. For example, when an individual is engaged and designed in a contract as a self-employed contractor but provides personal services, the individual may be able to establish "worker" status for certain rights (including minimum wage and paid holiday). If a contract allows for a substitute to carry out the work, then that may negate personal service if the right is a genuine reflection of the intention of the parties. Worker status is a complex and developing area of law with ongoing appeals defining and redefining legal principles. Specific advice should be sought from Scottish Engineering if any question arises in practice.

3.6.1.2 Therefore, employees are not the only individuals legally protected from having unlawful deductions made from their wages.

3.6.2 Who is not protected?

3.6.3 Although the protection is afforded to workers, certain individuals are not included and they are:

- police officers who are office holders;
- those serving with the armed forces; and
- those employed under a crew agreement under the Merchants Shipping Act 1995.

3.6.4 Permitted deductions

3.6.4.1 Employers can make deductions from a worker's wages when:

- the deduction is required or authorised to be made by statute or a relevant provision in the worker's contract, or
- the worker has previously agreed or consented in writing to the making of the deduction.

3.6.4.2 The relevant provision in a worker's contract means a written term of his or her contract that is agreed and notified to the employee before the deduction was made.

3.6.4.3 An employer will be entitled to make deductions as required by law, such as PAYE or national insurance contributions or repayments of student loans. It will also be entitled to make deductions if the worker has taken part in a strike or other industrial action.

3.6.4.4 Employers are also able to deduct any over payment of wages or any over payment of any expenses made to a worker.

3.6.5 What is a deduction?

3.6.5.1 A deduction can be any failure to pay a worker the full amount that he or she is entitled to. Therefore, an employer may fall foul of the legislation if it fails to pay an employee his or her full salary (or part of it) at the end of the relevant pay period (e.g. per week or per month) or if it fails to pay holiday pay or sick pay. For further information on deductions from holiday pay, see 5.0 Working time regulations.

3.6.5.2 An unlawful deduction would include instances where an employer has deducted a sum of money from a worker's wage when it has not reserved the right to do so in the worker's contract and does not otherwise have the worker's written consent to make the deduction.

3.6.6 What are wages?

3.6.6.1 Wages means any sum payable to a worker in connection with his or her employment. This includes:

- any fee, bonus, commission, holiday pay or other emolument referable to their employment, whether payable under his or her contract of employment or otherwise;
- statutory maternity pay;
- statutory paternity pay;
- statutory adoption pay;
- a guaranteed payment;
- any payment for time off for carrying out trade union duties;
- remuneration on suspension on medical grounds;
- remuneration on suspension on maternity grounds;
- any sum payable in pursuance of an order for reinstatement or reengagement;
- any sum payable in pursuance of an order for the continuation of a contract of employment;
- remuneration under a protective award; or
- any payment in the nature of a non contractual bonus paid (for any reason) by the employer to the worker.

3.6.6.2 Wages do not include:

- advances under an agreement for a loan or an advance of wages;
- payment of expenses incurred by the worker in carrying out his or her employment;
- pension payments, allowance or gratuity in connection with the workers retirement or as compensation for loss of office;
- redundancy payments;
- any payment to the worker otherwise than in his capacity as a worker; or
- any payment or benefit in kind that is a voucher, stamp or similar document which is for a fixed value expressed in monetary terms and capable of being exchanged for money, goods or services (or a combination of those things).

3.6.7 Practical advice

3.6.7.1 It is advisable for employers to ensure that there is an express contractual term in a worker's contract of employment stating not only that deductions may be made but what those deductions could be and how and when they will be made.

3.6.7.2 It is usual for an express term in the contract of employment to state that by signing the contract, the employee is in fact consenting to any such deductions being made. On that basis, an employer can demonstrate that there was a 'relevant provision' in the worker's contract before the deduction was made that allowed for the deduction to be made.

3.6.7.3 It is important for employers to check that they have the legal right to make a deduction before making it. If a tribunal finds that an unlawful deduction has been made (even if the employee was not due the sum that was paid by the employer or the employer was entitled to be repaid a certain amount by the employee) the employer will have to repay the amount deducted and will be deemed to have waived its right to seek the amount even if it were legitimately due and payable by the worker. This is why it is important for employers to ensure that they have contractually reserved the right to make deductions or have sought the worker's written consent before doing so.

3.6.8 Worker's right to make a claim

3.6.8.1 Workers are entitled to raise a claim at an Employment Tribunal within 3 months from the date the deduction was made or from the date of the last deduction if there has been a series of deductions. If a claim is submitted outwith the 3 month time limit, the Tribunal will only consider it if it was not reasonably practicable for the claim to be raised within the time limit and it was lodged within a reasonable period thereafter.

3.6.8.2 Where a worker has suffered a series of deductions, for example where a worker has been underpaid for a number of months, there is a limit of two years on the period of backdated deductions from the date of the presentation of a worker's claim, as long as the deductions are all part of the same series.

3.6.8.3 A worker will also be able to make a claim for any consequential losses that he or she may have incurred as a result of the employer's deduction. This may include any interest or penalties that have been incurred by the worker as a result of any deduction or payment not being made.

Chapter 4

Managing sickness and absence

4.0 Managing sickness and absence

4.1 Introduction

4.1.1 Whilst sickness absence is a significant problem for many employers, it must be remembered that employees are entitled to take time off work when they are genuinely ill. If, however, persistent sickness absence is ignored it can lead to operational difficulties and low morale within the workforce. It should be highlighted that sickness absences relate to circumstances where employees cannot attend work or carry out their duties due to illness or injury. It is important to highlight this in any sickness absence policy so that employees can be held accountable if they have been absent, but not genuinely ill.

4.1.2 Employers can fairly dismiss employees who have a poor sick record providing the decision to dismiss is reasonable in the circumstances and a fair procedure has been followed. It is also important to consider whether any illness or injury amounts to a disability defined by the Equality Act 2010. An employer may have to modify its approach to a particular ill health issue if it appears that an employee may be disabled. See 6.4.9 Disability for a more detailed analysis of the rules on disability discrimination. It is also important to note when dealing with absence issues that records relating to employees' health are sensitive personal information which is protected by the Data Protection Act 2018. See 9.0 Data protection for further information on the rules relating to Data Protection.

4.1.3 This chapter covers:

- short and long term sickness absences;
- dismissal and disciplinary action relating to sickness absences;
- unauthorised absence;
- measuring and analysing absence;
- suspension from work on medical grounds;
- statutory sick pay (SSP); and
- company sick pay.

4.2 Procedures for dealing with short-term sickness absences

4.2.1 Short-term sickness absences are normally absences of 7 calendar days or less. They may be a one-off absence of short duration or may be short absences occurring on a regular basis. To avoid short-term sickness absences developing into a problem, it is important that an employer intervenes at a relatively early stage. Failure to do so may give signals to employees that having a poor absence record is acceptable. This can lead to sickness absence becoming an accepted part of workplace culture.

4.2.2 Short-term sickness absence monitoring procedures

4.2.2.1 Employers should have a sickness absence monitoring policy or procedure in place to ensure an effective and consistent approach is applied. It is not appropriate to deal with absence issues through the disciplinary procedure unless the employer has evidence that the illness or injury is not genuine or not the reason for the absence. If the illness isn't genuine then it is a misconduct issue to be dealt with through the disciplinary procedure. For detailed information in relation to disciplinary procedures please refer to Chapter 11.

When managing short-term sickness absence procedures the following steps are recommended:

- if an employee is incapable of working due to illness or injury he or she should be obliged to advise the line manager preferably in advance of the normal start time. The employee should provide details of the illness and the likely duration of the absence. Usually an employee who is not genuinely ill will find it more difficult to speak directly to his or her line manager. Such employees would prefer to leave voicemail messages or send texts. A prudent employer will prohibit notification of sickness absence by text or voicemail and only accept contact by a third party in exceptional circumstances;
- employees returning to work within 7 calendar days should complete a self- certification form, which briefly describes the nature of their illness and length of absence;
- employees absent for 7 calendar days or more should produce a fit note stating why they cannot work and how long they will be unfit to work. The fit note contains an option for the medical practitioner to say the employee "may be fit for work". When this option is selected there are tick boxes which allow the doctor to select common ways of facilitating a return to work, these are: a phased return, altered hours, amended duties and/or workplace adaptations;
- unless there is a genuine reason related to the employee's illness why there should be no contact, employers should maintain contact with employees by telephone or email whilst they are absent. It should be made clear to employees that they will be contacted during any period of ill health absences and they have a duty to keep their employer informed on the progress of their condition. Regular contact by the company to all employees assists in preventing claims of harassment;
- employers should carry out return-to-work interviews, regardless of the length of an employee's sickness absence. This can be a deterrent to malingering employees who know they will be faced with a review meeting when they have not been genuinely ill;
- employers should communicate regularly with employees on their return to work to ensure that there are no ongoing problems.

Previously fit notes could only be provided by a doctor, however from 1 July 2022 fit notes can be issued and certified by nurses, occupational therapists, pharmacists and physiotherapists.

4.2.2.2 Following these basic monitoring steps may help to minimise frequent, short-term absence and ensure that any problems are identified and tackled at an early stage. It is advisable to incorporate these measures into a sickness absence policy so that any failure on the part of an employee to comply with the procedures may be dealt with through the disciplinary procedure. If, despite these monitoring steps, an employee's absence record continues to be a problem then it may become necessary for the issue to be managed in a more formal way. Implementing an absence management procedure is explained in 4.3 Warnings and dismissal – frequent short-term absences.

4.3 Warnings and dismissal – frequent short-term absences

4.3.1 When an employer is faced with frequent, intermittent absences, there comes a time when it may be fair to dismiss an employee or take other forms of action such as demotion or transfer. Before contemplating dismissal or other action, employers must ensure that they have followed appropriate procedures. It is essential that an employee with a poor record of intermittent absence is provided with appropriate warnings that if no improvement is made to the level of absence, irrespective of the genuine nature of the ill health, dismissal may result. It is not appropriate to deal with sickness absence issues via a disciplinary or grievance process however the principles of sickness absence management tend to mirror the basic principles of disciplinary procedures. Meetings must be held with the employee being given every opportunity to put forward explanations for his or her poor attendance record. The employee must be given the opportunity to improve and must be made aware that if the poor attendance persists, dismissal may result. Pregnancy and maternity related sickness absences should be disregarded for the purpose of absence management. Care should be taken with absences that may be caused by a disability, see 4.3.6 Underlying health condition.

4.3.2 In terms of measures other than dismissal, employers should ensure that they have reserved the contractual right to demote or transfer in relation to sickness absence issues. If no such right exists any attempt to demote or transfer in the face of resistance from the employees may be a breach of contract.

4.3.3 At the beginning of an absence management process it should be explained to the employee that warnings or action which may be taken are not as a result of a belief that the absences are not genuine but rather on grounds of capability.

4.3.4 Informal Intervention

It may be that an informal discussion with the employee at a back to work interview or other meeting is all that is required to convey that the absenteeism is unacceptable. An informal warning to the effect that things must improve if formal intervention is to be avoided may suffice. If after such an informal meeting there continue to be instances of frequent, short term absence then it may be necessary to instigate formal absence management procedures.

4.3.5 Sickness absence management

4.3.5.1 The following are some basic principles to be followed in managing sickness absence:

- keep an accurate record of absences; and
- each time the level of an employee's short-term absences becomes an issue, employers must take action promptly:
- invite the employee to a meeting to discuss the absence record. It is sensible to allow the employee to be accompanied by a colleague or trade union
- representative at such a meeting although the employee has no legal right to be accompanied;
- inform the employee at the meeting that the absence record is unacceptable. Give the employee an opportunity to respond and explain the reasons for the level of absence; and
- issue the appropriate warning and inform the employee of the level of improvement required, for example, there should be no further short-term absences within 3 months of the date of the meeting. Warn the employee that any further absences during a specified time are likely to lead to further action being taken.

4.3.5.2 At the end of an initial absence review meeting the employee should be given a clear indication of the type of improvement required in attendance. Many employers choose to specify a level of permitted absence in a specific time period following the initial review meeting and detail the actions the employer will take if there is no improvement in attendance.

4.3.6 Underlying health condition

If following the initial review meeting it appears that there may be an underlying health issue linking the absences or that the absences are all related to one physical or mental condition, then it is essential that the employer seeks medical information in the form of a GP's or specialist's report. It may be prudent for the employer to arrange an appointment for the employee with its own occupational health expert. Whilst obtaining up-to-date medical information tends to be more critical when employers are considering dismissing employees who have been on long-term sickness absence, if in relation to intermittent short absences there is some form of disability resulting in the employee being unable to attend work then any dismissal that takes place without that medical issue being explored further is likely to be unfair and possibly in breach of the disability provisions of the Equality Act. For a more detailed analysis of disability discrimination see Chapter 6.

4.3.7 Further review meeting

If there is no underlying issue and the employee is absent again for a few days within a short space of time, or alternatively does not meet the attendance/absence target set at the initial review meeting, then it may be appropriate for the employer to convene a further absence review meeting. The format of this further meeting will mirror the initial meeting. It is vital that at this further review meeting the employer impresses very strongly on the employee that further absences may well lead to dismissal. Again, at this stage the employer should take care to establish that there is no underlying health issue that requires to be investigated. The employee should be given full opportunity to explain why his or her absence record is not improving. Essentially, a warning issued at or in the aftermath of a second review meeting is akin to a final written warning under a disciplinary procedure.

4.3.8 Final review meeting

If following the second review meeting there is further deterioration in the absence record or specific absence targets are breached within the relevant period, the employer should convene a further review meeting. The letter advising the employee of the further review meeting should state that one possible outcome of the review meeting is the dismissal of the employee on grounds of capability. Given that dismissal is a potential outcome the employee should be advised in the invite letter of his or her right to be accompanied by a colleague or trade union representative. It should also set out details of the employees absence and summarise or enclose any medical evidence which the employer is relying on. For full details of an employee's right to be accompanied see 11.5 Disciplinary hearing.

4.3.9 Dismissal and other sanctions

If this further review meeting results in the employee's dismissal then as with dismissals for misconduct, the employee should be advised of the right to appeal. The employee is entitled to be accompanied at any subsequent appeal. The letter confirming dismissal should set out the right of appeal. The employer must notify the employee of the appeal outcome in writing. An employee dismissed for his or her poor attendance record is entitled to notice or payment in lieu of notice. For further details of notice and pay in lieu see 14.3 Dismissal with notice. Employers should consider whether or not there are any appropriate alternatives to dismissal although persistent, intermittent absences are not usually linked to the nature of an employee's job. Such alternatives are demotion or redeployment. If the absences have been caused by some aspect of the job then that usually becomes clear at an earlier stage in the process. Although by the time of the third review meeting it is unlikely that an alternative measure would be appropriate, employers should still consider such alternative measures before moving to dismissal. This is particularly important if the employee appears to be disabled as there is a duty on the employer to make reasonable adjustments before resorting to dismissal. However, the duty is not triggered where the employee has not given any indication that they would be returning to work.

4.3.10 How many absences justify employer intervention?

It is for employers to decide the level of absence which will lead to initial and further intervention in terms of sickness absence management. They are however expected to act consistently and fairly. Reasonableness dictates that an employer should not seize upon the first instance of absence of say two or three days and immediately seek to issue some form of capability warning. Informal intervention should be tried first however if a pattern emerges over time of periodic absences for a variety of minor ailments then a problem may exist at that stage which should be dealt with formally. In deciding the level of absence that justifies intervention, employers should act consistently rather than singling out a troublesome employee whose absence record is no worse than other colleagues.

4.3.11 Absence management systems

There are a number of mechanistic and formal absence management systems which tend to be followed more by larger employers. These processes tend to be fairly mechanistic with little room for discretion. Once a certain number of days' absence occur in a prescribed time period a warning is automatically issued following a review meeting. Such systems tend to be fairly rigid and are sometimes driven purely by numerical calculation of absence. An employer who is thinking of putting in place an absence management process with specified numerical default absences should take advice. The application of any such procedures will always be subject to the disability provisions of the Equality Act and the general principles of fairness in relation to the law of unfair dismissal. Any employer who applies the rules of a mechanistic absence management process rigidly without consideration of the facts and circumstances of an individual case runs the risk of both discrimination and unfair dismissal claims.

4.4 Dealing with long term sickness absence

4.4.1 General issues

4.4.1.1 Long-term sickness absence is usually due to more serious illness or injury. The absence may be a one-off or may consist of a lengthy period of absence broken up by intermittent unsuccessful returns to work. Whilst long-term sickness absence is less common than short-term absence, when it does occur, it can be a major problem for employers, particularly when the likely duration of an employee's absence is not known.

Unless there is a genuine medical reason why there should be no contact, employers should ensure that they maintain regular contact with employees who are on long- term sickness absence so that they can:

- fully understand the nature of an employee's illness;
- be kept up-to-date as to an employee's wellbeing/recovery and get an indication of a likely date for return to work; and
- consider whether there are any steps which can be taken in relation to the job role or other working conditions or arrangements that might assist the employee to return to work.

4.4.1.2 Employers should also take all reasonable steps to deal with any problems in the workplace which may be causing or contributing to the employee's illness. For example, if an employee states that his or her absence is due to work- related stress, the employer should determine the cause of the stress and take all reasonable steps to deal with that issue. It may, for example, come to light that a lack of training is causing the employee stress in which case additional training may resolve the issue. If bullying or harassment appears to be the cause then that should be investigated and appropriate action taken.

4.4.2 Review meetings

The frequency of contact with employees on long-term sickness absence will depend on the employee's illness, the job they do and how long they have been certified as unfit for work. It is, however, best practice for employers to have a review meeting with employees who are absent for longer than one month and, thereafter, further review meetings at regular intervals or to tie in with, for example, test results or a medical report being received. These meetings should take place within an employee's normal working hours, however, depending on the nature of an employee's illness, employers should be flexible in terms of the timing and location of the meeting. For example, an employee suffering from work-related stress may find that a welfare meeting at the workplace makes the illness worse. In these circumstances, employers should consider visiting the employee at home or at a neutral location.

4.4.3 Agenda for review meetings

The employer should take the following steps at the welfare meeting:

- enquire after the employee's health;
- establish further details of the illness, symptoms and how/ why the illness prevents attendance at work;
- discuss whether a medical report is required;
- discuss any medical reports or test results received;
- discuss whether arrangements can be made for the employee to return to work and the likely date of return;
- offer appropriate assistance or support;
- discuss whether the employer can make any 'reasonable adjustments' to the employee's working conditions as required by the Equality Act;
- consider whether a phased return to work is appropriate and can be accommodated. For example, the employee will work 3 days in their first week back, 4 days in their second week back then return to full-time in their third week back; and
- discuss sick pay arrangements. If discretionary or contractual full sick pay is about to come to an end the employee should be advised of that fact.

4.4.4 Return to work

Before the employee returns to work, arrangements regarding a phased return, additional support or supervision and adjustments to working conditions should be confirmed in writing to ensure that the employee is aware of what to expect and there is a record of what has been agreed. On the day of return, a 'back-to-work' interview should be conducted. This should address the nature of the employee's illness, confirm the arrangements for the return to work and check that the employee is indeed fit to return.

4.5 Obtaining medical evidence

4.5.1 In cases of long-term sickness absence employers should undertake a full investigation into the nature of any employee's illness or injury and how this is likely to affect future employment. This may sometimes be necessary or appropriate with intermittent short-term absence. Where dismissal is being considered, it is essential for employers to obtain medical evidence on an employee's condition and the likely timescale for a return to work. If the employer requires an independent medical examination or occupational health assessment, the cost of obtaining this should be borne by the employer. It is of particular importance where the absence may be caused by a disability and is therefore protected by the disability provisions of the Equality Act (see Chapter 6 for further details).

4.5.2 Access to medical reports

When obtaining a medical report, employers must consider whether the Access to Medical Reports Act 1988 ('AMRA') applies. AMRA only applies to reports prepared by a medical practitioner who is or has been responsible for the clinical care of the employee. Clinical care involves any examination, diagnosis or investigation in connection with any form of medical treatment of the employee. AMRA does not, therefore, apply to reports supplied to employers by an independent medical practitioner who has been asked to carry out an examination of the employee with a view to preparing a one-off report. This is because no medical treatment of the employee is involved. Neither does it apply to reports from occupational health physicians unless they have been involved in the medical care of the employee. AMRA will almost always apply to medical reports from employees' GPs.

4.5.3 Requesting a medical report

4.5.3.1 Before requesting a medical report the employer must notify the employee that it intends to make such a request and obtain the employee's consent. The letter should do the following:

- advise that the employer wishes to obtain a medical report;
- ask the employee's consent;
- notify the employee that he or she has the right to refuse to give consent; and
- ask the employee to confirm whether he or she wishes to have access to the medical report before it is sent to the employer;
- notify the employee that he or she has the right to request that the medical report be amended;
- advise the employee that the medical practitioner is not obliged to give him or her access to the report in the circumstances detailed at section 4.5.7.

4.5.3.2 Where an employee consents to the report being commissioned, the employer must inform the employee when the report has been requested. Where the employee is required to attend an appointment with, for example, the GP or regular consultant or other doctor, the employer needs to liaise with the parties to ensure that suitable arrangements can be made. When employers commission a one-off report from an occupational health specialist, the AMRA requirements do not apply, however the employee's consent is still required. Employers should also ask the employee's consent to medical records being released to the occupational health specialist where they have had no prior involvement in the employee's care. It is normal practise to attach a 'mandate' to the letter from the employer which is a separate letter to the employee's GP stating that the employee consents to records being released. The employee should sign and return this to the employer who in turn should send it to the GP.

Employers may consider inserting a clause into their sickness absence procedures or statements of employment particulars to the effect that employees have a duty to engage in all reasonable requests to attend occupational health examinations or interviews, such as "Employees are expected to co-operate with all reasonable requests to provide medical information/reports, and attendance at medical appointments arranged by the employer. Failure to do so may result in company sick pay being withheld".

4.5.4 Right to access the report

Under AMRA, employees have the right to access the report before it is sent to their employer. Employees should inform their employer that they wish to access the report when they give their consent for the report to be supplied. Employers must then notify the medical practitioner of this at the time of making the application.

The employee then has 21 days from the date of the employer's application to make arrangements with the medical practitioner to access the report. Even where an employee has not previously asked to see the report, he or she can still contact the medical practitioner within 21 days to have access to the report before it is supplied to the employer. If an employee has not contacted the medical practitioner within 21 days, the report can be supplied to the employer without the employee seeing it.

4.5.5 Amending the report

Employees must be given the opportunity to ask the medical practitioner to amend any part of the report that he or she considers incorrect or misleading. Should the medical practitioner not agree to amend the medical report then the employee has the right to require the medical practitioner to attach a report of the employee's own views in respect of any part of the report with which the employee does not agree.

4.5.6 Employee's refusal to consent to report being commissioned or supplied

Where employees either refuse consent to a report being prepared or refuse their consent to the medical report being released to their employer, then this is clearly a barrier to the employer making a thorough investigation into the medical condition. In these circumstances, it should be made abundantly clear to the employee that the employer will make a decision about future employment based on the information available. This could mean that the employer is unable to take account of the employee's current medical condition. Employees should not be pressurised into giving consent. Where an employer is considering a dismissal on the grounds of incapacity and the employee refuses consent, specific legal advice should be sought before the employee is dismissed.

4.5.7 Medical practitioner's refusal to give employee access to the report

Medical practitioners can refuse to give employees access to all or any part of the medical report if:

- disclosure would cause serious harm to the physical or mental health of the employee or others, or would indicate what the medical practitioner intends to do with the employee. For example, where the report contained reference to an intention to have the employee placed in a secure mental hospital;
- disclosure would be likely to reveal information about another person or reveal the identity of another person who has supplied information to the medical practitioner about the individual. This exception does not apply where the person has consented to disclosure or is a health professional who has provided information in a professional capacity.

The medical practitioner must inform employees if any part of the report is withheld from them. If the whole of the report is withheld, the medical practitioner must inform the employee of this but must not supply the report to the employer unless the employee has given his or her written consent.

4.5.8 Considering the medical evidence

On receipt of medical evidence, employers should consider the contents of the report together with information obtained from welfare meetings or other medical reports. The medical evidence is only one factor, albeit an important one, to be considered when deciding whether to dismiss an employee on long-term sickness absence.

Employers should consider whether the medical report provides sufficient information on which to make an informed decision about the employee's future employment.

Further information or clarification from the medical practitioner may be required before an employer can make a decision.

4.5.9 Conflicting medical opinions

Where medical evidence has been received from more than one source and there is a conflict of opinion, employers have the right to rely on the information which they reasonably believe to be the most credible. In practice this is not always a straightforward task. An employer faced with a conflict of medical opinion should seek legal advice before taking action.

4.5.10 Who decides if the employee has a disability

In relation to potential disability cases, a medical opinion that an employee is disabled is not conclusive. What constitutes a disability is a question of fact for tribunals. In addition, medical opinion as to what adjustments should be made for a disabled employee is not binding on employers although on most occasions it is sensible for an employer to follow the guidance or recommendation of a medical professional unless there is good reason not to. See Chapter 6, 6.4.9 Disability and 6.4.10 Duty to make reasonable adjustments for further information on what constitutes a disability and what is meant by reasonable adjustments for the purposes of the Equality Act.

4.6 Redeployment

Where it is decided that an employee cannot return to his or her current job, the employer should consider whether any alternative positions exist which could be offered to the employee. There is no requirement for employers to create a new position for the employee. In these circumstances, employers should consult with employees to seek their views on whether any available alternative positions are suitable taking into account the illness or injury. This is especially important if an employee has a disability, as employers are required to make reasonable adjustments. Reasonable adjustments can include a temporary or permanent change to an employee's job or duties.

4.7 Dismissal

4.7.1 How long an employer should wait before taking steps to dismiss an employee on long term sick depends on the facts and circumstances of each individual case. The additional cost and disruption caused by an employee's absence is an important factor. If the absence is having little or no detrimental impact on the business then the employer may be expected to be more patient. An employee should not normally be dismissed whilst he or she is continuing to receive company sick pay. For more details on company or enhanced sick pay see 4.9 Sick pay. If for example an employee is entitled to 4 months' full pay under the contract of employment then the employer has clearly contemplated that he or she may be off for such a period and is prepared to pay full salary. A decision to dismiss on capability grounds during this period of full pay is unlikely to be justifiable. That does not mean however that an employer is free to dismiss when company sick pay comes to an end. That is not the case. All of the following factors must be weighed up before coming to a decision to dismiss:

- after a lengthy period of absence the employee continues to be incapable of work due to ill health and there is no imminent likelihood of a return;
- adequate consultation has taken place with the employee to discuss the illness and prognosis;
- a medical report which confirms that the employee remains unfit to resume his or her duties has been obtained;
- consideration has been given as to whether any 'reasonable adjustments' are required, whether the employee's illness/symptoms can be accommodated and/or whether there is scope for redeployment; and
- the employer has fully consulted with the employee in respect of the dismissal and has given full and proper consideration to the employee's view.

The employer must ensure that they make an effort to explore all other options to avoid dismissal in instances where the employee's ill health has been caused or aggravated by the employer's actions. Failure to do so may make a dismissal unfair.

4.7.2 The medical report does not necessarily have to conclude that the employee is permanently unfit to return to work. It is sufficient after a lengthy period of absence for a report to conclude that the prognosis is unclear and it is difficult or impossible to say when the employee might return to work. Even after a lengthy period of absence, if a medical report concludes that it is probable that the employee will return to work in the short-term, the dismissal of that employee is likely to be unfair unless there are compelling reasons why the employer cannot wait any longer.

4.7.3 Other factors to consider

A number of other factors should be taken into consideration before dismissal:

- whether it is reasonable or possible to wait any longer for the employee to recover and return to work;
- what effect, including cost, the employee's absence is having on the business and other employees who may be carrying out additional work as a result of the absence;
- how long the employee has been absent from work;
- when the likely return date of the employee is, if known; and
- how other employees have been treated in the past in similar circumstances.

4.7.4 Dismissal procedure

Before deciding to dismiss, employers must first follow a fair procedure. Importantly though, the ACAS Code on Disciplinary Grievance Procedures does not apply to a dismissal on grounds of ill health. The procedure will involve providing the employee with advanced warning that if the illness and associated absence continues and if there is no likelihood of an imminent return to work then dismissal will be the likely outcome. Employers should take all reasonable steps to meet and consult with the employee in respect of the decision to dismiss. The employee should be advised of his or her right to representation at this meeting. See 11.5 Disciplinary hearing for a detailed analysis of the right to representation. The right to representation arises in these circumstances because the employer is considering dismissing the employee.

In practice, with certain illnesses it can be difficult for the employer to meet with the employee, however it is important that all reasonable efforts are made to have a meeting before dismissal takes effect. At the meeting it is sensible to review the medical position, the likelihood of an imminent return to work and to consider alternative work if that would assist. Finally if there is an underlying disability, it may be necessary to consider whether any reasonable adjustments could be made to assist the situation.

4.7.5 Entitlement to pay during the notice period

Dismissal on the grounds of capability is with notice or pay in lieu of notice if the contract of employment permits. If the employee is on sick leave during the notice period, he or she is normally entitled to receive full pay. This is the case even if the employee is only in receipt of statutory sick pay or no pay at all. There is, however, a peculiar rule that employees have a right to their normal pay during the notice period irrespective of the contractual sick pay entitlement unless the period of notice which their employer is required to give is at least one week more than the statutory minimum notice required. See 14.3 Dismissal with notice for further information on notice and pay in lieu of notice. For example, if an employee with six complete years' service is contractually entitled to six weeks' notice then the employee will have the right to normal pay if sick during the notice period. If, however, the entitlement to notice is seven weeks there will be no entitlement to normal pay as this is at least one week more than the statutory minimum. There may, however, be an entitlement to normal pay if there is a specific contractual right to full pay during the notice period irrespective of the circumstances.

4.7.6 Entitlement to accrued but unused holiday pay

If the employee is sick and prevented from taking holiday, they may be entitled to carry over accrued but unused holiday to the next leave year. If the employee is dismissed then they are entitled to a payment in lieu of that accrued but untaken holiday pay.

From 1 January 2024, workers who are unable to take annual leave due to a period of sickness will be able to carry this leave over into subsequent holiday years. This simply confirms the position previously set out in case law and applies only to the 20 days statutory entitlement derived from the European Working Time Directive. The additional 8 days entitlement under UK law do not have to be carried over, though some employers will choose to treat all leave in the same way for administrative ease.

If there is a desire to distinguish between the two categories of leave, specific advice should be taken as following as the Supreme Court have held different types of leave are not necessarily taken in sequence and that, if it's not practical to distinguish between them, all the leave to which a worker is entitled forms part of a single 'composite' po and there is therefore the potential for uncertain and complex holiday pay calculations to be carried out and contracts will need to be carefully drafted. The new Regulations set out that any carried over leave must be used within 18 months of the end of the holiday year in which the entitlement originally arose, even if they remain off sick

Some contracts of employment allow for an employee to take annual leave during sickness absence or for an employer to force an employee to take annual leave prior to the termination of their contract. However, if an employee is on sick leave they cannot be forced by their employer to take annual leave.

4.8 Suspension from work on medical grounds

4.8.1 Employers are required to take reasonable steps to ensure the health and safety of employees and, as a result, may have occasion to suspend an employee from work who is at risk of harm or injury. An example of this is where an employee suffers a severe allergic reaction to a chemical that he or she is temporarily handling at work. Employees who have at least one month's continuous service have the right to be suspended on normal pay for up to 26 weeks. However, there is no right to pay if:

- the employer offers to provide the employee with suitable alternative work and the employee unreasonably refuses the offer. It should be noted that the alternative work does not need to be within the scope of the contract of employment for it to be suitable;
- the employee is sick (unless there is a contractual right to company sick pay); or
- the employee does not comply with reasonable requirements imposed by their employer to ensure that the employee is available for alternative work when required.

4.8.2 There is also a right to suspension from work on maternity grounds if the work normally carried out by the employee could be hazardous to the employee or her baby. See 7.2.5 Suspension on maternity grounds for further details.

4.9 Sick pay

4.9.1 Employees are entitled to receive statutory sick pay (SSP) if:

- they are sick for at least 4 'qualifying' days in a row. Qualifying days are days in which the employee is normally at work and do not include, for example bank holidays or weekends unless these are normal working days; and they have average earnings at least equivalent to the lower earnings limit for National Insurance contributions. This limit is reviewed annually. This is
- calculated before deduction of tax and National Insurance contributions. Average weekly earnings are calculated over an 8-week period immediately prior to the commencement of the sick leave. The calculation is based on actual earnings and includes bonuses, holiday pay, overtime and any other statutory payments that have been made in that period.

4.9.2 Examples

4.9.2.1 If an employee normally works Monday to Friday and falls sick on Thursday, the employee will not be paid SSP for Thursday, Friday and Monday (these being the first three days of absence). If the employee continues to be off sick, SSP will be paid from the following Tuesday.

4.9.2.2 These are usually the days the employee would normally be required to be at work, but the company can agree other days with the employee provided there is at least one qualifying day each week.

4.9.2.3 If an employee normally works Tuesday, Wednesday and Thursday and falls sick on Thursday then SSP will not be paid on the first Thursday, Tuesday and Wednesday. If the employee continues to be off sick, SSP will be paid from the following Thursday.

4.9.2.4 Employees are entitled to receive SSP for up to 28 weeks. The rate is reviewed annually and the relevant figure can be obtained from the "GOV.UK" website. As at the date of publishing, the current SSP rate from 6 April 2024 tis £116.75. For qualifying absences of less than a week, the daily rate of SSP is calculated by dividing the weekly rate by the number of days in an employee's normal working week as shown in the formula below:

Formula

$$\text{SSP daily rate} = \frac{\text{weekly rate of SSP}}{\text{days in employees normal working week}}$$

4.9.2.5 If an employee has received SSP for a previous illness within the last 8 weeks then the second or subsequent period of illness of 4 days or more will be linked to the earlier period and for SSP purposes will be treated as one continuous period. Whilst the employee must be ill for at least 4 days, SSP will, in these circumstances, be payable from the first day of sickness absence. The previous period will, however, count towards the 28 weeks' maximum entitlement.

4.9.2.6 SSP is normally paid along with employees' normal pay. As SSP is treated as earnings it is subject to tax and National Insurance contributions. However, if employees only receive SSP, the earnings may be below the income tax threshold.

4.9.3 Company sick pay

4.9.3.1 SSP is the statutory minimum entitlement, however, employers occasionally choose to pay more than SSP. Employers should always specify that company sick pay is inclusive of SSP. It should also be made clear whether or not the payment in excess of SSP is contractual or discretionary. Often, employers pay full pay for a period of time followed by half pay. The written statement of employment particulars should include details of any company sick pay scheme. If there is no entitlement to company sick pay, the written statement or contract should state this.

4.9.3.2 It is open to employers to operate a discretionary company sick pay scheme. This can either be a formal scheme which provides that any right to sick pay is discretionary or may simply consist of employers choosing to make exceptions from time to time and paying sick pay in circumstances where employees would normally only receive SSP. In both instances, employers should be careful to exercise their discretion reasonably and in a non-discriminatory manner. Where employees have a contractual right to company sick pay it may be a breach of the contract of employment and unfair dismissal if the employee is dismissed before the expiry of their sick pay entitlement.

4.9.4 Sickness absence and accrual of holidays

Entitlement to paid annual leave continues to accrue during any period of ill-health absence irrespective of the length of the absence. For a more detailed analysis of the accrual of holidays during sickness absence, please see 5.13.8 Holiday entitlement and sick leave.

Chapter 5

Working time regulations

5.0 Working time regulations

5.1 Introduction

5.1.1 The Working Time Regulations 1998 (the 'Regulations') cover a number of important areas in relation to rest and time away from work. The Regulations are intended to implement in the UK the European Working Time Directive which was itself introduced as a health and safety measure. Many of the matters now regulated by the Regulations were previously left to employers and employees to agree. The Regulations place duties on employers in relation to the working time of workers including the provision of rest breaks, restrictions on night work as well as setting out workers' minimum entitlement to paid holidays. The Regulations complement the statutory framework of health and safety rules in the workplace.

5.1.2 There are serious health and safety considerations underpinning the Regulations. Tired workers are more likely to have difficulty concentrating and make mistakes, thereby putting themselves at risk as well as others around them. The Regulations set out minimum entitlements to time away from work on a daily, weekly and annual basis. It should be noted that employers are not obliged by the Regulations to ensure that rest breaks and holidays are taken. It is sufficient that employers facilitate the taking of the required time away from work.

5.1.3 Employers should give careful consideration to rights and obligations contained in the Regulations when drafting contracts of employment. Generally speaking the Regulations take precedence over what may have been agreed between the employer and employee in a contract. Parties cannot contract out of most of the provisions of the Regulations. There are however certain provisions of the Regulations which can be departed from as long as the employer and employee are party to what is referred to in the Regulations as a "relevant agreement." Most contracts of employment are relevant agreements. These limited departures from the terms of the Regulations can also be set out in a "workforce agreement" between an employer and a recognised trade union. Parties can agree on a holiday year. Agreement can be reached in respect of the carry over of holidays in excess of 5.6 weeks in any year. Parties can agree rules on the required periods of notification for requesting and refusing holidays. Employers can nominate holidays for shutdown periods and periods during which no holidays can be taken due to peaks of demand.

5.1.4 The employer and employee are free to agree their own rules in respect of contractual holiday entitlement over and above the Regulations minimum level of 5.6 weeks. The Regulations do not apply to holidays in excess of that minimum.

5.2 Meaning of worker who is covered by the Regulations

5.2.1 The Regulations cover all workers, not just employees. The term 'worker' covers many categories of self-employed engagement only excluding those individuals who are genuinely in business for themselves. A 'worker' includes anyone who has entered into or works under any contract where that worker undertakes 'to do or perform personally any work or services for another party to the contract' as long as the contract does not result in the other party to the contract being a client or customer of the profession or business being run by the individual. Some self- employed individuals are covered whilst others are not. The key question is to what extent the self-employed person is in business on his or her own account. Worker status is a complex and developing area of law with ongoing appeals challenging this position. Specific advice should be sought from Scottish Engineering if any question arises.

5.3 Summary of basic provisions

5.3.1 The following matters will be set out in more detail later in this chapter but the main provisions of the Regulations are as follows:

Workers	
Maximum working week	Average of not more than 48 hours a week
Night workers maximum working day	Average of not more than 8 hours in 24 hours
Daily rest entitlement	11 hours' rest a day
Weekly rest entitlement	1 day off a week or 2 days off in a fortnight
Rest breaks	20 minutes if working for more than 6 hours
Young workers	
Maximum working day	Not more than 8 hours in 24 hours
Maximum working week	Not more than 40 hours a week
Night work	Cannot work between 10pm and 6am
Daily rest entitlement	12 hours in 24 hours
Weekly rest entitlement	48 hours in 7 days
Rest break entitlement	30 minutes if working for more than $4^1/_2$ hours
Holidays	
Minimum Statutory holidays	5.6 weeks
Notice to take holidays	Twice the length of the holiday
Public Holidays	No automatic entitlement

5.4 Rest breaks

5.4.1 The Regulations provide that employers must allow workers to take adequate breaks. The employer should therefore ensure that work is organised in a way that allows the worker to take the necessary breaks.

5.4.2 Rest breaks

5.4.2.1 'Rest breaks' cover lunch, tea breaks and other short breaks during the day. Some employers pay workers during rest breaks although there is no requirement under the Regulations to do so.

5.4.2.2 Workers usually have the right to a 20-minute rest break under the Regulations if they have to work more than 6 hours at one time. Employers, if they wish, can allow workers to take longer breaks under the contract. If longer breaks are permitted, it is best practice to have the workers' entitlement to breaks specified in contracts, handbooks and/or any collective/workforce agreement. There is also an obligation to provide 'adequate rest breaks' if the pattern of work puts the health and safety of the worker at risk. Examples given are where the work is monotonous or the work- rate pre-determined.

5.4.2.3 The break has to be one period of 20 minutes. It should not be split into smaller periods and workers are entitled to spend their rest break away from their workstation.

5.4.2.4 Employers can decide on the timing of the breaks however the break cannot be taken at the very beginning or at the very end of the working day.

5.4.2.5 Importantly, there is no requirement for the worker to ask for a rest break. It is up to the employer to ensure that they provide a period of time to comply with the necessary rest requirements.

5.4.3 Daily rest

Workers also have the right to daily rest. This covers any break between finishing one day's work and starting the next. For most workers the daily rest will be overnight between weekdays. Workers have the right to daily rest of at least 11 hours between working days. Daily rest breaks are not usually paid.

5.4.4 Weekly rest

Workers are also entitled to weekly rest. This is the right to a complete period of 24 hours continuous rest in every working week, or a complete period of 48 hours every fortnight. Weekly rest is in addition to daily rest, i.e. 11 + 24. As with daily rest, weekly rest breaks are not usually paid.

5.4.5 Shift workers

A shift worker is someone whose work schedule or rota is part of 'any method of organising work in shifts whereby workers succeed each other at the same workstations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks'. The most obvious example is a factory worker who works on a production line which runs continuously and who is required to work at different times of the day. Other workers may not strictly speaking be shift workers but still have periods of work split up over the day. For example, cleaning staff may be engaged first thing in the morning to clean an office and then at lunchtime to do a 'tidy up'. These types of workers may be unable to take their entitlement to daily or weekly rest periods between shifts and in that event, they are entitled to take compensatory rest instead.

5.4.6 Compensatory rest

If a worker has to work during a period which would otherwise be a break (whether rest, daily or weekly), then whenever possible, the employer must allow him or her to take an equivalent period of compensatory rest. In some cases, it is not possible for workers to take normal breaks. This can happen where round-the-clock staffing is required or where a worker regularly works in different locations so that it is difficult to establish regular breaks. Compensatory rest is not defined but the official guidance from BIS states it is an equivalent period of rest that is taken as soon as possible at another time, e.g. later on the same or the next working day.

A recent court decision has confirmed that, in relation to rest breaks, compensatory rest must be a break from work and, so far as possible, be for at least 20 minutes (30 minutes in the case of young workers). The Regulations state that in exceptional circumstances where compensatory rest is not possible then the employer shall afford such protection (to the workers' health and safety) as may be appropriate. It is not clear what such protection might be.

5.5 Maximum weekly working time

5.5.1 Employers have a duty to ensure that workers do not work for more than an average of 48 hours in each week. Overtime is included in the maximum number of hours a worker can work.

5.5.2 What is 'working time'?

In summary, 'working time' for the purposes of calculating a worker's weekly average hours includes:

- time when a worker is working at his or her employer's disposal and carrying out work activities or duties;
- periods when a worker is receiving relevant training;
- time during which workers undertake other types of activities which they have agreed can be classified as 'working time';
- some work travel. For example, where a worker is office-based but is asked to travel to an external work event;
- time spent waiting for work related appointments/activities to commence. For example, a worker attends an external seminar which commences an hour later than scheduled. The hour's waiting time is working time; and
- time spent 'on call' if the worker has to spend it at his or her place of work, or even not at work when subject to restrictions or obligations imposed by the employer, in certain circumstances.

5.5.3 Are on call hours working time?

This area has been subject of much debate by the European Commission and it is likely that the law will change to draw a distinction between what is referred to as 'inactive' on call time which will not be regarded as working time and 'active' on call time which will constitute working time. That is likely to mean that on call time when a worker is not at the place of work or is otherwise free to pursue personal activities (including sleep) will not be regarded as working time whereas time spent available at the place of work will be regarded as working time. It should however be noted that there is an authoritative judgement to the effect that time spent by a care worker on call at night in tied accommodation was working time notwithstanding the fact that she was permitted to sleep. That decision seems to be at odds with the European Commission's desire to distinguish between 'active' and 'inactive' on call. Can time spent asleep really be regarded as 'active' time? It has yet to be definitively clarified whether time spent at the place of work but asleep is active or inactive on call. This is a particularly complex and unsettled area and advice should be sought from Scottish Engineering.

5.5.4 The following is not normally treated as 'working time':

- time spent travelling to and from work unless this is actually part of the worker's work activities;
- time spent by trade union representatives attending union meetings; and
- breaks when workers are not working, for example, lunch breaks.

5.5.5 Recent European case law has determined that travel time between home and work does count towards working time for those who are considered as peripatetic, or "mobile", workers, that being workers who do not have a fixed or habitual place of work.

5.5.6 Working time limits do not apply to workers in certain industries, for example, sea transport workers. The limits do not apply to workers who are free to decide their own working pattern or hours of work and whose working time is not determined by their employers, for example, company executives.

5.6 Calculating a worker's average working time

5.6.1 Calculation

The average number of hours worked is calculated using 3 main steps:

Step 1
Identify the 'reference period' over which the average is to be calculated.
This is normally a period of 17 weeks.

Step 2
Identify the number of hours worked during that reference period.
If the worker was off work during the reference period for certain reasons, such as holidays under the Regulations, sick leave, maternity/paternity/adoption and/or parental leave, the period is excluded from the calculation of the total number of hours in the 17-week reference period. Instead, the employer must look at the hours worked in the equivalent period immediately after the reference period. This does not affect the length of the reference period. It is still 17 weeks albeit that different days make up the 17-week period.

Step 3
The total of the working hours is then divided by the number of weeks in the reference period.

Example

A worker normally works 40 hours per week plus 3 hours overtime; his working hours are therefore 43 hours per week. The worker was on holiday for 2 weeks during the 17-week reference period. At the end of the reference period, he worked 40 hours per week plus 4 hours overtime resulting in 44 hours per week. Here is how the calculation would work:

- the reference period is 17 weeks;
- discount the hours in the 2-week holiday period;
- multiply the hours worked in the remaining reference period (15 weeks x 43 hours = 645 hours);
- calculate the working hours worked by the worker in the 2 weeks immediately following the end of the 17-week reference period (44 hours x 2 weeks = 88 hours);
- add the two totals together (88 + 645 = 733 hours); then
- divide the total by the number of weeks in the reference period (733 ÷ 17 = average of 43.11 hours per week).

5.6.2 Different reference periods

5.6.2.1 For certain categories of workers the reference period is extended to 26 weeks. This includes workers who live a long way from their workplace, workers involved in 'security or surveillance activities requiring a permanent presence' and workers carrying out activities involving 'the need for continuity of service or production', for example, workers involved in gas, water or electricity production or dock workers.

5.6.2.2 A collective or workforce agreement can set down a different reference period on the basis that a 17 week reference period is inappropriate 'for objective or technical reasons or reasons concerning the organisation of work'. The agreed reference period is subject to a maximum of 52 weeks. There can also be an agreement in relation to workers engaged in 'night work' (see 5.10 Night working). However, such an agreement does not depend on the reference period being inappropriate.

5.6.2.3 There are different provisions for young workers (see 5.11 Young workers).

5.6.2.4 If it appears that the weekly limit is going to be exceeded, employers must take reasonable steps to reduce the worker's average weekly working hours. The Regulations do not give guidance on what reasonable steps might be. Some steps that employers can take to reduce the amount of working time are as follows:

- limit unnecessary overtime;
- spread overtime evenly amongst workers;
- review resource profile;
- train others where there is a skill shortage;
- reallocate work;
- redeploy staff; and/or
- change working patterns.

5.7 Opt-out agreements

5.7.1 Workers have the choice to opt out of the 48-hour restriction but employers should bear in mind their general obligations under Health and Safety legislation even if workers agree to opt out. If a worker agrees to opt out the agreement must satisfy the following criteria:

- it must be in writing;
- it must notify the worker that he or she has the right to end the agreement by giving 7 days' written notice to the employer. The agreement can provide for a longer period of notice up to a maximum of three months; and
- it must specify whether or not the opt-out agreement applies for a specific period of time. It is possible for the agreement to run indefinitely and no particular period need be specified.

The opt-out agreement must be specific to the worker. It can be a stand-alone document or a clause or section of the worker's contract.

5.7.2 Workers cannot be forced to enter into an opt-out agreement and no worker should be dismissed or unfairly treated for refusing to sign an opt-out agreement.

5.7.3 If a worker has more than one employer, an opt-out agreement will have to be entered into in relation to each of those employers. Employers must also keep a list of all workers who have signed opt-out agreements.

5.8 Overtime

5.8.1 In general, overtime means any work over and above the basic hours set out in a worker's contract. The term 'overtime' relates to both hourly paid staff and salaried staff. An employer cannot insist that a worker does overtime unless the worker's contract makes overtime mandatory. If the contract does not mention overtime, an employer needs a worker's specific agreement to work the additional hours.

5.8.2 If workers are expected to work overtime on a regular basis, their contracts should include details of the overtime arrangements, including:

- the fact that the worker may be required to work overtime;
- whether the overtime is voluntary or compulsory on either party;
- how much notice will be given if overtime is required;
- how overtime is to be authorised; and
- the applicable rate(s) of pay for overtime hours.

5.8.3 There is no statutory legal entitlement to pay for work carried out beyond normal working hours, but most employers do pay hourly paid staff for overtime. Employers frequently pay a premium over and above normal hourly rates of pay for overtime hours, however this is not mandatory and is a matter of agreement between employer and worker. Overtime rates are sometimes covered by an industry wide agreement.

5.8.4 Employers should make it clear when overtime becomes payable. This is usually when hours worked exceed the normal weekly contractual working hours. Some employers pay overtime for hours worked in excess of daily working hours. Again this is a matter of agreement between employer and worker.

5.8.5 Senior and salaried staff are generally subject to an implied contractual duty to work a reasonable amount of overtime without pay or to work the hours required for the proper performance of their duties. It is still, however, good practice to have a statement to this effect in the contract of employment.

5.8.6 There have been a number of cases recently in relation to the calculation of holiday pay and whether any payment, allowance or supplement (paid as a direct reward for tasks the employee is required to do) should be taken into account as normal pay. The general principle is that all overtime, whether compulsory, non-guaranteed or voluntary (where voluntary overtime has occurred regularly and/or on a recurring basis over such a period of time to be considered "normal"), should be taken into account for the purpose of calculating the worker's basic 4 week leave entitlement (referred to as Euroleave) under the Working Time Directive. This is however potentially not the case in respect of the additional 1.6 weeks under the Domestic Working Time Regulations. The law in this area is extremely complex and therefore advice should be sought from Scottish Engineering.

5.9 Time off in lieu

5.9.1 An employer can offer time off in lieu (TOIL) instead of paying workers for overtime. TOIL should not be confused with Compensatory Rest (see 5.4.6 Compensatory rest). TOIL cannot be used as Compensatory Rest. Workers have to agree to TOIL and employers can decide when this time off has to be taken. Arrangements for TOIL should be managed carefully to avoid workers accumulating significant amounts of TOIL and attempting to take it at one time.

5.9.2 It is best practice for employers to specify TOIL arrangements either in contracts of employment or employee handbooks. It is sensible to set out the following:

- how the TOIL accrues;
- the maximum amount of TOIL that can be accrued during a particular time period;
- when TOIL must be taken; and
- whether the employee is allowed to carry forward accrued TOIL.

Specific arrangements may vary from employer to employer depending on the needs of the business.

5.10 Night working

Workers who fall into the category of 'night workers' benefit from additional protection under the Regulations.

5.10.1 What is classed as 'night time'?

'Night' usually means the period between 11pm and 6am. Workers can agree to a different night time period as long as it is at least 7 hours long and includes time between midnight and 5am. Night time cannot begin before 10pm.

5.10.2 Who is a 'night worker'?

A 'night worker' is someone who regularly works for at least 3 hours during night time:

- on the majority of the days that he or she works;
- sufficiently often that he or she can be said to work those hours on a regular basis; or
- on a specific proportion of the days he or she works which have been set out in a collective or workforce agreement.

5.10.3 Night working hours

5.10.3.1 A night worker's normal working hours must not be more than an average of 8 hours in a 24-hour period. This average is normally calculated over a 17-week reference period but this may be modified by a collective or workforce agreement (see 5.6.2 Different reference periods). Accordingly it is not unlawful for a night worker to work more than 8 hours in a shift as long as the average of the reference period does not exceed 8 hours.

5.10.3.2 Employers must also make sure that no night worker whose work involves 'special hazards or heavy physical or mental strain' works more than 8 hours in any 24- hour period during which he or she undertakes night work. This is an absolute limit and not subject to averaging over a reference period. Work will be considered as involving special hazards or heavy physical or mental strain if there is a collective or workforce agreement identifying it as falling into this category and the agreement is one that takes account of the specific effects and hazards of night work. Alternatively, the work may have been recognised as involving a significant risk to the health and safety of the workers in a risk assessment carried out by the employer.

5.10.3.3 This does not of course mean that no shift can exceed 8 hours. The following examples show the way in which a night worker can work 12-hour shifts in each week.

5.10.3.4 Example

A night worker normally works 4 12-hour shifts each week. The total number of normal hours of work for the 17-week reference period is:

Step 1
Calculate the number of hours the worker has worked – 4 x 12 x 17 = 816 hours.

Step 2
Work out the number of days the worker could have been asked to work – 17 x 7 = 119 days in the reference period.

Step 3
Minus 1 day per week for weekly rest – 119 – 17 = 102 work days in the reference period.

Step 4
Calculate the weekly average by dividing the hours worked by the number of days – 816 ÷ 102 = 8 hours per day.

In this example, the worker works an average of 48 hours per week, which is within the working time limits.

Time off in lieu

5.10.4 Health assessments

5.10.4.1 All night workers must be given the opportunity to have a free and confidential health assessment before starting night work and at regular intervals thereafter. Previous BIS guidance on this point suggested that a questionnaire prepared by a qualified occupational health practitioner and filled out by the worker would fulfil this requirement provided the worker does not have any pre-existing medical condition.

5.10.4.2 If a night worker develops health problems as a result of night work there is provision in the Regulations for transferring the worker to daytime work if suitable day work is available.

5.10.4.3 Employers must make sure that they keep to night work limits and they must also keep records in relation to every night worker for 2 years to show compliance with night working rules.

5.10.4.4 There are different night working provisions for young workers (see 5.11 Young workers).

5.11 Young workers

5.11.1 There are separate provisions for young workers in the Regulations. A young worker is someone over the school leaving age but under the age of 18.

5.11.2 Maximum working hours

The working limit for young workers is 8 hours a day and 40 hours a week. These limits are absolute and are not calculated by average number of hours worked over a reference period. Young workers cannot enter into opt-out agreements.

The limits relating to young workers can be altered if:

- no adult worker is available to carry out the work;
- the employer needs the young worker to carry out work that is necessary either to maintain continuity of service or production, or to respond to a surge in demand for a service or product; or
- carrying out the work will not have an adverse impact on the young worker's education or training.

If all of these conditions are met young workers are subject to the 11 hour daily and 48-hour weekly limit that applies to adult workers.

5.11.3 Night work

5.11.3.1 Young workers must not work between 10pm and 6am, although the contract of employment can vary this to a period between 11pm and 7am. Where a young worker is employed in any of the following industries:

- agriculture;
- retail trading;
- postal or newspaper deliveries;
- a catering business;
- a hotel, public house, restaurant, bar or similar establishment; or
- a bakery.

and the circumstances listed in section 5.11.2 apply, then the young worker must not work between midnight and 4am.

5.11.4 Rest breaks

5.11.4.1 Young workers must be given 48 hours' uninterrupted rest in every 7 day period and at least 12 hours' consecutive rest during each 24-hour period.

5.11.4.2 If a young worker works more than 41/2 hours a day, he or she is entitled to a rest break of at least 30 minutes. The comments in 5.4 Rest breaks also apply to the timing of young workers' rest breaks. The 30-minute break cannot be split into smaller periods.

5.12 Drivers

There are special rules regulating drivers' working hours and rest periods. There are rules depending on where the driving takes place and what type of vehicle is used. There is detailed guidance on this area on the Department for Transport 'DVSA' (Driver and Vehicle Standards Agency) website at gov.uk/government/organisations/driver-and-vehicle-standards-agency

Mobile Road Transport workers (such as HGV drivers) who are covered by EU Drivers' hours rules are only subject to provisions in the Working Time Regulations covering paid holiday and health checks for night workers. Full guidance on Working Time Regulations for mobile workers can be found at gov.uk/government/publications/working-time-regulations-for-mobile-workers

The Working Time Regulations for Mobile Workers limit the amount of time that can be worked and no opt-out is available. They do not replace the EC drivers' hours rules.

A maximum of 48 hours may be worked on average each week over a specified reference period. In any single week, mobile workers can undertake a maximum of 60 hours provided the 48 hour average is maintained over the period. Night work is limited to 10 hours a night unless there is workforce agreement to work longer.

Statutory annual leave and any sick leave and/or maternity/ paternity leave counts as working time.

30 minute breaks must be provided when working between 6 and 9 hours extending to 45 minutes beyond 9 hours. All breaks must be for a minimum of 15 minutes. For what counts as work, see the DVSA guidelines at the above web address.

Employers are required to keep a record of drivers' working time. This can be through the use of tachographs or another type of accurate record.

5.13 Holidays

5.13.1 The Regulations also govern workers' minimum entitlement to paid holidays. Many employers give their workers contractual holidays over and above the statutory minimum set out in the Regulations. The Government commenced consultation in May 2011 in relation to holidays, including issues surrounding the interaction with sickness absence. It is currently unclear when any proposed changes will be implemented. If you are in any doubt as to the applicable rules in relation to paid annual leave you should seek advice from Scottish Engineering.

5.13.2 Minimum UK statutory entitlement

5.13.2.1 From 1st April 2009, workers are entitled to a minimum of 5.6 weeks' paid holiday a year though confusingly the original Directive still refers to 4 weeks. This means that a worker who works 5 days a week would have a minimum annual holiday entitlement of 28 days a year (5.6 x 5 days).

5.13.2.2 The statutory minimum entitlement includes bank and public holidays. Employers are not obliged to give workers paid time off for public or bank holidays.

5.13.2.3 Workers begin to accrue holiday as soon as employment or engagement begins. New workers accrue 1/12th of their entitlement for the first year of employment or engagement at the beginning of each month. New workers have no right to take holidays in excess of the amount of holidays accrued at any given point in the first year of employment or engagement.

5.13.2.4 Workers are entitled to written details of their paid holiday entitlement. These details should be included in the contact of employment.

5.13.3 Part time and part year workers

In November 2023 the UK Government announced the introduction of new legislation aimed at simplifying what have become complex annual leave and holiday pay rules in relation to irregular hours and part-year workers. This change came in response to a 2022 UK Supreme Court decision which resulted in a prohibition on the calculation of holiday pay using the 'percentage method' of adding 12.07% to earnings after the Supreme Court determined that employers required to pay all part-year workers at least 5.6 weeks' holiday pay (without pro-rating this to the time spent working) based on its assessment of the provisions of the current form of the Regulations

Following widespread criticism and a 2023 government consultation, it was announced that new Regulations would be brought into effect to implement proposed reforms. The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (the 'Regulations') came into force on 1 January 2024 and apply to holiday years beginning after 1 April 2024

The new Regulations include provisions which will correct the issue created by the Supreme Court ruling from 2022. For holiday years beginning after 1 April 2024 irregular hours and part-year workers will now be entitled to accrue 5.6 weeks holiday each year, from the commencement of employment, at the rate of 12.07% of the number of hours they have worked in the preceding pay period. In short, this means holiday entitlement can be reduced pro-rata to reflect the weeks per year worked by the worker, subject to a maximum of 28 days per year, ensuring holiday pay and entitlement is proportionate to the time that irregular hours and part-time workers spend working.

5.13.3.1 Leave year

5.13.3.2 Employers can decide when their workers' leave year will begin and different sets of workers can have different leave years. It is important for employers to stipulate the leave year in contracts of employment.

5.13.3.3 In the absence of a leave year set by the employer, the leave year for workers whose employment began after 1st October 1998 runs from the date on which they started employment and each subsequent leave year starts on the anniversary of that date. For workers whose employment began before 1st October 1998, the leave year begins on 1st October and ends on 30th September the following year.

5.13.4 Carrying forward holiday entitlement

There is no express right within the Regulations to carry forward unused holiday entitlement into the next leave year. Although employers may voluntarily agree to this, they are not generally obliged to. Workers must take at least four weeks of their statutory holiday entitlement in the relevant leave year. Only holiday in excess of 4 weeks up to 5.6 weeks can be carried over with the employer's agreement or if provided for in a relevant agreement. However, as a consequence of case law and legislative developments there are special rules that now apply to carrying over holidays where an employee through no fault of their own could not take his or her holiday entitlement under the Regulations in a holiday year, through illness (see 4.7.6 Entitlement to accrued but unused holiday pay and 5.13.8 Holiday entitlement and sick leave) or a period of maternity (see paragraph 7.2.7.5.5), adoption (see paragraph 7.5.7.3) or shared parental leave (see paragraph 7.6.4.3). This is a complex area and employers should take advice if in doubt

5.13.5 Payment in lieu of holidays

Ordinarily, if a worker does not take his or her holiday entitlement in the relevant leave year he or she is not entitled to any payment in lieu of this accrued but untaken leave. However, if the worker is sick and prevented from taking holiday, any carried over holiday may be paid in lieu on termination of employment.

Employers are not entitled to insist that a worker accepts payment of lieu of his or her statutory holiday entitlement, unless the employment comes to an end (see paragraph 5.13.7).

5.13.6 Holiday entitlement for workers on other leave

Workers on maternity, parental, paternity or adoption leave continue to accrue entitlement to paid statutory holidays.

5.13.7 Entitlement to holiday pay on leaving employment

If the worker has not taken all holidays that have accrued at the date of the employment contract coming to an end he or she is entitled to pay in lieu of the accrued but untaken holidays. This rule applies even if the worker is being dismissed for gross misconduct. The reason for and manner of dismissal do not affect the right to holiday pay. If the worker has taken more holidays than have accrued at the date of termination of employment, the employer is entitled to re-coup the equivalent pay for the excess days taken but only if there is a relevant agreement in place to that effect.

5.13.8 Holiday entitlement and sick leave

5.13.8.1 This is a particularly unstable and difficult area currently. There has been a great deal of litigation over the last few years in this area. Employers who provide for holidays in excess of the 5.6 week minimum need not follow the rules set out below in relation to those additional holidays but instead are free to agree different rules with workers. The legislation in this area only applies to the 20 days statutory entitlement under the Working Time Directive, however for administration simplicity and to avoid potential litigation, many employers chose to apply the same rules to all 5.6 weeks leave (and any further enhanced company holiday entitlement).

If an employer wishes to apply different rules to holidays over and above the statutory minimum set out in the Regulations it is sensible to state that in the contract of employment and specify the rules that apply to those holidays. In relation to the minimum holidays set out in the Regulations some issues have been clarified whilst others remain unresolved or uncertain.

The following basic principles have been established in relation to the minimum holiday entitlement under the Regulations:

- paid holidays under the Regulations continue to accrue during any period of ill- health absence irrespective of the length of that absence,
- workers can request to take holidays under the Regulations during ill-health absence thereby triggering the payment of holiday pay rather than the applicable sick pay under the contract of employment. This does not apply to contractual holidays over and above the minimum level set by the Regulations;
- employers can refuse worker requests to take holiday whilst on ill-health absence;

- if such requests are refused then the worker must be allowed to take the holidays when he or she returns to work or be paid in lieu of those holidays if the employment relationship ends;
- if a worker becomes ill on the eve of or during a planned holiday under the Regulations that worker is entitled to suspend or defer the holiday, or part of it, and take the holidays missed due to the illness at another time in the holiday year or, if that is not feasible, be allowed to carry it over into the following holiday year. This does not apply to contractual holidays over and above the minimum level set by the Regulations.
- payment in lieu of accrued but untaken holidays under the Regulations can only be made at termination of employment. Employers cannot pay in lieu of holidays under the Regulations untaken at the holiday year end because of ill health absence; and
- if there is insufficient time for an worker returning from sick leave to take all remaining accrued holidays under the Regulations before the holiday year end, the employer must allow those days to be carried into the following holiday year '(but then must be taken within 18 months of the end of the holiday year in which the entitlement originally arose, even if they remain off sick)'.

5.13.8.2 The fundamental principle is that workers must have a reasonable opportunity to exercise the right to paid holidays under the Regulations and paid holiday cannot be lost or diminished because a worker has not been able to exercise the right to take holidays as a result of ill-health absence.

5.13.9 Notice of holidays

5.13.9.1 A worker must give his or her employer notice of intention to take holiday. The notice should be at least twice as long as the amount of the holiday leave he or she intends to take. The employer should reply to the request within the same length of time as the intended holiday. If a worker intends to take a week's holiday he or she should give the employer at least 2 weeks' notice and the employer should reply within a week. In practice however many employers are prepared to accept less notice.

5.13.9.2 Employers are entitled to refuse a worker's request for holiday even if the worker has given the correct notice. The employer's refusal must be reasonable in all the circumstances.

5.13.9.3 Employers can require workers to take holidays at a particular time or during a particular period provided the worker is given the required notice. For example, employers may close their business for one week at Christmas every year and workers are required to take one week of holiday entitlement in that time. Employers can also set a limit on the amount of leave that can be taken at the one time. In deciding the timing of workers' holidays the employer must act reasonably.

5.13.10 Holiday pay

Workers are entitled to normal weekly pay during statutory holiday entitlement. For each week of leave that a worker accrues, he or she is entitled to a week's pay. A week's pay for the purposes of the Regulations is normally calculated as follows:

- for workers on fixed pay and hours the amount due for a week's work; and
- for shift workers the average weekly hours of work in the previous 52 weeks at the average hourly rate. Employers are now going to have to consider, following recent case law, what other elements of pay (i.e. commission, overtime, on-call payments etc) require to be taken into account for the purposes of calculating a worker's holiday pay entitlement. For example, it has been held that, under the Working Time Directive, that:
- overtime, whether compulsory, non-guaranteed or voluntary (where voluntary overtime has occurred regularly and/or on a recurring basis over such a period of time to be considered "normal"); and
- bonuses, commission and allowances which are intrinsically linked to the performance of the tasks that the worker is required to carry out under his contract of employment should all be included when calculating pay in respect of statutory holiday periods, if non-payment would be a disincentive to the taking of holiday. This is a complex and developing area of law with ongoing appeals challenging this position. Specific advice should be sought from Scottish Engineering if any question arises.

5.13.11 Rolled up holiday pay

The term 'rolled-up' holiday pay refers to the practice of paying an employee's holiday pay throughout the year on top of their basic pay as opposed to when holiday is taken.

This approach was deemed unlawful by the European Court of Justice in 2006, on the basis that it could discourage workers from taking time off, creating a health and safety risk.

The new Regulations make provision for rolled up holiday pay to be paid in limited circumstances, to workers that meet the new statutory definition of either an irregular hours or part-year worker only.

Under the new rules, holiday pay is calculated at 12.07% of all pay for work done and the extra 12.07% is paid at the same time as pay for the work done (and is itemised separately on the payslip). These changes can be applied to holiday years starting from 1 April 2024. This means that if your holiday year aligns with the calendar year, the earliest you can implement this change is 1 January 2025.

This change only allows holiday pay to be rolled up and does not mean that an individual can be prevented from taking time off or required to work 52 weeks of the year. There remains an obligation on employers to ensure that their staff have at least 5.6 weeks' holiday in each leave year, the only difference now is that there is no specific holiday payment made to them when they take that leave.

5.13.12 Contractual holiday entitlement

An employer can decide to give workers a more generous holiday entitlement than the statutory minimum in the Regulations. Those holidays will not be subject to the rules in the Regulations that relate to the taking of or payment for holidays.

Employers should ensure that the contract of employment sets out the rules that apply to those holidays that are not covered by the Regulations.

5.13.13 Protection

5.13.13.1 It is an automatically unfair dismissal if an employee is dismissed for claiming his or her annual holiday right under the Regulations.

5.13.13.2 Workers can also claim for non-payment or under-payment of holiday pay either as a claim for a breach of the Regulations or as a claim for unlawful deduction from wages. Such claims are currently subject to a two-year limitation period (see paragraph 3.6.8.2 for further details).

5.14 Keeping records

5.14.1 Employers do not currently need to keep records of the hours worked by workers who have entered into opt-out agreements although they must keep a list of the workers who have opted out. However, employer's should be aware that recent case law developments may alter recording requirements in the near future.

5.15 Offences and remedies

5.15.1 It is a criminal offence to fail to comply with certain aspects of the Regulations. The obligations in relation to weekly working time limits, night work limits and health assessments for night work are enforced by various authorities including the Health and Safety Executive and local authorities.

5.15.2 Workers also have certain separate rights to bring claims against employers who refuse to allow them to exercise their rights under the Regulations. Such claims are lodged at the Employment Tribunal.

5.15.3 If a worker is dismissed for asserting his or her rights under the Regulations, the dismissal is automatically unfair. Workers also have a statutory right not to suffer any detriment for asserting rights under the Regulations.

Chapter 6

Equal opportunities

6.0 Equal opportunities

6.1 Introduction

6.1.1 Equal opportunities is a subject which filters through all aspects of working relationships from recruitment, appointment, treatment at work, terms and conditions of work, access to benefits as well as termination of employment or engagement.

6.1.2 October 2010 saw the introduction of the Equality Act 2010. Discrimination law in the UK had developed over more than 40 years and had become complex and confusing. The Equality Act harmonises discrimination law in the UK and most of the UK law in this area can now be found in one place.

6.1.3 There are two key concepts which underpin equal opportunities in the Equality Act which are:

- there are certain 'protected characteristics' (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation); and
- it is generally unlawful to discriminate against (either directly or indirectly), harass or victimise a person at work or in certain circumstances linked to work because of a protected characteristic.

6.1.4 This chapter sets out the different types of discriminatory behaviour which employers must avoid, potential defences to discrimination claims, codes of practice which must be adhered to and practical steps to promote equality in the workplace. See 3.5 Part-time workers for information on less favourable treatment of part time workers and 2.7 Fixed term contracts for those on fixed term contracts.

6.2 Types of discriminatory act

6.2.1 Discrimination falls into the following five broad categories:

- direct discrimination;
- indirect discrimination;
- harassment;
- victimisation; and
- in cases involving disability there are two additional types of discriminatory act, which are:
- the failure to make reasonable adjustments; and
- discrimination arising from disability.

6.2.2 In general terms, it is unlawful for an employer to discriminate against a person because of a protected characteristic in any of the following ways:

- in determining who to employ or engage;
- the terms and conditions of employment or engagement offered;
- opportunities for promotion, transfer, training or receiving any other benefit, facility or service;
- dismissal or termination of engagement;
- subjecting a person to any other detriment because of a protected characteristic;
- verbal or physical harassment;
- victimisation;
- selecting employees for redundancy; or
- subjecting a former employee or worker to any form of discrimination if it arises out of and is closely connected to the relationship which used to exist between them i.e. by way of provision of a discriminatory reference for example.

6.3 Who is protected?

All of the following types of employees and workers are protected against discrimination:

- employees;
- apprentices and trainees;
- self employed contractors, casual workers and home workers, all of whom are not employed but do have a contract to carry out services personally for the employer;
- sub contractors;
- agency staff;
- those undertaking practical work experience or vocational training;
- applicants for any of the types of work detailed above;
- former employees or workers provided the discrimination arises out of and is closely connected with their employment or work for the employer;
- People who do not have a 'protected characteristic' but are discriminated against because they are perceived to have a protected characteristic (in direct discrimination and harassment cases only); and
- People who do not have a 'protected characteristic' but are discriminated against because they are associated with someone who has a protected characteristic (in direct discrimination and harassment cases only).

Use of the words 'employee' and 'worker' in this chapter include reference to all of the above.

A protected "person" also includes legal personalities, such as limited companies. Clearly such entities do not have protected characteristics themselves, but could be protected from discrimination where they are associated with someone or some group who has a protected characteristic (again in direct discrimination and harassment cases only).

6.4 The protected characteristics

The protected characteristics listed below are the same as those protected by previous discrimination legislation in Great Britain.

6.4.1 Age

6.4.1.1 Age is defined by reference to a person's age group. An age group can mean people of the same age or people of a range of ages, for example, people under 30 or people in their mid-50s.

6.4.1.2 It should be remembered that the age discrimination rules seek to protect people of all ages, not only the elderly or ageing population as is commonly reported in the press. For example, in a transfer situation, protecting older employees, but not younger employees, in relation to pension rights, was less favourable treatment.

6.4.2 Gender Reassignment

6.4.2.1 People who are proposing to undergo, are undergoing, or have undergone the process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

6.4.2.2 In order to be protected, the Equality Act requires that a person should have at least planned to undergo gender reassignment. There is no requirement that the person be undergoing any medical process or be under medical supervision. Further, if someone is driven by his or her gender identity to cross-dress as part of the process of reassigning sex, he or she would have protection under the Act.

6.4.2.3 Recent case law has illustrated that this protected characteristic can extend to employees who identify as being "gender fluid" or "non-binary" though there has yet to be confirmation of this point which can be considered binding..

6.4.2.4 It should be remembered that the Gender Recognition Act 2004 still applies and provides that where a person holds a Gender Recognition Certificate, he or she must be treated according to his or her acquired gender.

In a recent case an employer was ordered to pay £25,000 in compensation to an employee who had transitioned in respect of discriminatory conduct, including "deadnaming" (i.e. using the name of the individual pre-transition). The judgment serves as a reminder to employers of the crucial role that a strong equality, diversity and inclusion programme plays in an organisation in order to remain effective in protecting all members of the workforce and that policies, processes and training must be regularly updated and relevant.

6.4.3 Marriage and Civil Partnership

6.4.3.1 The Equality Act protects people who are married or in a civil partnership against discrimination. People who are unmarried, single, intend to marry or form a civil partnership, who have divorced or had their civil partnership dissolved are not protected.

6.4.3.2 Case law has recently confirmed that the scope of this protection is narrow. It is not a protection from being treated badly because an individual is married to a particular person, but rather that an unmarried person would have been treated differently.

Claims relying on this protected characteristic are rare, albeit to happen from time to time.

6.4.4 Pregnancy and Maternity

6.4.4.1 It is unlawful to subject a woman to unfavourable treatment, i.e. direct discrimination, harassment or victimisation, during the 'protected period' (defined below) because of pregnancy and/or maternity. Further, a woman cannot be treated unfavourably because:

- of a pregnancy related illness (including any associated sickness absence);
- she is on compulsory maternity leave;
- she is exercising, has exercised, is seeking or has sought to exercise her right to maternity leave.

6.4.4.2 As of 6 April 2024, tThe protected period commences from the beginning of the pregnancy and ends 18 months after the birth of the child.

The protected characteristics

6.4.4.3 Unfavourable treatment will only be unlawful if an employer is aware that the woman is pregnant. An employer must know or suspect that she is pregnant, whether this is by formal notification or through the 'grapevine'.

6.4.4.4 A 'maternity equality clause' is automatically implied into a woman's employment contract. This clause denotes entitlement to equality during maternity leave, allowing an employee on maternity leave to insist on equality in, for example, the payment of a bonus. However, it has been held not to be discrimination to withhold childcare vouchers during maternity leave. For further detail on female employees' rights and entitlements during maternity leave generally see 7.2.7 Maternity leave.

6.4.4.5 It should be remembered that there are separate legal rights included in the Employment Rights Act 1996 and various maternity and paternity leave rules in addition to those in the Equality Act. For example, handling redundancies and offers of suitable alternative employment for employees on maternity leave, dealing with requests for flexible working, the rights of women on return to work after maternity leave. For further details see 7.0 Maternity, paternity and other types of leave

6.4.5 Race

6.4.5.1 The meaning of race encompasses colour, nationality and ethnic or national origin. A person has protection under the Equality Act if he or she falls within a particular racial group. A racial group is a group of people who have or share colour, nationality or ethnic or national origins. Caste discrimination may be covered under race in certain circumstances. Caste will become a protected characteristic under the Equality Act.

6.4.5.2 Nationality is a specific legal relationship between a person and a state through birth or naturalisation. Ethnic origins relate to people belonging to an 'ethnic group' which regards itself and is regarded by others as a distinct and separate community. There are two essential characteristics which an ethnic group must have. Firstly, a long shared history and cultural tradition of its own. Secondly, an ethnic group may have one or more of the following characteristics:

- a common language;
- a common literature;
- common religion;
- common geographical origin;
- a minority or an oppressed group.

Examples of ethnic groups include Sikhs, Jews and Romany gypsies.

6.4.6 Religion or Belief

Protection is afforded to people of any religion and those who hold any religious or philosophical belief. For example, dismissing an employee because they are Christian would be less favourable treatment because of their religion (and very likely to be contrary to the Equality Act 2010, unless, for example, being of a different religion was an important genuine occupational requirement for the role), but dismissing a Christian employee for improperly trying to convert the faith of customers would not likely breach the Equality Act 2010. The protection also extends to those with a lack of religion or belief.

Recent case law illustrated that a "no beard" policy was contrary to the Equality Act 2010 as it was ruled to be indirectly discriminatory to a Sikh employee who could not have any hair on his body cut in accordance with his religious beliefs. This case was very fact specific, and there may be circumstances where employers may have objective justifications for imposing such a policy (for example on health and safety grounds).

6.4.6.1 To fall within the scope of the Equality Act, a religion must have a clear structure and belief system such as the more commonly recognised religions in the UK, for example, Buddhism, Christianity, Islam and Judaism.

6.4.6.2 'Belief' means any religious or philosophical belief and includes lack of belief. Examples of philosophical beliefs include humanism and atheism. A person is only protected under the Equality Act in relation to this characteristic where the philosophical belief affects how that person lives their life or perceives the world.

For a philosophical belief to be protected, it must:

- be genuinely held;
- be a belief and not an opinion or view point;
- relate to weighty or substantial aspect of human life and behaviour;
- have a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

6.4.6.3 Case law has also confirmed that gender critical beliefs – the belief that sex is immutable – is capable of being a qualifying philosophical belief and therefore protected under the Equality Act. However, the Employment Appeal Tribunal was keen to stress that this does not mean that those who hold such a belief can discriminate against those who identity as transgender. The Employment Appeal Tribunal has recently found that an employee, who held gender critical beliefs and refused to use service user's preferred pronouns as a result, was not discriminated against and/or unfairly dismissed when he was summarily dismissed as a result of this refusal.

The Equality Act protects those who have firm beliefs on either side of the debate. Both have a right to hold and express those beliefs - provided they do so in a way that does not discriminate or harass their colleagues or breach their employers' legitimate internal policies.

6.4.6.4 Other qualifying beliefs considered in case law include ethical veganism and a belief in Scottish independence. This area of the law is complex and rapidly developing. Advice should be sought from Scottish Engineering.

6.4.7 Sex

Sex is a protected characteristic and refers to a male or female of any age. Sex does not include gender reassignment or sexual orientation.

Throughout 2022 there were calls for menopause to be made a protected characteristic under the Equality Act 2010, however this has been rejected by Government.

Notwithstanding this, workers going through the menopause can be (and have been) protected by the Equality Act, by relying on the protected characteristics of age, sex and/or disability. For example, in 2022 a female employee was successful in a harassment complaint against her employer where she had been subjected to comments and taunts about being 'in her menopause'.

6.4.8 Sexual Orientation

Sexual orientation means a person's sexual orientation towards:

- persons of the same sex (a gay man or a lesbian);
- persons of the opposite sex (heterosexual);
- persons of either sex (bi-sexual).

Sexual orientation relates to how people feel as well as their actions and includes discrimination connected with manifestations of that sexual orientation, for example, someone's appearance, the places they visit or the people with whom they associate.

6.4.9 Disability

6.4.9.1 Definition of a Disabled Person

6.4.9.1.1 A person has the protected characteristic of disability if he or she has a physical or mental impairment which has a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities. 'Long term' means that the impairment has lasted or is likely to last for at least 12 months, likely meaning it could well happen and does not mean on the balance of probabilities. 'Substantial' means more than minor or trivial.

'Day-to-day' activities are anything that is not abnormal or unusual, with a focus on the individual; for example, it was held that being able to lift up to 25kg in a warehouse was a day-to-day activity for a particular employee in a case, given that employee's ordinary activities.

6.4.9.1.2 In determining whether someone has a disability, any medical treatment received by the individual which lessens or masks the impairment should normally be disregarded.

6.4.9.1.3 Particular rules apply to people with medical conditions relating to sight. In addition, cancer, HIV and multiple sclerosis are all deemed to be disabilities from the point of diagnosis. Progressive conditions and conditions with fluctuating or recurring effects can amount to disabilities in certain circumstances. This means that certain underlying medical conditions where symptoms are not always present can be sufficient to qualify as a disability. Case law has also determined that the symptoms of obesity or long Covid may possibly be considered as falling within the definition of disability for discrimination purposes.

6.4.9.2 Discrimination arising from disability

6.4.9.2.1 There is a separate strand of discrimination that applies only to people with the protected characteristic of disability. This is discrimination 'arising from' disability which occurs where:

- An employer treats a disabled person unfavourably and this treatment is because of something arising in consequence of the disabled person's disability; and
- The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, employers have a defence if they did not know, and could not reasonably be expected to know that the person had the disability at the time the act complained of took place.

6.4.9.2.2 This strand of discrimination is different from direct discrimination. The question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability, not merely 'because of' the disability. There has to be some connection between the 'something' and the individual's disability. For example, if an employer dismisses a worker because he has had a lengthy sickness absence and the employer is aware that most of this absence is disability-related, the decision to dismiss is not because of the worker's disability itself, but rather, it is because of the absence which has arisen in consequence of the disability. The dismissal is therefore unfavourable treatment arising from disability. This is discrimination unless the employer can objectively justify the decision to dismiss.

In a recent case, a disabled employee who found it "impossible" to use the employer's software, was moved to a paper based role as an alternative until the employer had resolved the issues. The Court held that even if moving the employee to a paper role as an *interim measure* was deemed unfavourable, the measure ultimately allowed the employee to remain employed on the same pay grade. Accordingly, the Court held that the employer's actions were reasonable and proportionate in the circumstances.

6.4.9.2.3 The 'consequences' of the disability includes anything which is a result, effect or outcome of a disabled person's disability.

6.4.9.3 Indirect disability discrimination

The Equality Act protects disabled people against indirect discrimination. For an explanation of what amounts to indirect discrimination see 6.6 Indirect discrimination. This protection allows disabled people to challenge formal policies and practices that place them at a disadvantage compared with non-disabled people. For example, a disabled person could challenge an employer's absence policy which states that any employee who has a specified number of absences is disciplined regardless of the reason for the absence. Such a policy is likely to have a disproportionate impact on people with disabilities because they are more likely to have higher absence levels. An employer will have to satisfy an employment tribunal that the policy was justified in the circumstances. For further detail of the 'justification' defence see 6.6.4 Justification defence. However, comparators are required for indirect disability discrimination claims and, in the context of disability, a person will need to identify an appropriate comparator with the same disability, not any disability. Indirect disability discrimination claims will involve complex legal issues and specific advice should be sought if a person claims indirect disability discrimination.

6.4.9.4 In order to rely on the defence that the employer did not know or could not reasonably have been expected to know that the disabled person had a disability, an employer must be able to show that it had done all it could reasonably have done to find out if the worker had a disability. What is reasonable will depend on the circumstances. Employers should not refrain from finding out more about an employee's medical condition so that they can argue that they had no knowledge of the disability. A tribunal will look at all the facts and circumstances and if it decides that the employer decided to look the other way, that employer will be deemed to have knowledge of the disability.

6.4.10 Duty to make reasonable adjustments

6.4.10.1 The duty to make reasonable adjustments requires employers to take positive steps to ensure that disabled people can have access to and progress in employment. Failure to make reasonable adjustments amounts to disability discrimination. The duty comprises of three elements. Employers are required to take reasonable steps to:

- avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts the disabled person at a substantial disadvantage compared to those who are not disabled;
- remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled;
- provide an auxiliary aid where a disabled person would, but for the provision of that aid, be at a substantial disadvantage compared to those who are not disabled.

6.4.10.2 Where the adjustment relates to the provision of information, employers should ensure the information is provided in an accessible format, for example, in large print or in audio format.

6.4.10.3 Factors to be considered by employers when deciding whether it is reasonable to make adjustments include:

- the extent to which it is practicable for adjustments to be made;
- the financial and other costs of doing so; and
- the nature of the organisation's activities and its size.

6.4.10.4 An employer's duty to make reasonable adjustments for disability begins when it could take steps to avoid the relevant disadvantage. However, an employer only has a duty to make an adjustment if it knows or could reasonably be expected to know that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. This disadvantage must bear some relation to the disability. It has now been established that there need not be a "good or real" prospect of a proposed adjustment removing a disabled employee's disadvantage for that adjustment to be reasonable. An adjustment might be reasonable, and therefore required, where there is simply "a prospect" that it will succeed.

6.4.10.5 It is not open to employers to justify a failure to comply with a duty to make reasonable adjustments. However, employers will only breach the duty if the adjustment in question is one which was reasonable for the employer to make. Some examples of reasonable adjustments include:

- making adjustments to premises such as structural or physical changes to doorways and/or ramps to allow wheelchair use;
- providing information in accessible format such as large text documents;
- allocating some of the disabled person's duties to another worker;
- transferring a disabled worker to fill an existing vacancy which could involve re-training or other adjustments to allow the disabled employee to occupy the post;
- altering a disabled worker's hours of work;
- acquiring or modifying equipment;
- engaging a support worker to assist the disabled worker or providing additional supervision or other support.

A recent case held that the duty to make reasonable adjustments extended to pay protection, when an alternative role was taken up, based on the particular facts of that case. While such "enhanced" pay for a disabled employee is rarely required, the case was very much fact-specific; other cases may require that some adjustment to pay may arise under a package of reasonable adjustments that an employer may have to make.

6.4.10.6 Schedule 8 of the Equality Act sets out particular circumstances in which the duty to make reasonable adjustments applies by clarifying who an 'interested' disabled person is in relation to specific categories of 'relevant matters'.

6.4.10.7 The Health and Safety Executive has published guidance on supporting disabled people at work, which can be accessed here:

https://www.hse.gov.uk/disability/

6.4.10.8 ACAS has released guidance on reasonable adjustments for mental health at work, available here:

https://www.acas.org.uk/reasonable-adjustments-for-mental-health

6.4.11 Pre-employment Health/Disability Enquiries

Except in limited circumstances, it is unlawful for employers to ask any job applicant about his or her disability or health until the applicant has been offered a job or included in a pool of successful candidates to be offered a job when a position becomes available. For further detail see 1.0 Recruitment.

6.4.12 Restrictions on protection under The Equality Act

6.4.12.1 For some of the protected characteristics, the Equality Act does not protect individuals against all types of discriminatory conduct. It should be noted that:

- in relation to the protected characteristics of marriage and civil partnership, there is no protection from direct discrimination by association or perception or harassment. However, harassment related to civil partnership would amount to harassment related to sexual orientation;
- for pregnancy and maternity, there is no express protection from direct discrimination by association, perception, indirect discrimination or harassment. However, in these situations, a worker is likely to be protected under the sex discrimination provisions.

6.4.13 Post - Employment Discrimination

There is also protection from discrimination and harassment post-employment. The Equality Act provides that a person must not discriminate against or harass another person if it arises out of and is closely connected to a relationship which used to exist between them and is conduct which if it occurred during the relationship would have constituted discrimination or harassment and therefore contravened the provisions of the Equality Act.

The duty to make reasonable adjustments continues to apply in disciplinary and dismissal processes, however recent case law has confirmed that where there is a failure to make reasonable adjustments as part of a dismissal process, it does not automatically follow that the subsequent dismissal will be unfair.

The duty to make reasonable adjustments can also apply in certain circumstances after the employment relationship has ended.

6.5 Direct discrimination

6.5.1 As the name suggests, direct discrimination covers situations where an employee has been treated less favourably because of a protected characteristic. Less favourable treatment includes dismissal, not offering a job to a prospective employee or disciplining because of a protected characteristic.

6.5.2 An employee can establish direct discrimination by proving that he or she has been treated less favourably than another person in the same or similar circumstances but who does not have the protected characteristic. If he or she can prove that the reason for that less favourable treatment is because of the protected characteristic then direct discrimination is proved. Employers will not be found to have directly discriminated against an employee if they demonstrate that the treatment of an employee is for a reason not related to a protected characteristic.

6.5.3 It must be emphasised that it does not matter that an employer did not intend to discriminate. The employer's motive or intention is not relevant. A prospective employer may refuse to recruit a homosexual man in the knowledge that the man is likely to encounter some potentially offensive language or banter in the workplace. The employer may have the intention of protecting the job applicant but does, in fact, directly discriminate because of his sexual orientation.

6.5.4 Further, a worker does not have to experience an actual disadvantage (economic or otherwise) for treatment to be less favourable. It is enough that a worker can say that he or she would have preferred not to be treated differently from the way the employer treated, or would have treated, another person. For example, the removal of certain duties from a female employee but not from her male colleagues may not result in any disadvantage because she is still paid the same. However, she may feel demeaned by this, which would mean that the removal of the duties was less favourable treatment.

6.5.5 It should be noted that for direct discrimination because of pregnancy and maternity, the test is whether the treatment of a person is 'unfavourable' rather than 'less favourable'. There is no need for a woman to compare her treatment with that of another worker.

6.5.6 It is no defence to a claim of direct discrimination that the alleged discriminator shares the protected characteristics (or one of them) of the victim.

6.5.7 In cases of direct discrimination (apart from pregnancy and maternity and racial segregation cases) a comparator is required to show that an employer has treated the employee less favourably than it treats, has treated or would treat another worker who did not have the protected characteristics. This other person is referred to as a 'comparator'. In identifying a suitable comparator, there must be no material difference between the circumstances of the two people. The circumstances do not need, however, to be identical in every way, but only to the extent that they are the same or nearly the same in the circumstances which are relevant to the particular treatment being complained of. The question of whether situations are comparable is one of fact. It is not always possible to identify a comparator. In these circumstances, a hypothetical comparator can be used.

6.6 Indirect discrimination

6.6.1 Indirect discrimination occurs when an apparently neutral provision, criterion or practice, such as a workplace policy, puts or would put employees with a protected characteristic at a particular disadvantage in comparison to employees who do not share that protected characteristic. It does not matter that the provision, criterion or practice applies to everyone within the workplace.

6.6.2 The first step in identifying whether there is potential indirect discrimination is to identify whether there is a provision, criterion or practice ('PCP'). A PCP can include an employer's workplace policies, a term in the employee's contract, an instruction issued to staff or a practice of not doing something. A one-off refusal of a flexible working request can be a PCP. Some potentially discriminatory PCPs are: -

- requiring employees to work on Sundays. Some religions forbid work on this day;
- a dress code which requires women to wear knee length skirts or does not allow headwear. Followers of some religions have particular rules on dress and appearance; and
- requiring candidates for a job to have a minimum period of work experience in a particular area. This could be discriminatory on the ground of age.

6.6.3 The second step is identifying whether the PCP puts or would put people of a particular characteristic at a particular disadvantage when compared with people who do not have that characteristic. This allows challenges to PCPs which have not yet been applied, but which would have a discriminatory effect if they were applied. However, for a claim of indirect discrimination to succeed, workers must show that they themselves would experience a disadvantage if the PCP were applied to them specifically.

6.6.4 Justification defence

When faced with a claim of indirect discrimination, an employer may avoid liability by showing that the application of the PCP was justified in the circumstances. To justify a PCP, an employer must show that:

- the aim of the PCP was non-discriminatory and represents a real and objective consideration (e.g. business needs and rewarding staff); and
- the PCP is proportionate to achieving that objective.

For example, it may not be indirect discrimination when a discrimination complaint affords a defence of justification, and the treatment is a direct result of applying a general rule, policy or procedure. Whether that treatment is justified will also depend on whether the rule, policy or procedure is justified. Where the role, policy or procedure allows for an assessment on an individual basis according to the circumstances, the particular treatment must be justified also, not just the rule, policy or procedure.

Employers should ensure that they consider alternative options to the potentially discriminatory policy or practice and should be able to demonstrate to an employment tribunal that they have done so. Although cost alone is unlikely to be a sufficient justification, employers are entitled to take cost into account. An employer does not need to demonstrate that the practice in place is the only way of achieving a particular aim but it must go further than just showing that putting the policy or practice in place is reasonable.

6.7 Harassment

6.7.1 The Equality Act prohibits three types of harassment:

- harassment related to protected characteristics (but excluding pregnancy and maternity or marriage and civil partnership);
- sexual harassment; and
- less favourable treatment because a worker submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

6.7.2 The first type of harassment occurs when a person engages in unwanted conduct which is related to the relevant protected characteristic which has the purpose or effect of violating the worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker. Conduct related to a protected characteristic can capture a wide range of situations, for example, it may be related to the worker's own protected characteristic or it may be that the worker has a connection with a protected characteristic (such as being associated with someone who has a disability or because they are perceived to be homosexual).

6.7.3 Sexual harassment occurs when a person engages in unwanted contact which is of a sexual nature such as unwelcome sexual advances, touching, sexual jokes or displaying pornographic photographs.

6.7.4 The third type of harassment occurs where a worker is treated less favourably by the employer because the worker has submitted to or rejected unwanted conduct of a sexual nature or unwanted conduct which is related to sex or to gender reassignment and it has the effect on the victim described at paragraph 6.7.2.

6.7.5 In order to amount to harassment, the victim must be aware of the unwanted conduct. Whether or not conduct is harassment is assessed by tribunals from the subjective view of the victim. Tribunals are, however, entitled to consider to what extent the victim of the alleged harassment is genuinely upset or offended by the conduct. It is extremely important that this is explained to employees through equal opportunities training. One employee's joke or banter is another employee's harassment.

6.7.6 Employers are liable for acts of harassment carried out by their employees while at work. The phrase 'while at work' has a very elastic meaning. It is not limited to acts carried out in the workplace or during the working day. Liability can extend to work-related functions or social occasions outwith working hours, even at the weekend. Inappropriate behaviour by one employee to another at a Christmas party or summer barbecue is likely to be regarded as an act committed while at work.

6.7.7 An employer who can show it has taken all reasonably practicable steps to prevent the harassment from taking place will be able to escape liability.

6.7.8 Case law has determined that an employee may be able to argue that their employer's inaction in the face of third party harassment itself amounted to an unlawful act.

6.7.9 The Worker Protection (Amendment of Equality Act 2010) Act 2023 came partially into force in October 2023, however the substantive provisions will not come into force until October 2024. The Act imposes a duty on employers to take 'reasonable steps' to prevent the sexual harassment of their employees in the course of their employment and provides for an employment tribunal to award an up-to-25% uplift in compensatory award for breach of that duty.

6.7.10 An employer may have a defence to a claim for harassment or discrimination if it can demonstrate that it took all reasonable steps to prevent those actions (or actions of that kind). Case law has reiterated however that the defence is only available to an employer that can show that it has taken all reasonable steps. The provision of training on issues such as equal opportunities and harassment for example, is not simply a tick box exercise. An employer must be able to show that, alongside any other relevant steps, the training provided to employees was comprehensive, rigorous, regularly refreshed and is being effectively applied in practice by those who have undergone it, not only evidenced by incidents being prevented but also by managers taking appropriate action and reporting to HR when incidents do occur.

6.8 Victimisation

There is specific provision within the Equality Act which states that employees must not be subjected to a detriment because they have exercised or intend to exercise rights under that Act. It does not matter whether or not that person has actually exercised those rights or has merely threatened to do so. Protection from victimisation can also be triggered where an employer has subjected an employee to a detriment simply because it suspects that the person has done or intended to exercise such a right. The protection also extends to those people who have given evidence or information in connection with legal proceedings or other discrimination proceedings brought by another person against his or her employer.

6.9 Occupational requirements and other exceptions

6.9.1 The Equality Act contains a number of limited exceptions that permit conduct that would otherwise be prohibited. Where an exception permits discrimination in relation to one particular characteristic, for example, religion, employers must ensure that they do not discriminate in relation to other protected characteristics.

6.9.2 The main exception is that it is lawful for an employer to require a job applicant or worker to have a particular protected characteristic provided certain statutory conditions are met. Employers who wish to reject a job application because of the absence of a particular characteristic must be able to show that, having regard to the nature of the work to be carried out by the person:

- the requirement to have a particular protected characteristic is an 'occupational requirement' ('OR');
- it is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement;
- the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

6.9.3 There is no set list of circumstances in which an OR will exist. Each situation has to be looked at as it arises. In relation to discrimination on the basis of sex, an OR may exist in circumstances where it is necessary to preserve decency or privacy or if a person of a particular sex can most effectively perform the job. Tribunals will not readily conclude that an OR exists and so if an employer intends to take a step that may be regarded as discriminatory on the basis that there is an OR, legal advice should be taken.

6.9.4 Direct age discrimination can be justified as a proportionate means of achieving a legitimate aim. Direct discrimination regarding any of the other protected characteristics cannot be justified. An example of where age discrimination may be justified as a proportionate means of achieving a legitimate aim was highlighted in a recent employment decision. In the case, an employee claimed age discrimination against his employer on the basis that the employer's revised pay policy was discriminatory to younger employers (in that changes to the policy meant that newly appointed probation officers would now take around 23 years to reach the top of the pay scale – something that would have taken 6/7 years before the change). Whilst it was held that the policy itself was discriminatory, it was held that it was justified on the employer's legitimate aim, to create a "fair policy in straitened circumstances". Whilst age discrimination would normally not be justified on cost alone, it had been shown that the employer was compelled to cut costs and that the employer had tried to avoid redundancies and had negotiated with unions.

6.9.5 The Equality Act also contains provisions allowing 'positive action' in recruitment and promotion. These provisions were not brought in force with the bulk of The Equality Act in October 2010, but took effect on 6 April 2011. The positive action provisions apply where people who share a protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. Employers can take certain actions to address these issues without the risk of discrimination claims from people without the relevant protected characteristic. Employers are not obliged to take positive action under the Equality Act although public sector employers may have a duty to consider positive action under the public sector single equality duty and all employers have a duty to make reasonable adjustments for people with disabilities, which duty might overlap with the scope of the positive action provisions.

The provisions do not permit "positive discrimination", which is the practice of giving an advantage to those groups in society which are often treated unfairly because of a protected characteristic. The provisions apply where an employer reasonably thinks that people with a particular protected characteristic are disadvantaged or have different needs, or that their participation in an activity is disproportionately low. In those circumstances, the employer can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation. In relation to recruitment and promotion, the positive action provisions permit employers faced with candidates who are equally qualified and experienced to favour a candidate with a protected characteristic where the employer reasonably believes there is under representation in its workforce of those with that protected characteristic or people with that characteristic are at a disadvantage.

6.10 Reasonably practicable steps

6.10.1 With some limited exceptions, employers are liable for the discriminatory behaviour of employees. There is, however, a defence available to an employer who can show that all reasonably practicable steps were taken to prevent the discrimination in question. In practice, it is very difficult for an employer to show that all reasonably practicable steps were taken, particularly if employees have not received any form of equal opportunities training or induction. Tribunals will not take account of arguments that no amount of training or induction would have prevented the discriminatory behaviour taking place.

Similarly, it will not be enough for an employer to demonstrate merely that they have put training on equal opportunities in place for their workforce. Thought must be given to the quality of the training and the frequency of delivery – it cannot simply be a tick box exercise.

6.10.2 An employer is unlikely to escape liability unless it has made it clear to its workforce the types of conduct it regards as discrimination (including harassment and victimisation), has put in place a policy clearly stating that such actions will not be tolerated and deals with complaints of discrimination promptly and fairly and takes appropriate disciplinary action against perpetrators. It is not sufficient for an employer merely to have such a policy. It must be able to show that the terms of the policy have been clearly communicated to employees.

6.10.3 Employers may wish to emphasise to employees that they can be personally liable for their discriminatory acts and potentially liable for an award of compensation to the victim, remembering that such compensation is potentially unlimited. An employee who is the victim of harassment can raise a claim against both the individual harasser (i.e. fellow employee) and the employer.

6.11 Equal opportunities policies

6.11.1 Employers should, as a minimum, put in place an equal opportunities policy. The policy should set out the employer's approach to equality in the workplace and should include:

- a statement of what is meant by equal opportunities;
- the various types of discrimination;
- a statement that discrimination will not be tolerated;
- examples of the types of conduct which are prohibited;
- an explanation of the possible disciplinary repercussions of such conduct;
- a definition and examples of harassment;
- a statement of equality principles that apply to recruitment, promotion and access to training;
- how to raise a complaint of discrimination within the workplace; and
- an explanation of how the company's equal opportunities policy is to be implemented and who is responsible for its implementation.

6.11.2 An equality or equal opportunities policy should be reviewed regularly. Records should be kept of training on and implementation of an equality policy so that the employer retains proof that training has, in fact, been given.

6.12 Equality monitoring

6.12.1 The Equality Act creates a new single public sector equality duty, mirroring the structure of the previous duties in relation to sex, race and disability. Public authorities are required to have regard to three matters when exercising this duty:

- Eliminating conduct that is prohibited by the Equality Act, including practices by reference to sex, race, age and disability;
- Advancing equality of opportunity between those who share a protected characteristic and people who do not share it;
- Fostering good relations between those who share a protected characteristic and those who do not share it.

Many private sector employers carry out equality monitoring although it is not mandatory. Monitoring assists employers in assessing whether equal opportunities provisions are effective in practice.

6.12.2 Employers should be mindful that all information gathered for monitoring purposes must be sifted and processed in line with data protection legislation and associated guidance. Information gathered will more often than not be sensitive personal data in terms of the Data Protection Act (see 9.0 Data protection). Whilst an employee's consent is normally required to process sensitive personal data, an exception is made where this data has been processed for the purposes of monitoring equal opportunities. The information gathered must be accurate and not excessive having regard to its purpose.

6.12.3 It is common for employers to carry out monitoring at the recruitment stage with job applicants being asked to complete an equal opportunities monitoring form. Such forms usually request details of age, sex, racial or ethnic origin and medical conditions (see 6.12.4 Prohibition of pre-employment health questions). Employers should ensure that these forms include a statement setting out why the information is being gathered and how it will be used. Unless it would hinder meaningful monitoring, all information gathered for these purposes should be anonymised. Ideally, equal opportunities monitoring forms should be kept separate from application forms and should not be provided to those carrying out the recruitment process to avoid any implication that an individual has not been called for an interview or offered a job due to answers given on the monitoring form.

6.12.4 Prohibition of pre-employment health questions

Under the Equality Act, a job applicant must not be asked about their health before they are offered work except in limited circumstances. Job offers can be made subject to satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks but employers must not discriminate against job applicants as a result of such enquiries or checks. Any health enquiries should be relevant to the job and any reasonable adjustments for disabled applicants must be made.

The limited circumstances in which pre-employment health questions are permitted are where the questions are "necessary for the purpose of" any of the following:

- Establishing if the applicant will be able to carry out the interview or other recruitment process or to establish whether reasonable adjustments will be required;
- Establishing if the applicant will be able to carry out an intrinsic function of the job;
- Monitoring diversity in relation to applicants;
- Taking positive action.

What is "necessary" is not defined. Questions about current health are more likely to be "necessary" than questions about past health.

6.12.5 Monitoring forms can be issued for existing employees. Employees should be made aware of the purpose of the exercise and the importance of completing the form. If possible, the exercise should be carried out anonymously. It must be made clear to the employee that the information will be placed on their personnel file with a statement of how the information was gathered.

6.13 Questionnaires

6.13.1 A statutory questionnaire procedure was a mechanism used previously to assist employees in establishing whether or not they have been subjected to discrimination.

6.13.2 In October 2012 the government announced that it would do away with the statutory questionnaire procedure and the statutory questionnaire procedure was removed with effect from 6 April 2014.

6.13.3 In the absence of the questionnaire procedure, employees are still able to ask questions of their employers in a less formal manner. ACAS has provided guidance on the new system in their Guide: "Asking and responding to questions of discrimination in the workplace".

6.14 Codes of practice

6.14.1 There are a number of statutory codes of practice which have been issued by what were formerly the Disability Rights Commission, Commission for Racial Equality and Equal Opportunities Commission. These organisations have all amalgamated into the Equality and Human Rights Commission ('EHRC'). Where such codes of practice have been issued under anti-discrimination legislation, they may be taken into account by Tribunals. For this reason it is sensible for employers to familiarise themselves with the terms of the various codes of practice.

6.14.2 The EHRC is now responsible for revising, updating and issuing codes of practice in relation to equality matters.

6.14.3 In light of the introduction of the Equality Act, the EHRC published three new codes of practice which came into force on 6 April 2011. These three codes of practice replaced previous codes of practice which were in place under the pre-October 2010 discrimination laws. When these codes of practice came into force the others were revoked. These are:

- Code of Practice on Equal Pay;
- Code of Practice on Employment;
- Code of Practice on Services, Public Functions and Associations.

6.14.4 Employers may wish to consider incorporating guidance from the codes of practice into existing employment policies and procedures.

6.14.5 Public Sector Equality Duty

On 6 April 2011 the new Public Sector Equality Duty (PSED) in The Equality Act 2010 came into force. The EHRC has published new codes of practice as guidance on the new PSED and the Commission is currently in the process of renewing and updating all non-statutory guidance.

6.15 Employment tribunal enforcement

6.15.1 Where a person succeeds in a discrimination claim, an employment tribunal can:

- order the employer to pay compensation. This is uncapped, unlike in unfair dismissal claims;
- make a declaration as to the rights of the person and the employer in relation to the matters raised in the claim.

6.15.2 Employment tribunals previously had the power to make recommendations for the benefit of the wider workforce in relation to discrimination claims under the Equality Act 2010, however the scope of this power is now limited to considering what steps an employer should take to reduce the adverse effect of the discrimination in relation only to the claimant. .

Chapter 7

Maternity, paternity and other types of leave

7.0 Maternity, paternity and other types of leave

7.1 Introduction

The rights, rules and obligations in relation to maternity, paternity, adoption, shared parental leave and flexible working are complex. Problems and legal liability for claims can arise out of an employer's failure to follow these rules. Sex discrimination and unfair dismissal are just two types of claim which can arise. For example any refusal of employment, dismissal or detriment suffered by an employee or prospective employee because of her pregnancy will amount to either sex or pregnancy discrimination. In the case of dismissal for a pregnancy related reason that dismissal is automatically unfair. For detailed information on sex discrimination see 6.0 Equal opportunities. For a detailed analysis of unfair dismissal rules and how to avoid effecting an unfair dismissal, see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair. This chapter also sets out the rules in relation to time off for other reasons such as paternity, shared parental leave, in relation to dependants, for adoption leave and in relation to public duties in addition to outlining flexible working rights.

7.2 Maternity rights

7.2.1 General

Pregnant employees and some agency workers have certain statutory rights including the right to maternity leave and maternity pay. This section will set out the maternity rights employees and agency workers have and what issues employers should consider when dealing with employees/ agency workers who are pregnant and/or on maternity leave.

7.2.2 Time off for antenatal care

7.2.2.1 Regardless of a pregnant employee's length of service, she is entitled to reasonable time off during working hours for antenatal appointments.

The right does not apply in ordinary adoption cases but does apply in surrogacy arrangements.

7.2.2.2 After the first antenatal appointment, employers may ask employees to produce a copy of their appointment card or some other documentary evidence of the appointment. Employers can ask employees to show them a certificate from a registered medical practitioner, registered midwife or registered nurse stating that she is pregnant before allowing time off to attend further antenatal appointments. Employees are entitled to receive their normal pay for time spent attending such appointments.

7.2.2.3 Employers can decide what is 'reasonable' when pregnant employees request time off to attend antenatal appointments. Employees do not have a right to unlimited time off, but employers are expected to act reasonably and not refuse a request without good cause.

7.2.2.4 Pregnant agency workers who have completed the 12 weeks' qualifying period are entitled to similar rights to time off for antenatal care as pregnant employees (see 2.9 Agency workers for further information on agency workers).

7.2.3 Risk assessment

Employers are under a general duty to carry out risk assessments with a view to identifying and dealing with risks related to jobs carried out by women of child-bearing age. There may be additional obligations once a woman becomes pregnant

It should be noted that the duty to carry out risk assessments applies to all workers, whether employees, agency or temporary workers. Once a worker has advised that she is pregnant (see 7.2.7.1 Advance notice for further details about what notification is required), a risk assessment is advisable to ensure that her duties and place of work do not present any risk to her or her unborn child. This need not be done with every worker who becomes pregnant. The Courts have determined that the obligation is only triggered if the job that the worker carries out poses some apparent and discernible risk to health and safety. If it appears that such a risk may exist the employer must carry out a risk assessment then take reasonable steps to either remove the risk or remove the worker from being exposed to the risk. The risk assessment should take account of a worker's pregnancy and pregnancy-related illnesses. In addition it may also need to take account of the fact that when she returns to work she may be breastfeeding and she may have given birth in the last 6 months. A failure to carry out appropriate risk assessments in relation to a woman of child bearing age or a woman who is pregnant where apparent risks exist is likely to be regarded as sex discrimination and/or pregnancy and maternity discrimination (see 6.0 Equal opportunities).

Pregnant women require special consideration as contained in government guides for different industries, available on the health and safety executive website at www.hse.gov.uk.

7.2.4 Offer alternative work

If, on completion of a risk assessment, there is a risk to the pregnant employee's health and safety, employers should offer suitable alternative work. Whether the alternative work is 'suitable' depends on:

- whether the work is of a kind which is both suitable in relation to the pregnant employee and appropriate for her to do in the circumstances. Note, however, the general duties/work need not be the same as the employee's normal duties; and

- whether the proposed terms and conditions are substantially less favourable in comparison to the normal terms and conditions. In essence, employees should be offered alternative work on terms and conditions that are broadly similar to their existing terms and conditions.

Similar provisions apply to pregnant agency workers who have completed the 12 weeks' qualifying period. Where the supply of any agency worker has ended on maternity grounds, the agency is required to offer to put her forward for any suitable work. What is suitable depends on the factors set out above. However, there is no obligation to offer alternative work to an agency worker if she has confirmed in writing that she no longer requires the services of the agency or beyond the intended or likely duration, whichever is longer, of the assignment which the agency worker was engaged on when it ended on maternity grounds.

7.2.5 Suspension on maternity grounds

If the existing job poses a risk which cannot be removed and there is no alternative work or the alternative work is not suitable, the employee must be suspended from work for as long as is necessary to avoid the risk. Employees suspended from work are entitled to be paid their usual pay whilst suspended. They are not, however, entitled to any pay during any suspension if they have unreasonably refused an offer of suitable alternative work. Adequate consultation should take place with the employee and employers should keep clear records of any discussions which take place. Employers considering suspending employees or not paying them during any period of pregnancy/maternity suspension should seek legal advice.

Agency workers who have completed the 12 weeks' qualifying service have similar rights to pay whilst suspended. There is, however, no right to pay where she has unreasonably refused an offer of suitable alternative work. The right to pay does not extend beyond the original intended duration or likely duration, of the assignment on which the agency worker was engaged when it ended due to her maternity. (See 2.9 Agency workers for further information).

7.2.6 Failure to pay during suspension or offer alternative work

7.2.6.1 Employees and agency workers can raise a tribunal claim should employers or agencies fail to pay the whole or any part of their pay during a period of suspension. Such claims must be raised, in broad terms, within three months from the day the employers or agencies failed to pay. If the claim is successful, the tribunal will order the employer to pay the deficit in the employee's or worker's pay. An award could also be made for any 'injury to feelings' claimed by the employee or worker.

7.2.6.2 Employees and workers can also raise a claim if the employer or agency fails to offer alternative work before the employee or worker is suspended. Such claims must be raised, in broad terms, within three months from the first day of suspension. If successful, the tribunal may award compensation which they consider to be 'just and equitable' in the circumstances. When deciding on the level of compensation, tribunals will give consideration to employers' failures to offer alternative work and any loss which is connected to those failures. Again, a tribunal could also make an award for any injury to feelings.

7.2.6.3 The Health and Safety Executive (HSE) has published helpful guidance for employers which outlines what action employers should take to ensure that pregnant employees' health and safety is protected at work (for further details please see the New and Expectant Mothers section of the HSE website, which can be found at https://www.hse.gov.uk/mothers/

7.2.7 Maternity leave

7.2.7.1 Advance notice

7.2.7.1.1 In order to claim maternity leave, employees must notify their employers in writing no later than the end of the fifteenth week before the expected week of childbirth of:

- the fact that they are pregnant;
- the expected week of childbirth; and
- the date on which they intend to start taking leave (which must be no sooner than the beginning of the 11th week before the expected week of childbirth).

7.2.7.1.2 The expected week of childbirth is the week, beginning at midnight between Saturday and Sunday, in which it is expected that the baby will be born.

7.2.7.1.3 In addition, for the purposes of claiming Statutory Maternity Pay ('SMP') employees must provide employers with medical evidence of the date the baby is due and, where appropriate, born. This will normally be a maternity certificate called 'Form Mat B1' (which can be provided by employees' doctors). This must be signed by a doctor or midwife no earlier than 20 weeks before the expected week of childbirth.

7.2.7.1.4 Employers should ensure that employees are made aware of what notification they must give (e.g. what information the notice should contain, when it should be given and to whom etc.) and ensure that their maternity policy clearly explains these requirements.

7.2.7.2 Period of leave

Pregnant employees are automatically entitled to 52 weeks' maternity leave, regardless of their length of service. This is made up of 26 weeks' Ordinary Maternity Leave (OML) and 26 weeks' Additional Maternity Leave (AML). Statutory Maternity Pay can be paid for up to a maximum of 39 weeks (see 7.2.8 Maternity pay for further details).

7.2.7.3 Compulsory maternity leave

7.2.7.3.1 Employees may not work during the 14 days immediately after the date of childbirth (4 weeks for female factory workers).

7.2.7.4 Maternity leave – start date

7.2.7.4.1 The intended start date

Employees must give employers notice of the date their leave is to begin. When employees give birth before the notified date or before they have notified a date, their maternity leave starts automatically on the day after the date of the birth. Also, where employees are absent from work for a pregnancy related reason at any time during the four weeks before the expected week of childbirth, their maternity leave begins automatically on the day after the first day of absence. Such employees should notify their employers that they are absent from work wholly or partly because of pregnancy and of the date on which their absence for that reason began as soon as is reasonably practicable. It is best practice for employers' maternity policies to notify employees of these requirements.

7.2.7.4.2 Change of start date

Once an employee has properly advised her employer of the date she wishes to start her OML, she can change this date provided that she gives written notification of the new start date by whichever is the earlier of:

- 28 days before the date she originally intended to start her leave; or
- 28 days before the new date she wishes to start her leave.

A shorter period of notice can be given if 28 days is not reasonably practicable.

7.2.7.5 The contract of employment during maternity leave

7.2.7.5.1 Contracts of employment continue throughout OML and AML and employees on OML or AML are entitled to all the same terms and conditions of employment which would have applied had they not been on maternity leave. The main exception is that 'remuneration' (wages and salary) is not covered and therefore, employees are not entitled to be paid their usual remuneration during OML and AML.

7.2.7.5.2 It is sometimes difficult to establish whether or not employees are still entitled to particular types of payments and/or benefits during maternity leave e.g. car allowance, bonuses or childcare vouchers etc. These benefits can sometimes be classified as 'remuneration'. Benefits such as health or life assurance, share schemes etc, are not generally regarded as remuneration and therefore cannot be withheld. This is an extremely difficult and uncertain area due to the absence of case law and so employers should seek further legal advice from Scottish Engineering before suspending or withholding any such payment or benefit from employees.

7.2.7.5.3 Employees continue to be employed during their OML and AML. OML and AML count towards their period of continuous service.

7.2.7.5.4 Annual leave accrues throughout both OML and AML in the same way and at the same rate as if the employee was at work. This includes statutory and contractual entitlement to annual leave. Where employees have a contractual right to public/ bank holidays, these will also accrue during maternity leave.

7.2.7.5.5 An employee cannot take any annual leave during OML or AML. As a result, the employee must be allowed to take all accrued holidays (including public/bank holidays) at another time. It is common for employers to allow employees to take such accrued holidays immediately before or after their maternity leave. The timing of the holidays is normally a matter for agreement between the employee and employer. Such arrangements are particularly important as recent case law has determined that all of an employee's accrued but unused annual leave will carry over to the next leave year if they are on maternity leave. Failure to do so would constitute sex discrimination.

7.2.7.5.6 Where employees are members of any service related benefit scheme (for example, an occupational pension scheme) they will continue to accrue rights and benefits under such schemes. Any benefits and employer contributions will be calculated as if they had been working normally and receiving their normal rate of pay. Contributions payable by employees will be calculated by reference to the pay they actually receive bearing in mind that deductions cannot be made from statutory maternity pay.

7.2.8 Maternity pay

7.2.8.1 Statutory Maternity Pay (SMP)

7.2.8.1.1 The right

Employees are entitled to a maximum of 39 weeks' SMP if they meet the qualifying conditions that:

- they have worked for the employer for 26 continuous weeks ending with the 15th week before the expected week of childbirth; and
- their average weekly earnings in the eight weeks up to and including the qualifying week have been at least equal to the lower earnings limit for National Insurance contributions (although contributions do not actually have to have been paid).

7.2.8.1.2 Notice required for SMP

Employees should give their employers 28 days' notice of the day on which they want to start receiving SMP. Where an employee has properly notified a start date for OML, the same date will be taken as the start date for SMP. Employees may continue working right up until the date their baby is born and still retain the full 39 weeks' entitlement to SMP.

SMP generally starts from the date the employee has notified that the employer's SMP liability will commence although it can start earlier in certain circumstances, e.g. the baby is born earlier or the employee is absent for a pregnancy related reason within 4 weeks of the expected date of childbirth.

Employees must also provide employers with evidence as to:

- the expected date of childbirth; and
- where entitlement to SMP depends upon the fact of confinement, the week in which she was confined (a certificate of birth will suffice).

The evidence must normally be submitted no earlier than the beginning of the 20th week before the expected week of confinement. This can be extended if the circumstances require.

7.2.8.1.3 The rate of SMP

The first six weeks of SMP are paid at 90% of employees' normal average weekly earnings.

The remaining weeks are paid at the lesser of the SMP current standard rate and 90% of the employees' average weekly earnings. The current rate of SMP is £172.48, increasing to £184.03 from 7 April 2024 The SMP rate is reviewed annually with effect from April in each year.

7.2.8.2 Maternity Allowance (MA)

7.2.8.2.1 The right to MA

Women who are not entitled to SMP may be entitled to MA if they meet the statutory requirements.

Employees are entitled to claim a maximum of 39 weeks' MA if they:

- are employed, but do not qualify for SMP;
- have recently been employed; or
- are self-employed.

Entitlement to MA is based on employment and earnings in the 66 weeks ending with the week before the expected week of childbirth. Employees must have been employed or self-employed for at least 26 weeks in the 66-week period and their gross earnings must meet the statutory limits in place from time to time. The claiming or payment of Maternity Allowance does not involve employers but instead is administered by Jobcentre Plus.

7.2.8.2.2 The rate of MA

The MA weekly rate is the lesser of the current MA standard rate or 90% of the employees' average weekly earnings. The current rate of MA is £184.03 from 7 April 2024.

7.2.8.3 Enhanced maternity terms

Some employers offer enhanced maternity rights such as additional maternity pay or leave. Employers wishing to offer enhanced benefits should carefully consider what those benefits will be and how they will be implemented. Any enhanced terms should clearly state that the rates/benefits are inclusive of employees' entitlement to statutory maternity leave and SMP. It is recommended that any enhanced maternity benefits should be set out in a clear policy or other written document. Advice should be obtained if enhanced maternity pay or leave is offered as there may be the possibility of discrimination claims if similar enhancements are not offered under adoption leave or shared parental leave.

7.2.9 Return to work after maternity leave

7.2.9.1 The intended date of return to work after maternity leave

Where an employee has given proper notification of the intended start date for maternity leave, the employer should notify the employee of the date on which the maternity leave will end. Such notice must be given within 28 days of receipt of the notification.

7.2.9.2 Change of return date

7.2.9.2.1 An employee may wish to return to work before the date notified. If so, she must give the employer at least eight weeks' written notice of the new intended return date.

7.2.9.2.2 Some employees only wish to take part of their maternity leave allowance, for example 39 weeks to coincide with any entitlement to SMP. Such employees must give employers at least eight weeks' notice of the date on which they intend to return to work.

7.2.9.2.3 An employee might not wish to return to work after maternity leave. If so, she must give proper notice of termination in accordance with the terms and conditions of employment. For example, if she does not wish to return to work and the notice period is four weeks, she must notify her employer of her resignation at least four weeks before the return date.

7.2.9.3 Returning to work after OML

Employees returning after OML are entitled to return to the same job on the same terms and conditions of employment as if they had not been absent, unless a redundancy situation has arisen. Even if a redundancy situation has arisen, employers should act with caution and seek advice from Scottish Engineering as dealing with employees on maternity leave can give rise to complications.

7.2.9.4 Returning to work after AML

7.2.9.4.1 After AML employees are entitled to return to the same job on the same terms and conditions as if they had not been absent. If, however, there is some reason why it is not reasonably practicable for them to return to the same job, they should be offered a similar job on their existing terms and conditions.

7.2.9.4.2 Employees may submit flexible working requests or request to take parental leave after OML or AML. Employers should consider such requests in accordance with their legal obligations. For further details please see 7.7 Flexible working, 7.3 Parental leave and 7.6 Shared parental leave.

7.2.9.5 Employees returning to work after two consecutive periods of maternity leave

7.2.9.5.1 It is possible that employees may become pregnant again whilst on maternity leave. If that happens the employee becomes entitled to another consecutive period of leave without returning to work.

7.2.9.5.2 Employees taking two consecutive periods of maternity leave are entitled to return to their original job or, if this is not reasonably practicable, to another job on their existing terms and conditions.

7.2.10 Keeping in Touch days

7.2.10.1 Employees may, with their employer's agreement, work for up to 10 days during their maternity leave without bringing the maternity leave to an end or affecting the right to SMP. These working days are called 'Keeping In Touch' (KIT) days.

7.2.10.2 Any work done on any day during the maternity leave period will count as a whole KIT day. For example, employees attending a 2-hour training session will still have used one KIT day.

7.2.10.3 There is no obligation on employees to undertake KIT days while on maternity leave nor any obligation on employers to arrange KIT days.

7.2.10.4 In addition, employers are entitled to make reasonable contact with employees during maternity leave, for example, to discuss their return to work. It is important to remember that employees absent on maternity leave should be given information which is relevant to their job even though they are absent. For example, a change of line manager or a merger of departments. Employees must be consulted with if a redundancy or other collective consultation situation arises (see 7.2.12 Pregnancy and redundancy for more detail). In the same way, employees are permitted to make reasonable contact with employers.

7.2.10.5 Whilst the regulations do not specify whether an employee should be paid for KIT days it is recommended that payment is made. A failure to pay employees for KIT days may amount to sex discrimination. It appears that the amount of pay is left for agreement between employer and employee but, to avoid potential sex discrimination claims, it is advisable to pay the employee normal pay for a KIT day.

7.2.11 Maternity cover

7.2.11.1 In order to maintain its operations, employers often employ temporary employees to cover the work of employees on maternity leave. In these circumstances, employers should ensure that:

- temporary employees are fully aware that their employment is for a fixed term to cover a period of maternity leave;

- the employment contract specifies this;
- the employment contract specifies that the employment will terminate automatically on the absent employee's return to work, either at the end of OML, AML or some earlier date if the employee chooses to return early; and
- the notice provisions in the employment contract are drafted carefully so that the employer can terminate the temporary employee's employment even if the absent employee does not return.

7.2.11.2 Once an employee informs her employer of the intended return date, it is advisable for the employer to confirm this date with the temporary employee. If there are any changes to the intended return date, these should also be confirmed with the temporary employee as soon as possible.

7.2.11.3 The Employment Rights Act 1996 provides that a dismissal of temporary employees is a potentially fair reason for dismissal (see 12.0 Dismissal - fair or unfair for a discussion of fair reasons for dismissal) if:

- on engaging the temporary employees, employers inform them in writing that their employment will be wholly or partly because of pregnancy, childbirth, adoption or additional paternity leave of another employee; and
- where the temporary employee is dismissed to make it possible to give work to the absent employees upon their return.

7.2.11.4 Employers must ensure that they follow a proper procedure when dismissing temporary employees and be mindful that statutory and possibly contractual notice provisions may apply. Employers are obliged to adhere to the usual principles of fairness and reasonableness (see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair for a more detailed discussion of how to dismiss fairly), especially when temporary employees have the minimum continuous service normally required to make a complaint of unfair dismissal. If you are in any doubt as to the applicable qualifying period you must consult Scottish Engineering. Employers should always consider whether any alternative work exists for the temporary employee before dismissing them.

7.2.11.5 As it is likely that a temporary employee's contract will be classed as a fixed term contract, an employer should ensure that they also comply with their obligations under the Fixed Terms Regulations (see 2.0 Contracts of employment).

7.2.12 Pregnancy and redundancy

7.2.12.1 There are certain rules employers must follow when considering making employees redundant during their maternity leave or shortly after their return to work. Employers have a statutory duty to offer available suitable alternative employment to such employees to avoid them being made redundant. This area of the law is complex and specific advice should be sought in each case. However, in general terms any alternative work offered should be:

- of a kind that is both suitable in relation to the employees and appropriate for them to do in the circumstances, and
- on substantially similar terms and conditions of employment when comparing it to their previous contract.

7.2.12.2 For further details of what suitable alternative employment should be offered in redundancy situations and a detailed analysis of redundancy rules and rights, see 13.0 Redundancy.

7.2.13 Dismissal or detriment

7.2.13.1 Automatically unfair dismissal and unlawful detriment

7.2.13.1.1 Under the Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999, any dismissal will be automatically unfair and, like any detriment suffered by an employee on the following grounds, will amount to sex discrimination if it is on the grounds of:

- pregnancy;
- the fact that she has given birth to a child;
- the fact that she is subject to a relevant requirement or a relevant recommendation (i.e. there is a health and safety risk that has been identified relating to her pregnancy which results in suspension from work (see 7.2.5 Suspension on maternity grounds));
- suspension on maternity grounds (see paragraph 7.2.5);
- the fact that she took, sought to take or availed herself of the right to OML or AML;
- the fact that she took or sought to take:
- parental leave (see 7.3 Parental leave); or
- time off for dependants (see 7.7 Flexible working);

- the fact that she failed to return to work after a period of OML or AML in a case where:
- the employer did not notify her of the return date and she reasonably believed that the maternity leave had not ended; or
- the employer gave her less than 28 days' notice of the date of her return date and it was not reasonably practicable for her to return on that date;
- the fact an employee undertook, considered undertaking or refused to undertake work during maternity leave (see 7.4.9 Dismissal and detriment for further details about KIT days);
- the fact that she declined to sign a workforce agreement for the purposes of the Maternity and Parental Leave etc Regulations 1999; and/or
- the fact that she, being (i) a representative of members of the workforce, or (ii) a candidate in an election in which any person elected will become such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate.

A court recently considered it essential for an employer to re-examine their decision to dismiss after the employee's pregnancy was discovered. In that case the employee was dismissed for an automatically unfair reason and had been subjected to pregnancy discrimination, even though it was accepted that the employer had not known about her pregnancy at the time of dismissing.

7.2.13.1.2 Employees may claim that they have been subject to a detriment, for example, that they did not get a promotion after returning to work from OML, arguing that this is because they took OML. Such claims must be raised, in broad terms, within three months of the act or failure complained of. In cases where employees complain that they have been subjected to a series of acts or failures, they can raise the claim, in broad terms, within three months of the last act or failure. Sometimes it is difficult to establish whether there has been a 'course' of events or an isolated incident. Advice should be sought from Scottish Engineering where such an issue arises. For further guidance on the time limits for lodging sex discrimination claims see 16.2.2 What is early conciliation.

7.2.13.2 Written statement

7.2.13.2.1 Any employee dismissed when she is pregnant or off on maternity leave should be provided with a written statement of reasons for her dismissal regardless of the length of service.

7.2.13.2.2 Failure to do so permits the employee to raise a tribunal claim. Should a tribunal find that the complaint is well founded, it may make a declaration as to what it believes was the employer's reason for dismissal. Also, the tribunal can make an award of compensation of two weeks' pay which is not subject to the statutory weekly cap. An employee must raise such claims, in broad terms, within three months of the effective date of termination (see 12.2 Effective Date of Termination).

7.2.14 Discrimination during the 'protected period'

7.2.14.1 In addition to general protection against any detriment and/or unfair dismissal set out in section 7.2.13, an employee has additional protection against less favourable treatment during what is referred to as the 'Protected Period' (see paragraph 7.2.14.2) on the grounds:

- of her pregnancy;
- that she is exercising or seeking to exercise, or has exercised or sought to exercise a statutory right to maternity leave;
- that she has to take compulsory maternity leave; or
- that she is suffering from any pregnancy-related illness.

7.2.14.2 Any such less favourable treatment will be unlawful discrimination if it occurs during the Protected Period. The Protected Period:

- begins when an employee is pregnant; and
- ends at the end of AML or, if earlier, when an employee returns;
- for an employee not entitled to maternity leave, the protected period will end two weeks from the end of the pregnancy (i.e. two weeks from the date of birth, miscarriage or abortion).

7.2.14.3 An employee can raise a claim for discrimination, in broad terms, within three months of the date on which the less favourable treatment occurred. Awards of compensation for discrimination are not capped and, therefore, employers may be liable for unlimited damages.

7.3 Parental leave

7.3.1 General

Parental leave is the right to take unpaid time off to look after a child or make arrangements for the child's welfare.

7.3.2 Entitlement

7.3.2.1 The right applies to mothers and fathers or any person who has formal responsibility for a child. Parents can take parental leave either when the child is born or placed with them for adoption, or as soon as they have completed one year's service, whichever is later. The right is also extended to parents matched for adoption through "fostering to adopt".

7.3.2.2 The right to take parental leave lasts until the child's 18th birthday in all cases.

7.3.3 Duration

7.3.3.1 Employees are entitled to a total of 18 weeks' leave for each child.

7.3.3.2 Parental leave can be taken in blocks or multiples of one week up to a maximum of four weeks' leave each year until the employee has used the overall maximum entitlement of 18 weeks. Parents of disabled children have the flexibility to take leave a day or more at a time or longer, but still subject to a maximum of 4 weeks' leave each year.

7.3.4 Application for leave

An employee should request parental leave in writing and give at least 21 days' notice. The employer can postpone leave for up to 6 months if the business cannot cope with the employee's absence at that time. This employer's right does not apply if the employee gives notice to take the parental leave immediately after the time the child is born or is placed with the family for adoption.

7.3.5 Pay

Parental leave is unpaid.

7.3.6 Return to work

7.3.6.1 Employees remain employed during parental leave and are guaranteed to return to the same job as before, provided the leave is for 4 weeks or less in a year. This applies even where the leave is taken immediately after a period of OML, Statutory Paternity Leave or Ordinary Adoption Leave.

7.3.6.2 If the leave is for a longer period, including where it is taken immediately after OML, AML, Statutory Paternity Leave, Ordinary Adoption Leave or Additional Adoption Leave, employees are entitled to return to the same job, or, if that is not reasonably practicable, work which is suitable and appropriate and on the same terms and conditions of employment.

7.3.7 Dismissal and detriment

7.3.7.1 A dismissal will be unfair if the reason (or principal reason) for the dismissal relates to an employee taking or agreeing to take parental leave.

7.3.7.2 In addition, it is unlawful for employers to subject employees to any detriment other than dismissal, for example, disciplinary action, because they have taken or sought to take parental leave.

7.3.7.3 An employee is entitled to raise an unfair dismissal claim within three months of the dismissal.

7.3.7.4 He or she may also claim that he or she has been subject to a detriment. Such claims should be raised, in broad terms, within three months of the act or failure complained of. In cases where employees complain that they have been subjected to a series of acts or failures, they can raise their claims, in broad terms, within three months of the last act or failure.

7.4 Paternity leave

7.4.1 General

7.4.1.1 Subject to certain statutory requirements, employees whose partners give birth to or adopt a child are entitled to paternity leave.

7.4.1.2 When employees' partners adopt a child or baby, they may be entitled to paternity leave and pay. When a couple adopts they can choose who takes (if eligible) the paternity leave and decide who takes the adoption leave.

Eligible employees are entitled to take Paternity Leave. Entitlement to paternity leave is in addition to any shared parental leave entitlement. It must be taken before any period of shared parental leave. An employee, who would otherwise have taken additional paternity leave, subject to certain notification and eligibility requirements, can opt to take shared parental leave if their partner chooses to shorten their maternity or adoption leave and associated pay period to enable the employee to take shared parental leave and receive shared parental pay. See section 7.6 for more information.

7.4.2 Time off for antenatal care

Expectant fathers or partners are entitled to time off to accompany their partners to antenatal appointments. This is limited to up to 2 appointments and there is no right for the employee to be paid for such time off (subject to any contractual right). The maximum time off for each appointment is capped at six and a half hours.

7.4.3 Eligibility for ordinary paternity leave

7.4.3.1 To qualify for ordinary paternity leave, employees must:

- expect to have responsibility for the baby's upbringing;
- be taking the time off to either support the mother or to care for the new baby;
- be either or both:
  - the biological father of the baby; or
  - the mother's husband or partner

or have entered a surrogacy arrangement with a woman, and have been granted, or intend to apply for, a parental order in relation to the child that she bears; and

- not already have taken shared parental leave.

7.4.3.2 To qualify for Ordinary Statutory Paternity Pay (OSPP) employees must give employers a signed declaration containing each of these requirements.

7.4.3.3 A partner is someone who lives with the mother of the baby in an enduring family relationship but need not be an immediate relative. This includes the biological father of the baby, the mother's husband or partner and a female partner in a same- sex couple.

7.4.3.4 In addition the employee must have worked continuously for the employer:

- for 26 weeks ending with the 15th week before the baby is due; and
- from the 15th week before the baby is due up to the date of birth.

7.4.4 The period of leave

7.4.4.1 Length of ordinary paternity leave

7.4.4.1.1 Eligible employees can now choose to take leave as two non-consecutive one-week blocks, whereas previously this was not possible and if only one week was taken, a second could not be taken at a later time. .

7.4.4.1.2 Only one period of leave can be taken even if more than one baby is born as the result of the same pregnancy.

7.4.4.2 Commencement of ordinary paternity leave

7.4.4.2.1 Employees cannot start ordinary paternity leave until the baby is born and must give the employer details of when they intend to start the leave which may be:

- on the date of the baby's birth (whether this is earlier or later than expected); or
- on a date falling a certain number of days or weeks after the date on which the baby is born (whether this is earlier or later than expected); or
- from a specific date after the first day of the week in which the baby is expected to be born.

7.4.4.2.2 When employees specify the date of birth as the start date of their leave and they are at work on that day, their leave will begin on the next day.

7.4.4.2.3 Employees cannot take ordinary paternity leave or be paid SPP before the baby is born. If the baby is not born by the date specified, employees must change the date on which their leave starts or choose to take leave from the actual date of birth or a specified number of days after the birth.

7.4.4.3 Period during which ordinary paternity leave must be taken

7.4.4.3.1 Ordinary paternity leave can start on any day of the week, as long as the employee has given the required notice.

7.4.4.3.2 It must be completed within 52 weeks of the date of birth, though this period can be extended in cases of premature birth.

- within 56 days of the date of birth; or
- if the baby is born earlier than expected, within 56 days of the first day of the week during which the baby was due.

7.4.4.4 Notification of intention to take ordinary paternity leave

7.4.4.4.1 Employees must inform their employers that they intend to take ordinary paternity leave 28 days before they intend the leave to start. This is a reduction from the previous position which required 15 weeks' notice – though notice of entitlement to statutory paternity pay must still be given 15 weeks before the expected week of childbirth. (if that is not possible, as soon as is reasonably practicable) and confirm:

- the expected week of the baby's birth;
- whether they wish to take one or two weeks' leave; and
- when they want the ordinary paternity leave to start.

7.4.4.4.2 Employees should complete a Paternity Leave Self-Certificate form, (form SC3) which can be found on HMRC's website hmrc.gov.uk. This will cover both ordinary paternity leave and SPP and should be submitted to employers by the end of the 15th week before the baby is due.

7.4.4.5 Change of start date

7.4.4.5.1 Employees can change the start date of their ordinary paternity leave (but not the length of the leave they are taking) as long as they give the required notice as follows:

- if they want their leave to start on the date of the birth, they must give notice of this new date at least 28 days before the first day of the expected week of childbirth; or
- if they want to change their start date to a specific number of days after the birth, they must give notice of this new date at least 28 days before the date falling the same specific number of days after the first day of the expected week of childbirth; or
- if they want to change their leave to start on a particular date, they must give notice of this new date 28 days before that date.

7.4.4.5.2 The expected week of childbirth is the week, beginning with midnight between Saturday and Sunday, in which it is expected that the baby will be born.

7.4.4.5.3 Employees wishing to change their leave start date should complete another Paternity Leave Self-Certificate (form SC3).

7.4.5 Statutory Paternity Pay (SPP)

7.4.5.1 General

Employers will pay Statutory Paternity Pay (SPP) for either 1 or 2 weeks depending on the amount of ordinary paternity leave taken.The amount of SPP is the lesser of the current standard rate (£184.03 from 7 April 2024 – which is the same as Statutory Maternity Pay) and 90% of the employees' average weekly earnings. . The current standard rate is reviewed annually with effect from April in each year.

7.4.5.2 Applying for SPP

7.4.5.2.1 Employees must give employers a completed paternity leave self-certificate form at least 28 days before they want their SPP to start.

7.4.5.2.2 If they cannot give their employers the self-certificate 28 days before they want their payment of SPP to begin, they must do so as soon as possible and explain why it is late. When an employer believes that that an employee did not have a good reason, it can refuse to pay SPP.

7.4.5.3 Payment of SPP

7.4.5.3.1 SPP is a weekly payment due at the end of each SPP week. The SPP week can start on any day. For example, for employees starting their leave on a Tuesday, a week's SPP runs from the Tuesday to the next Monday.

7.4.5.3.2 SPP will not be paid for any SPP week in which the employee does some paid work, or for any SPP week in which they are sick and entitled to Statutory Sick Pay. When employees are unwell before starting their period of ordinary paternity leave, they may postpone it, however the 56-day period within which employees should take their leave will not be extended.

7.4.6 Terms and conditions during ordinary paternity leave and on return

7.4.6.1 Contractual terms and conditions while on ordinary paternity leave

7.4.6.1.1 The contract of employment continues throughout ordinary paternity leave. While on ordinary paternity leave, employees are entitled to benefit from all their normal terms and conditions, except for terms relating to wages or salary. Employers should take legal advice before withholding any benefits or payments to employees during ordinary paternity leave.

7.4.6.1.2 At the end of ordinary paternity leave, employees are entitled to return to the same job as before on the same terms and conditions of employment as if they had not been absent, unless a redundancy situation has arisen.

7.4.6.1.3 Employees who are members of any service related benefit schemes, for example, an occupational pension scheme, will continue to accrue rights and benefits under such schemes. Any benefits and employer contributions will be calculated as if they had been working normally and receiving their normal rate of pay. Contributions payable by employees will be calculated by reference to the pay they actually receive.

7.4.6.2 Annual leave during ordinary paternity leave

Employees will continue to accrue annual leave while on ordinary paternity leave. They are not entitled to take annual leave during ordinary paternity leave but, subject to employers' holiday procedures, can apply to take a period of annual leave immediately before or after ordinary paternity leave.

7.4.7 Parental leave immediately before or after ordinary paternity leave

Please see 7.3.4 Application for leave above for further details of how an employee can take parental leave immediately after a period of statutory paternity leave.

7.4.8 Ordinary paternity leave when a child is placed for adoption

7.4.8.1 Eligibility

7.4.8.1.1 Eligible employees can take up to 2 weeks' paid ordinary paternity leave following the placement of a child for adoption. To qualify for ordinary paternity leave in these circumstances the employee must:

- either be married to, or the partner of the adopter;
- have or expect to have main responsibility for the child's upbringing, with the adopter;
- have been continuously employed for at least 26 weeks ending with the week in which the adopter is notified of having been matched with the child. The week in question starts on a Sunday and ends on a Saturday;
- continue to work from the week in which the adopter is notified of having been matched with a child up to the date of placement;
- notify the employer of when he wants to take ordinary paternity leave no later than 7 days after the adopter is notified that they have been matched with a child; and
- be taking time off either to support the adopter, or to care for the child, or both.

7.4.8.1.2 In addition, to qualify for Statutory Paternity Pay they must:

- either be married to, in a civil partnership with, or be the partner of, the child's adopter;
- notify their employer of when they want to receive SPP at least 28 days before the date they want payment to begin, or as soon as reasonably practicable; and
- have average weekly earnings at or above the lower earnings limited for National Insurance which applied at the end of the matching week.

7.4.8.2 Period of ordinary paternity leave and pay

Ordinary paternity leave and SPP can begin any time from the date of the child's placement with the adopter, but must be taken within 56 days of this date.

Employees can choose to begin ordinary paternity leave and SPP on:

- the date on which the child is placed with the adopter, even if this is earlier or later than the expected date of placement; or
- a predetermined date after the date of placement; or
- a date following a specified number of days after the expected date of placement.

7.4.8.3 Notification of intention to take ordinary paternity leave and claim SPP

7.4.8.3.1 Employees must confirm that they intend to take ordinary paternity leave no later than 7 days after the day the adopter is notified of having been matched with the child or as soon as is reasonably practicable.

7.4.8.3.2 They must give the employers at least 28 days' notice of the date on which they want SPP to start, or as soon as is reasonably practicable.

7.4.8.3.3 When employees change their mind about when they want their leave to start, they must give at least 28 days' notice before the new start date.

7.4.8.3.4 If the date of placement changes before they begin ordinary paternity leave, they must give appropriate notice to change the start date as outlined above.

7.4.8.3.5 They must tell the employer the date on which the child is expected to be placed for adoption and the date on which the adopter was notified of being matched for adoption.

7.4.9 Dismissal and detriment

7.4.9.1 A dismissal will be unfair if the reason or principal reason relates to employees taking, agreeing to take, or refusing to take paternity leave. An employee must raise the claim within three months of the dismissal.

7.4.9.2 It is unlawful for employers to subject employees to any detriment (for example, removal of discretionary bonus whilst other employees received a bonus), by any act or any deliberate failure to act because employees took or sought to take paternity leave. Employees should raise such a claim, in broad terms, within three months of the act or failure complained of. In cases where employees complain that they have been subjected to a series of acts or omissions, they can raise a complaint, in broad terms, within three months of the last act or omission.

7.5 Adoption leave

7.5.1 General

7.5.1.1 Employees have certain statutory rights in relation to adopted children placed with adoptive parents on or after 6 April 2003. There are certain 'adoption' terms with which employers should familiarise themselves:

- **Adopter**
  A person who has been matched with a child for adoption or, if the couple have been matched jointly, the member of the couple who has chosen to take adoption leave and/or Statutory Adoption Pay ('SAP');
- **Matched/Matching**
  This is when an adoption agency decides that the person would be a suitable adoptive parent for the child, either individually or with another person;
- **Notification of Matching**
  The process of a person being informed of having been matched with a child for adoption by the adoption agency;
- **Matching Certificate**
  A document issued to the Adopter by the Adoption Agency confirming details of the adoption;
- **Placement**
  A child is placed for adoption when the child goes to live with the Adopter or Adopters with a view to being adopted by them in the future.

7.5.2 Time off for adoption appointments

An employee who has received notification of an adoption has a right to take time off during working hours for pre-adoption appointments as detailed below i.e. they do not require length of service to obtain the right.

There are two types of time off that an employee may take, that being paid or unpaid. The employee must elect which one they will be taking. This will determine whether they or their partner will be able to take paternity leave. Taking paid time off for appointments will prevent that employee from taking paternity leave as they will be the "adopter" and entitled to take adoption leave.

To take paid time off the employee must elect to do so. The entitlement is to attend up to 5 appointments that have been arranged by the adoption agency. The employer is entitled to request a document from the employee showing the date and time of the appointment and that it has been arranged by the adoption agency prior to permitting attendance. Time off can be up to 6.5 hours per appointment. Employees are entitled to receive their normal pay for time spent attending such appointments.

The employee who is not the "adopter" has the right to take unpaid time off. The entitlement is to attend up to two appointments that have been arranged by the adoption agency. The employer is entitled to request a document from the employee showing the date and time of the appointment and that it has been arranged by the adoption agency prior to permitting attendance. Time off can be up to 6.5 hours per appointment.

Employers can refuse time off for adoption appointments. However, if the refusal is unreasonable the employee can bring a claim to the employment tribunal. A claim can also be raised if an employer does not pay for time off where pay is due to an adopter.

Agency workers who have completed the 12 weeks' qualifying period are entitled to similar rights to time off for adoption appointments as employees (see 2.9 Agency workers).

7.5.3 Duration

Eligible employees are entitled to 52 weeks' adoption leave. This is made up of 26 weeks' Ordinary Adoption Leave (OAL) and 26 weeks' Additional Adoption Leave (AAL). Statutory Adoption Pay (SAP) is paid for a maximum of 39 weeks. Although the leave may continue for up to another 13 weeks, this period of leave is unpaid. With the introduction of the shared parental leave regime with effect from 5 April 2015, subject to certain eligibility and notification requirements, an employee can choose to shorten their adoption leave and pay period to enable themselves or their partner to take shared parental leave and receive shared parental pay. An employee who is eligible and elects to take shared parental leave is likely to have their entitlement to adoption leave and pay reduced. For more information on shared parental leave see 7.6.1 General.

7.5.4 Eligibility

From 5 April 2015, an employee's right to adoption leave is a day one right, i.e. there is no requirement of 26 weeks prior service with the employer to be eligible. To qualify for adoption leave employees must:

- either have been newly matched to a child by an adoption agency i.e. not, for example, where a step-parent is adopting a partner's child, have been matched with a child through "fostering to adopt" or have entered a surrogacy arrangement with a woman, and have been granted, or intend to apply for, a parental order in relation to the child that she bears;
- have confirmed with the adoption agency that they agree that the child should be placed with them on the date of placement; and
- where they are adopting jointly as part of a couple, only one or the other of the Adopters will be entitled to adoption leave. The other (male or female) may be entitled to paternity leave and/or shared parental leave

7.5.5 Ordinary Adoption Leave (OAL)

Employees who meet the above criteria are entitled to 26 consecutive weeks' OAL. They can only take one period of OAL, regardless of how many children are placed at one time.

7.5.6 Additional Adoption Leave (AAL)

Employees who qualify for OAL also qualify for AAL. The entitlement to AAL is limited to:

- up to 26 consecutive weeks' AAL immediately after OAL (i.e. OAL and AAL run back to back with no break in between); and
- one period of AAL regardless of how many children are placed at any one time.

7.5.7 The contract of employment during adoption leave (OAL and AAL)

7.5.7.1 Employees' contracts continue throughout adoption leave. They have a statutory right to continue to benefit from terms and conditions of employment, except for in relation to 'remuneration' (7.2.7.5). Adoption leave counts towards the period of continuous employment.

7.5.7.2 Annual leave accrues in the same way and at the same rate as if employees were at work. This includes statutory and contractual entitlement to annual leave. Where employees have a contractual right to public/bank holidays, these will also accrue during adoption leave.

7.5.7.3 Employees cannot take annual leave during adoption leave. As a result, employees must be allowed to take their accrued holidays (including public/bank holidays) at another time. It is common for employers to allow employees to take such accrued holidays immediately before or after their adoption leave, however, the timing of the holidays is normally a matter for agreement between employees and employers. An employee may be precluded from carrying over holidays into a subsequent leave year if the employee had the opportunity to take the leave in the previous year but did not take the leave.

7.5.7.4 For employees who are members of any service related benefit schemes, for example, an occupational pension scheme, they will continue to accrue rights and benefits under such schemes. Any benefits and employer contributions will be calculated as if the employee had been working normally and receiving the normal rate of pay. Contributions payable by employees will be calculated by reference to the pay they actually receive.

7.5.8 Start date of adoption leave

7.5.8.1 Employees may choose to commence their adoption leave:

- on the date of the placement of the child; or
- some other fixed date during the 14 days before the expected date of the placement of the child.

7.5.8.2 The start date can be any day of the week. Leave must start no later than the expected date of placement.

7.5.8.3 Employees can change their start date by giving 28 days' advance notice, provided this does not conflict with the employer's arrangements for dealing with the employee's absence.

7.5.9 Notice for adoption leave and adoption pay

7.5.9.1 Employees must give written notice of:

- their intention to take adoption leave within 7 days of being notified of having been matched with a child;
- the expected placement date;
- the start date of the adoption leave; and
- for Statutory Adoption Pay purposes:
    - written notice of the date they wish to receive Statutory Adoption Pay (notice of this must be given at least 28 days before they want payment to begin); and
    - a copy of a Matching Certificate from the adoption agency.

7.5.9.2 Employees may apply for an extension of time for notification where it is not reasonably practicable to comply with the 7 day or 28 day time limits. Employers may ask employees to provide a Matching Certificate from the adoption agency as evidence of their entitlement to adoption leave.

7.5.10 Statutory Adoption Pay (SAP)

7.5.10.1 Employees who meet the qualifying conditions for adoption leave and give notice as detailed above will also qualify for Statutory Adoption Pay (SAP), provided they earn no less than the lower earnings limit for the purposes of Class 1 National Insurance Contributions at the end of the matching week.

7.5.10.2 Employees are entitled to SAP for 39 weeks of their adoption leave. The first six weeks of SAP are paid at 90% of employees' normal average weekly earnings. The remaining weeks are paid at the lesser of the SAP current standard rate and 90% of the employees' average weekly earnings. The current rate of SAP is £184.03 from 7 April 2024

7.5.11 Return to work

7.5.11.1 Employers should write to employees within 28 days of receiving the employee's notice, acknowledging receipt of the notice, setting out the date on which the adoption leave expires and when they are expected to return to work. There is no need for employees to give any further notice of intention to return to work.

7.5.11.2 However, when an employee intends to return before the adoption leave ends, he or she must give eight weeks' notice of the new return date.

7.5.11.3 OAL or AAL will end prematurely if there is a disrupted placement, for example, the child is returned to the adoption agency. In these circumstances employees can continue the adoption leave for a further 8 weeks, provided that it does not go beyond the date the leave would have ended if the placement had not been disrupted.

7.5.11.4 Return to work after OAL

Employees are entitled to return from OAL to the same job in which they were employed before their absence.

7.5.11.5 Return to work after AAL

7.5.11.5.1 Employees are entitled to return from AAL to work on the same terms and conditions as if they had not been absent. If that is not reasonably practicable they should return to work to a job which is both suitable and appropriate and on their existing terms and conditions.

7.5.11.5.2 Some employees may not wish to return to work after adoption leave. In these circumstances they must give proper notice of termination of employment to the employer in accordance with the employment contract.

7.5.12 Keeping in Touch days

Employees may, with their employer's agreement, work for up to 10 days during their adoption leave without bringing their adoption leave to an end or affecting the right to SAP. These are called 'Keeping In Touch' (KIT) days. For further details on KIT days see 7.2.10 Keeping in Touch days.

7.5.13 Dismissal and detriment

7.5.13.1 A dismissal will be unfair if the reason or principal reason relates to the employee taking, agreeing to take or refusing to take adoption leave.

7.5.13.2 Under the Paternity and Adoption Leave Regulations 2002, it is unlawful for employers to subject an employee to any detriment by any act, or any deliberate failure to act, because:

- the employee took or sought to take adoption leave;
- an employer believed that the employee was likely to take adoption leave;
- the employee undertook, considered, undertaking or refused to undertake work; or
- the employee failed to return after a period of additional adoption leave in a case where:

    - the employer did not notify the employee as required or otherwise of the date on which the leave ended and the employee reasonably believed that the period had not ended; or
    - the employer gave the employee less than 28 days' notice of the date on which the leave would end, and it was not reasonably practicable for the employee to return on that date.

7.5.13.3 Employees are entitled to raise an unfair dismissal claim within three months of the dismissal.

7.5.13.4 They may also claim that they have been subject to a detriment, for example, overlooked for promotion, and should raise, in broad terms, such a claim within three months of the act or failure complained of. In cases where employees complain that they have been subjected to a series of acts or failures, they can raise a complaint, in broad terms, within three months of the last act or failure.

7.6 Shared parental leave

7.6.1 General

Shared parental leave is an entitlement to take leave that applies to all employees with an expected week of childbirth or date of placement for adoption on or after April 5, 2015. The entitlement was introduced by the Shared Parental Leave Regula- tions 2014 in order to provide parents with greater flexibility for taking leave during their first year with their child.

7.6.1.1 Those employees who satisfy the eligibility criteria will be able to take up to 50 weeks shared parental leave minus any maternity or adoption leave already used (excluding the first 2 weeks of maternity (or 4 weeks in the case of a female factory worker) or adoption leave). During this period they may also be entitled to receive statutory shared parental pay. Eligible parents may be off work simultaneously or at the separate times and can each take up to 3 separate blocks (or potentially more with employer consent) of leave. Importantly, for shared parental leave entitlement to be available a mother or primary adopter must choose to curtail their maternity or adoption leave so that the remaining weeks can be allocated for shared parental leave. Shared parental leave replaces the right to additional paternity leave.

7.6.1.2 The right to take shared parental leave is also available to employees who have entered a surrogacy arrangement with a woman, and have been granted, or intend to apply for, a parental order in relation to the child that she bears.

7.6.2 Eligibility

In order to be eligible to take shared parental leave and receive shared parental pay, an employee must meet certain requirements:- (i) the mother or primary adopter and co-parent (mother's civil partner/spouse or the child's father) must both have the main responsibility for caring for the child, be that a newly born child or a newly placed child to adoptive parents; (ii) the mother or primary adopter must choose to curtail their maternity or adoption leave. This can be done by returning to work or by serving a curtailment notice on their employer.

7.6.2.1 For the mother or primary adopter to qualify for shared parental leave they must:

- Have been employed for at least 26 weeks immediately preceding either the 15th week prior to the expected week of birth or the week prior to notification of a match for adoption;
- Still be working for the employer the week preceding the start of any period of SPL;
- Be entitled to take maternity/adoption leave; and
- The co-parent also satisfies certain conditions.

7.6.2.2 For the co-parent to qualify for shared parental leave they must:

- Have been employed for at least 26 weeks immediately preceding either the 15th week prior to the expected week of birth or the week prior to notification of a match for adoption;
- Still be working for the employer the week preceding the start of any period of SPL;
- Share the primary care for the child with mother or primary adopter at the time of the child's birth/adoption;
- Mother or primary adopter have worked on a self/employed basis for 26 of the last 66 weeks and have earned at least £390 in total in 13 of the 66 weeks (add up the highest paying weeks - they do not need to be in a row); and
- Mother or primary adopter has curtailed maternity/adoption leave.

7.6.3 The period of leave

7.6.3.1 Length of shared parental leave

Eligible employees may take up to 50 weeks shared parental leave between themselves and the co-parent, subject to both parents meeting the specified conditions. The maximum period of leave will be determined by the amount of weeks remaining following the mother or primary adopter's curtailment of their maternity or adoption leave.

7.6.3.2 Continuous and discontinuous periods of leave

Employees with an entitlement to shared parental leave may request to take leave in one continuous block or in discontinuous blocks. There is no restriction on the pattern of leave requested for discontinuous blocks, subject to any block requested being a minimum of one week in length. Both parents may choose to take leave at the same time.

If requesting a period of continuous leave then the employee will be entitled to take shared parental leave for the weeks requested and dates provided. However, if requesting periods of discontinuous leave a 14-day consultation period with the employer is automatically triggered. The employer can:

- consent to the periods of leave requested;
- propose alternative dates for the periods of leave; or
- refuse the periods of leave requested without proposing alternative dates.

Where no agreement is reached on the proposed leave, the employee is entitled to take the requested number of weeks as a continuous period of shared parental leave which commences either on a date of the employee's choosing at least 8 weeks after the notice is given or, at the start of the first block of leave.

7.6.3.3 Commencement of shared parental leave

Shared parental leave cannot have effect during a mother 's period of compulsory maternity leave (see 7.2.7.3 Compulsory maternity leave). The same restriction applies to the first two weeks of adoption leave. Shared parental leave can be taken at any time during the 50 week period after this time.

7.6.3.4 Period during which shared parental leave must be taken

Shared parental leave must be taken within the first year of the birth or the date that the child was placed with the parents.

7.6.3.5 Notification of intention to take

Employees must inform their employers that they intend to take shared parental leave at least 8 weeks before the proposed date of commencement of leave. This is done by serving of curtailment notices, notices of entitlement and period of leave notices on the employer. An employee may submit the notices together or individually.

7.6.3.6 Curtailment notice

To be entitled to shared parental leave, the mother or primary adopter must have served a curtailment notice (or have returned to work). The notice must be in writing and state the date that maternity/adoption leave is to end. The date of curtailment must be after the first two weeks of maternity/adoption leave.

7.6.3.7 Notice of entitlement

The employee requesting leave must serve on their employer a notice of entitlement, which requires to state:

- The names of the parents;
- The co-parent's address, and national insurance number;
- A declaration that both parents meet the specified conditions, that the information provided is accurate and that the employer may process all information provided;
- Total amount of shared parental leave available at that point;
- The expected week of birth/date of placement for adoption;
- Proposed start and end dates of leave; and
- How the leave will be shared.

The proposed period(s) of shared parental leave in a notice of entitlement are non- binding. An employee may vary their notice of entitlement an unlimited number of times.

7.6.3.8 Period of leave notice

The employee must also serve on their employer a period of leave notice, which sets out the start and end dates of each period of shared parental leave requested in that notice. There is a statutory limit of three period of leave notices that an employee may submit, though an employer has discretion to allow more. An employer may also request for the period of leave notice to state whether the employee is seeking statutory shared parental pay (see 7.6.5 Shared parental leave pay).

An employee can seek to vary the period leave by providing written notice of variation even after the period of shared parental leave has been agreed. This done by submitting a period of leave notice and allows the employee to do one of the following:

- vary the start date or the end date of any period of shared parental leave provided that the notice is given not less than eight weeks before both the date varied and the new date;
- request that a single period of leave become discontinuous periods of leave or vice versa;
- vary (including cancel) the amount of leave requested provided that the notice is given not less than eight weeks before any period of leave varied by the notice is due to commence.

7.6.3.9 Concurrent leave

An eligible employee can take shared parental leave at the same time as the other parent or adopter may be on a period of shared parental leave, maternity leave or paternity leave, subject to the necessary notice requirements being provided. If both parents/adopters are taking shared parental leave during the same week, then this will count as 2 weeks of the available leave entitlement remaining.

7.6.4 Contracts of employment during shared parental leave

7.6.4.1 Contracts of employment continue throughout periods of shared parental leave and employees are entitled to all the same terms and conditions of employment which would have applied had they not been on leave. The main exception is that 'remuneration' (wages and salary) is not covered and therefore, employees are not entitled to be paid their usual remuneration during shared parental leave. For further information on what counts as remuneration see paragraph 7.2.7.5.2.

7.6.4.2 Employees continue to be employed during periods of shared parental leave. Shared parental leave counts towards their period of continuous service.

7.6.4.3 Annual leave accrues throughout both shared parental leave in the same way and at the same rate as if the employee was at work. This includes statutory and contractual entitlement to annual leave. Where employees have a contractual right to public/bank holidays, these will also accrue during shared parental leave. The holidays cannot be taken during shared parental leave and should be allowed to be taken before or after shared parental leave. Holidays should be taken in the appropriate holiday year and there should be no payment in lieu of statutory holiday entitlement.

7.6.4.4 Contributions to any occupational pension scheme should continue during shared parental leave, with the amount being based on the amount of statutory or contractual shared parental pay being made but the employer contributes as though the employee was working normally.

7.6.5 Shared parental leave pay

7.6.5.1 Statutory shared parental pay

The right

Any employee who has been continuously employed by their employer for at least 26 weeks as at the 15th week before the expected week of birth/the week prior to notification of a match for adoption is entitled to statutory shared parental pay (ShPP). ShPP is due and payable from the day that shared parental leave starts. ShPP will be available for the remaining entitlement of maternity or adoption leave following the mother or primary adopter's curtailment of such leave, up to maximum of 37 weeks.

7.6.5.2 Notice required for ShPP

An employee must inform their employer of that they are seeking to receive ShPP at least 8 weeks prior to commencement of the period of leave. ShPP cannot be paid prior to that date or during maternity or adoption leave.

7.6.5.3 The rate of ShPP

The rate for ShPP is either the statutory rate of £172.48, increasing to £184.03 from 7 April 2024 a week or 90 per cent of normal weekly earnings, whichever is the lower. The ShPP rate is reviewed annually with effect from April each year.

7.6.5.4 Enhanced schemes

The Department for Business, Innovation and Skills states in guidance that offering enhanced shared parental pay schemes to mothers and co-parents will be at the sole discretion of the employer.

If enhanced shared parental pay is paid to mothers then it must also be paid to co-parents. However, employers who offer enhanced maternity pay but not enhanced shared parental pay will, according to recent case law, not be committing an act of sex discrimination. This is because maternity leave is to protect the birth mother for matters exclusive to pregnancy and childbirth is not shared by the husband or partner. For more information on sex discrimination see 6.4.7 Sex.

7.6.6 Keeping in Touch days

7.6.6.1 Employees may, with their employer's agreement, work for up to 20 days during their shared parental leave without bringing the leave period to an end or affecting their right to ShPP. These days are in addition to the "keeping in touch days" for maternity or adoption leave. For further information on Keeping in Touch days see 7.2.10 Keeping in Touch days.

7.6.7 Return to work after shared parental leave

7.6.7.1 There is no requirement for notice of return to be given by the employee, although this is advisable. Should the employee wish to return to work before their full entitlement to shared parental leave has expired, they will be required to submit a notice of variation to their employer at least eight weeks prior of the return date (see 7.6.3.7 Notice of entitlement).

7.6.7.2 Employees returning from shared parental leave totalling 26 weeks or less are entitled to return to their old job on the same terms and conditions as if they had not been absent, unless a redundancy situation has arisen. Employers should seek advice from Scottish Engineering if a redundancy situation has arisen.

7.6.7.3 Employees returning from shared parental leave totalling more than 26 weeks have the right to return to their old job, or, if it is not reasonably practicable, to another job suitable for them on terms no less favourable than those which would have applied had there been no shared parental leave.

7.6.8 Unfair dismissal and protection from detriment

7.6.8.1 Under the Employment Rights Act 1996 and the Shared Parental Leave Regulations 2014 any dismissal will be automatically unfair where the employee was dismissed because they took, sought to take or made use of the benefit of shared parental leave. Such dismissals include redundancy if the fact that the employee took, sought to take, or made use of the benefit of shared parental leave was connected with the reason for redundancy selection.

7.6.8.2 An employee will also be protected from detriment due to any act, or any deliberate failure to act, by an employer because the employee took, sought to take, or made use of the benefit of shared parental leave.

7.6.9 Further information

The Department for Business, Innovation and Skills has published detailed guidance titled "Shared parental leave and pay: employers' technical guide" which can be accessed here: https://www.gov.uk/government/publications/shared-parental-leave-and-pay-employers-technical-guide .

7.7 Flexible working

7.7.1 General

7.7.1.1 In 2014 legislation was passed which allowed any employee with 26 week's continuous service to make a flexible working request. From 6 April 2024, the right to request flexible working will no longer require an employee to have 26 weeks' continuous service and will instead be a 'day one' employment right as a result of the Flexible Working (Amendment) Regulations 2023. .

7.7.1.2 Eligible employees may request any of the following (the list is not exhaustive):

- a change in working hours;
- to work from home;
- job sharing;
- working term-time only;
- working part-time;
- shifts.

7.7.1.3 It is not an automatic right to work flexibly as there may valid business reasons when employers are unable to accommodate the change requested (please see 7.4.4 Grounds for refusal).

7.7.1.4 From 6 April 2024, employees can make two applications in any rolling 12-month period

7.7.2 How employees should apply?

The application must:

- be in writing;
- specify the date of the application;
- specify the change(s) applied for;
- specify the date on which the employee would like the change to take effect; and
- That this is a statutory request and if they have made a previous application for flexible working and the date of that application;

There is no longer any need for the employee to explain what effect, if any, the change might have on the employer and how that effect might be managed

Employers should, but are not obliged to, provide guidance on what information an application must contain.

7.7.3 Meeting

7.7.3.1 Employers should try to set up a meeting with the employee in a timely manner after receiving a request, as all requests need to be considered within 2 months of receipt of the request, unless an extension is expressly agreed in writing with the employee who has made the request. This includes any process of appeal.

7.7.3.2 If an employee is unable to attend the meeting, the date should be rearranged.

7.7.3.3 Deciding on a request

7.7.3.4 Employers should carefully consider any requests made and weigh up the benefits and drawbacks to their business before making a decision. If the application is to be refused, an employer must first consult with the applicant before doing so.

7.7.4 Grounds for refusal

7.7.4.1 Employers can refuse an application for flexible working if they consider that one or more of the following grounds apply:

- there will be a burden of additional costs;
- it will have a detrimental effect on ability to meet customer demand;
- the employer is unable to re-organise work among existing staff;
- the employer is unable to recruit additional staff;
- it will have a detrimental impact on quality;
- it will have a detrimental impact on performance;
- there is insufficient work during the period the employee proposes to work;
- there are planned structural changes; or
- on any other grounds as the Secretary of State may specify.

7.7.4.2 Employers are not, therefore, obliged to agree to any request if any of the above grounds apply. Despite this, employers must still act reasonably and it would be advisable to take legal advice from Scottish Engineering before declining any flexible working request.

7.7.5 Notification of outcome

7.7.5.1 If an application is accepted, employers should confirm the acceptance, specify the change to the employee's terms and conditions of employment and the date it will become effective.

7.7.5.2 If the application is unsuccessful, employers should confirm their decision in writing and specify which of the grounds for refusal apply (see 7.4.4 Grounds for refusal). The notice of the decision should also contain a sufficient explanation of why those grounds apply. It should also confirm the employee has a right of appeal and specify the relevant appeal procedures.

7.7.6 Appeal process

7.7.6.1 Following the changes in June 2014, employees no longer have the right to appeal any decision regarding their flexible working request. Nonetheless it is good practice to allow an employee to appeal a refusal to work flexibly. It is also good practice to allow an employee to be accompanied at any appeal meeting. Employees should be aware that any appeal must be concluded within 3 months from the receipt of the original request, unless an extension is agreed with the employee

7.7.7 Notification of appeal outcome

7.7.7.1 If an appeal is successful, the employer should notify the employee in writing of the changes to the contract of employment and the date the changes will take effect.

7.7.7.2 If an appeal is unsuccessful, the employer should confirm this in writing and provide an explanation of the grounds for rejecting the application.

7.7.8 Extension of timescales

7.7.8.1 The timescales referred to in this section can be extended by mutual agreement. Any such agreement should be recorded in writing by the employer and should:

- specify what period the extension relates to;
- specify the date on which the extension is to end;
- be dated; and
- be sent to the employee.

7.7.8.2 Employees may raise a tribunal claim if the employer has failed to comply with its duties to consider the request reasonably or if the decision made to reject the application was based on incorrect facts. Any such claim must be raised, in broad terms, within three months of either the date the employer notified the employee of the appeal decision or the date on which the alleged breach of the duty was committed.

A tribunal may award up to 8 weeks' pay subject to the statutory cap on a week's pay.

7.7.9 Implications of flexible working

An accepted application is a permanent contractual variation. The agreed terms form part of the employees' contract of employment and cannot be changed unless both parties agree. Employees will not automatically revert back to their previous terms and conditions of employment should they subsequently decide that they no longer wish to work in the flexible pattern requested and granted.

7.7.10 Dismissal and detriment

7.7.10.1 Any dismissal because, or principally because, an employee has made or proposes to make an application for flexible working is unfair. Similarly, an employee has the right not to be subjected to any detriment because he or she has made or proposes to make an application for flexible working.

7.7.10.2 There is no qualifying period of continuous service required for employees to raise an unfair dismissal claim if the dismissal was because a flexible working request was made.

7.7.11 4 day-working week

In 2023 the Scottish Government began funding a series of four-day working week pilots across Scotland, intended to provide guidance and learnings for other employers and give an insight into the benefits and drawbacks of a shorter working week as well as the logistics as to how that may work. Many employers are also choosing to launch their own trials. No formal outcome or report has been published as yet into the findings.

7.8 Time off for dependants

7.8.1 Parental Bereavement Leave

Parental Bereavement leave is a statutory right for bereaved parents to take a period of up to 2 weeks' paid leave. This right is available to employees who suffer the loss of a child under the age of 18, including instances of still birth where pregnancy has reached 24 weeks. The period of leave has to be taken within 56 days of the death of the child. The right to leave is a "day one" right without the need for a period of qualifying service.

If the employee has 26 weeks or more service then they may be entitled to receive statutory parental bereavement pay for the period of leave taken.

Employees will be protected from detriment or dismissal if they took, sought to take or availed themselves of the benefits of parental bereavement leave. This will be paid at the same statutory rate as applies to SMP, SAP, etc (currently £184.03 from 7 April 2024), or 90% of average earnings, whichever is the lower.

The right has been available since 6 April 2020.

7.8.2 Neo-natal leave and pay

The Neonatal Care (Leave and Pay) Act 2023 received Royal Assent in May 2023, but its provisions are not yet in force. It will entitle eligible employed parents to up to 12 weeks' paid leave if their baby is admitted to neonatal care.

Currently, employees have no statutory entitlement to neonatal care leave and instead normally have to use their maternity/paternity allowance and ultimately supplement this with holiday and compassionate or unpaid leave.

The right to unpaid time off will be available to all employees as a 'day one' right with no qualifying service needed, provided that they have a parental or 'other personal relationship' to the child. The right to pay under the new act mirrors that of maternity pay (i.e. employees will require 26 weeks' continuous service and to meet other eligibility requirements to be eligible for paid leave)

'Neonatal care' is medical or palliative care for a continuous period of at least seven days which commences within 28 days following the day after the birth.

The expected date for implementation is April 2025.

7.8.3 The right to time off

7.8.3.1 7.8.1.2 A dependant includes an employee's husband, wife or civil partner, child, parent, or someone who lives in the employee's household as a member of the family. In certain cases the definition of a dependant also extends to someone who reasonably relies on an employee for assistance or for making arrangements for the provision of care.

7.8.4 What constitutes an unexpected event or emergency?

7.8.4.1 An unexpected event or emergency includes a situation where a dependant falls ill, gives birth, is injured, assaulted or dies. It also includes the unexpected breakdown of care arrangements for a dependant or to deal with an unexpected incident involving a child whilst at school. These are considered in more detail below.

7.8.4.2 Illness of a dependant

The illness can be physical or mental and does not need to be serious or life threatening. It also includes the unexpected deterioration of the health of a dependant who was previously ill but who did not require care during working hours. In these circumstances, employees have the right to time off to provide immediate care and, if necessary, to make arrangements for long-term care. In the case of illness, a dependant also includes someone who reasonably relies on the employee for assistance or to make arrangements for the provision of care in the event that they fall ill.

7.8.4.3 A dependant is injured or assaulted

The injury does not have to be serious and can be a physical or mental injury, for example, where someone has been robbed and is extremely upset. In the case of injury or assault, a dependant also includes someone who reasonably relies on employees for assistance when they are injured or assaulted or to make arrangements for the provision of care in the event of injury.

7.8.4.4 A dependant gives birth

This right does not only apply to an expectant father but extends to any dependant of the employee who is giving or has just given birth. The right does not apply to time off to care for the child after the birth but this may be covered by paternity or parental leave. See 7.3 Parental leave and 7.4 Paternity leave.

7.8.4.5 Death of a dependant

Following the death of a dependant, employees have the right to time off to make funeral arrangements and to attend the funeral.

7.8.4.6 Unexpected breakdown of care arrangements

This covers matters such as a child minder cancelling at short-notice or a nursery or care home closing unexpectedly. In these circumstances, a dependant also includes someone who reasonably relies on an employee to make arrangements for the provision of care.

7.8.4.7 Unexpected incident involving the employee's children whilst at school

This deals with situations such as when a child is suspended from school. It would also cover the child being injured or ill, which is also covered by the right to time off for illness or injury.

7.8.5 Duty to inform the employers

To qualify for the right to time off, employees must tell employers the reason for the absence as soon as reasonably practicable after the need arises and state how long they expect to be absent.

7.8.6 When the right does not apply

7.8.6.1 Non-dependants

7.8.7 The right to time off only applies to situations involving a dependant. 'Dependant' does not include:

- someone living in an employee's house as a boarder, tenant, or lodger;

- someone living in an employee's house as an employee, such as a live-in housekeeper;
- a family friend unless that person reasonably relies on the employee as discussed at section 7.7.1.2 above; nor
- a pet.

7.8.7.1 Non-emergencies and foreseeable situations

The right to time off applies to unexpected situations involving dependants. It does not therefore include foreseeable events. If an employee knows in advance that his or her child's school is due to close, for example on a bank holiday, then he or she should make the necessary care arrangements in advance. Similarly, if a dependant is due to go into hospital for a routine operation there is no right to take time off. It does not include time off for domestic incidents such as a burst water pipe.

7.8.8 What if no right to time off exists?

If employees do not have a statutory right, employers can still agree to them having time off. This may take the form of paid or unpaid time off, or a holiday and is entirely at an employer's discretion. When employers exercise their discretion they should confirm the arrangements in writing and that the arrangements only apply to that particular situation. It is not possible to exclude the right to time off for dependants, even if the employee agrees.

7.8.9 Paid time off?

There is no statutory right to paid time off for dependants, however, employees' contracts of employment may provide more favourable rights, for example, paid time off after bereavement. Whilst employers would always be best advised to have a clear written policy in place, this may be implied through custom and practice.

For further information on implied contractual terms see 2.5 Implied terms.

If there is a contractual right to paid time off for dependants, employers should ensure that this is applied equally to all employees and the right does not operate in a discriminatory manner. For further information on discrimination see 6.0 Equal opportunities.

7.9 Carer's leave

Under the Carer's Leave Regulations 2024 from 6 April 2024 employees with long term caring responsibilities will have a 'day one' right to take one week's unpaid carer's leave **in a 12 month period** to arrange or provide care for a dependent who has long term care needs.

The term "dependant" includes not only an employee's spouse/partner, child or parent but anyone else who reasonably relies on the employee for care.

Under the new Regulations, the employee must give notice of their intention to take leave (though there is no requirement for this to be in writing) and the leave can be taken as a full week or in smaller chunks, provided each period of leave is for at least half of a working day. An employer can defer a request if they reasonably believe it will excessively disrupt their business operations, but then must allow the leave to be taken within one month.

For the purposes of calculating 'one week', employers should look at the number of days the employee requesting the leave normally works in a week. For example, someone who works part-time, 3 days per week, would be eligible for 3 days leave under the new Regulations.

7.10 Time off for jury service

7.10.1 Employees called up for jury service must be allowed time off work to perform this duty. Employers who refuse to permit employees to attend jury service may be in contempt of court and could therefore face criminal charges.

7.10.2 Employees should not be dismissed or treated unfairly as a result of being called up for jury service. A dismissal for this reason is automatically unfair. In addition, employees do not need a minimum period of continuous employment to claim unfair dismissal.

7.10.3 Deferring jury service

7.10.3.1 Employees have a right to ask for jury service to be deferred for up to 12 months from the date first notified. Therefore, if employees are called for Jury Service at a particularly busy or otherwise inconvenient time for the business, employers can request that employees ask for the jury service to be deferred. Employers may also make submissions to the court, however, there is no guarantee that the court will take these into account.

7.10.3.2 As previously mentioned, employees have the right not to be dismissed for taking time off for jury service. If, however, the employee has been informed that his or her absence on jury service will cause substantial loss to the employer's business and the employee unreasonably refuses to apply for the jury service to be deferred, he or she is not protected against dismissal. The employer would still have to follow appropriate procedures and rules in order to avoid a claim for unfair dismissal. For further information see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair.

7.10.4 Paid time off?

Whilst employees have the right to time off for jury service, there is no right to paid time off, unless the contract of employment provides for this. Employees can, however, claim for travel, subsistence expenses and loss of earnings from the court. Employers will need to fill out a Certificate of Loss of Earnings to allow the employees to make a claim. Limits are placed on the loss of earnings that can be claimed. There may be a shortfall in the employee's wages during the period of jury service. There is no obligation on employers to make employees' wages up to their normal amount unless the contract of employment provides for this.

7.11 Time off for public duties

7.11.1 Employees have the right to time off for various public duties and services.

The exact right to time off will depend on the type of duty or service and also what work employees do. Employees have the right to time off work for public duties if they are:

- a Justice of the Peace (a Magistrate in England and Wales);
- a local Councillor;
- a School Governor;
- a member of a police authority;
- a member of any statutory tribunal (e.g. an Employment Tribunal or Children's Panel);
- a member of the managing or governing body of an educational establishment;
- a member of a school council or board in Scotland;
- a member of the General Teaching Councils for England and Wales;
- a member of a NHS Trust or Health Board;
- a member of the Scottish Environment Protection Agency (or the Environment Agency in England and Wales);
- a member of the Prison Visiting Committee (or the Prison Independent Monitoring Boards in England and Wales); or
- a member of Scottish Water or a Water Customer Consultation Panel.

7.11.2 Employers should note that the right to time off for public duties only applies to employees.

7.11.3 The right to reasonable time off

Employees who are required to carry out public duties are entitled to 'reasonable' time off in order to attend meetings and to carry out duties. Employees must agree the time off with employers in advance and employers can refuse to allow the time off if it believes that the request is unreasonable. There is no minimum or maximum amount of time off which is defined as being 'reasonable'. What is reasonable will depend on a number of factors including:

- the nature of the public duties;
- how much time employees need to carry out the duties;
- what effect the time off will have on the running of the employers' business; and
- how much time employees have already taken off for public duties.

7.11.4 Paid time off?

Whilst employees have a right to reasonable time off there is no right to payment. Whether employees are entitled to payment is down to the contract of employment and is otherwise at the employers' discretion.

7.12 Reserve Forces duty

7.12.1 Where an employee joins one of the Reserve Forces (the Regular or Army Reserves, Royal Naval Reserve, Royal Marines Reserve or Royal Auxiliary Air Force), they may be mobilised at any time to be used on full-time operations, as well as be expected to attend regular training. As a member of the reserves an employee will have certain employment rights.

7.12.2 Leave for training

Employers are under no obligation to offer paid or unpaid leave to reservist employees. Employees may be expected to use their existing holiday entitlement or seek the agreement of their employer for unpaid leave.

7.12.3 Mobilisation

When a reservist is to be mobilised, the employer receives written notice from the MoD, together with an explanation of their rights and obligations. The employer has the right to seek an exemption for their employee from the mobilisation or a revocation or deferral of the mobilisation if their absence would cause harm to the business. This includes financial harm, impairment to the ability to produce goods and services. The application for exemption, deferral or revocation must be made within seven days of receiving the mobilisation notice. There is an appeals process if the employer is dissatisfied with the MoD's response to their application.

7.12.4 Return to work

A reservist has the right to be reinstated by his former employer (i.e. the employer by whom he or she was employed within the four week period immediately before mobilisation). Following demobilisation, reservists must write to the employer (usually by the third Monday following the end of military service), making an application for reinstatement of their employment. Re-employment should be in the same job and on terms and conditions no less favourable than those which would have applied if there had been no call-up. If not reasonable and practicable to do so, the employee must be offered the most favourable terms and conditions that are reasonable and practicable in the circumstances. The employee must be allowed to remain in post for a minimum protected period, depending on their pre-mobilisation length of service.

7.12.5 The employer has the right to refuse reinstatement if it would result in the dismissal of another employee who was employed before the reservist was mobilised, whose job is as permanent as the reservist's and who had longer service at the time of the mobilisation.

7.12.6 Is there a right to payment?

There is no obligation to continue paying a reservist who has been mobilised and is absent from the workplace.

7.12.7 An employer may claim financial assistance to cover the additional costs of replacing an employee who is mobilised, over and above their earnings. This may include hiring a temporary replacement and the cost of training the reservist on his or her return.

7.12.8 Employer incentive payments are also available where an employee is mobilised. These are not conditional on loss, but are restricted to eligible small/medium sized businesses. Payment can be up to £500 per month per reservist.

7.12.9 Legal remedies for the employee

If an employer terminates a reservist's employment on the grounds that they may be mobilised at a future date, it is guilty of a criminal offence. A court can order the employer to pay compensation to the employee as well as levying a fine. The employee may also have a claim for unfair dismissal. There is no qualifying period of service for a reservist to raise such a claim.

7.12.10 Reservists can also complain to a Reinstatement Committee if they are dissatisfied with their employer's response following demobilisation. This Committee can order reinstatement or compensation, which is enforceable in a sheriff court. Failure to comply with a reinstatement order may incur a fine of up to £1,000 plus compensation for the employee.

7.13 Summary of employees' statutory rights to time off work

Right to time off	Employees only or all workers	Paid?	How long?
Time off for dependants	Employees only	No	Reasonable time off
Time off for jury service	All workers	No	To carry out jury service
Time off for public service and duties	Employees only	No	Reasonable time off
Time off for Armed Forces Reservists who are called up for active service*	All workers	No	Indefinite
Time off for job-seeking or making arrangements for training in a redundancy situation *See Chapter 13*	Employees only	Yes	Reasonable time off
Time off for employee representatives in collective redundancy situations *See Chapter 13*	Employees only	Yes	Reasonable time off
Time off for employee representatives off in a business transfer situation *See Chapter 13*	Employees only	Yes	Reasonable time
Time off for negotiation, information and consultation representatives	Employees only	Yes	Reasonable time off and consultation representatives
Basic training/continuing training for young workers	Employees only	Yes	Reasonable time off
Time off for carrying out duties as an employee safety representative	Employees only	Yes	Reasonable time off
Time off for carrying out duties relating to Pension Scheme Trustee training and duties	Employees only	Yes	Reasonable time off
Time off for Trade Union training and duties *See Chapter 8*	Employees only	Yes	Reasonable time off

* An employer may be able to obtain an exemption on behalf of the employees
** 26 weeks OML and 26 weeks AML
*** Less any any maternity or adoption leave already taken
**** Up to 6 months pay for employees with one month's service or more

Right to time off	Employees only or all workers	Paid?	How long?
Time off for Trade Union activities *See Chapter 8*	Employees only	No	Reasonable time off
Time off to accompany a colleague at a disciplinary or grievance hearing colleague at the hearing *See Chapter 11*	All workers	Yes	To accompany the colleague at the hearing
Time off to accompany a colleague at a flexible working hearing *See Chapter 7*	All workers	Yes	To accompany the colleague at the hearing
Maternity leave	Employees only	Yes	52 weeks**
Neo Natal Leave	Employees only	Yes,	12 weeks
Carers Leave	Employees only	No	1 week
Paternity leave	Employees only but see *Chapter 7*	Yes,	Up to 2 weeks
Adoption leave	Employees only but see *Chapter 7*	Yes	52 weeks**
Shared Parental Leave	Employees only	Yes	Up to 52 weeks***
Shared Parental Leave	Employees only but see *Chapter 7*	Yes	Up to 52 weeks***
Antenatal care	Employees only but see *Chapter 7*	Yes	Reasonable time off
Suspension from work on maternity grounds	Employees only	Yes	For as long as necessary to avoid the risk
Suspension from work on maternity grounds	Employees only	Yes	For as long as necessary to avoid the risk
Suspension from work on medical grounds *See Chapter 4*	Employees only	Yes****	For the length of the suspension

Chapter 8

Trade unions

8.0 Trade unions

8.1 Introduction

8.1.1 A trade union is essentially an organisation of workers whose principal purpose includes the conduct of industrial relations between workers and their employers.

8.1.2 The relationship of employer and employee is governed by individual contracts of employment. Employers are almost inevitably the dominant party to the contract and, as a result, the balance of bargaining power tends to rest with them. The trade union movement has always sought to redress that balance by providing a system for collective bargaining. In other words, unions provide a greater bargaining strength by representing a group of workers as a collective whole rather than each individual employee being left to negotiate on their own behalf.

8.2 Time off

8.2.1 General

Once a trade union has been recognised by the employer as having negotiation rights it gains additional statutory rights for itself, its members and its officials. Many of these rights comprise a right to time off for certain union related purposes.

8.2.2 Time off for union duties

8.2.2.1 The time spent carrying out trade union duties does not count towards an employee's "working time" for the purpose of the Working Time Regulations (see 5.5 Maximum weekly working time).

8.2.2.2 Union officials are entitled to time off for:

- negotiations with employers in relation to collective bargaining matters;
- performing on behalf of employees any functions that their employers have agreed may be performed by the union;
- receiving information from, and consulting with, employers in relation to proposed collective redundancies or TUPE transfers. See 10.0 TUPE and 13.0 Redundancy; and
- negotiations or functions on behalf of employees with a view to entering into an agreement under TUPE.

8.2.3 Time off for training

8.2.3.1 As well as time off for performing their duties, trade union officials are entitled to time off to undergo training which is relevant to their official duties. The training must be approved by either the Trades Union Congress (TUC) or the official's trade union.

8.2.3.2 The legislation does not stipulate how or when a request for time off should be made, but the ACAS Code on time off for Trade Union duties and activities provides that officials should give management as much notice as possible of the time, place, purpose and duration of the training.

8.3 Union recognition

8.3.1 General

Employers who are reluctant to recognise a union may nevertheless be compelled to do so. Independent trade unions have a legal right to be recognised by employers for collective bargaining purposes in certain specific circumstances. This is commonly known as statutory recognition. A union can achieve statutory recognition if a certain percentage of workers vote in favour of recognition. This section is intended as a brief summary of what is a relatively complex process. It is therefore recommended that legal advice is sought if employers receive a request to recognise a union.

8.3.2 Types of recognition

8.3.2.1 Voluntary recognition

Voluntary recognition is where a union is recognised on an entirely voluntarily basis and not as a result of a request made under the statutory procedures set out below. Employers can unilaterally withdraw voluntary recognition at any time, subject to any notice provision in the recognition agreement.

8.3.2.2 Semi-voluntary recognition

Semi-voluntary recognition is where a union is recognised voluntarily but only after a recognition request is made under the statutory procedures set out below. Recognition usually lasts for a minimum of 3 years, after which employers can unilaterally withdraw, again subject to any notice provision in the recognition agreement.

8.3.2.3 Statutory recognition

Statutory recognition is where a union is recognised following the statutory process set out below. Recognition usually lasts for a minimum of 3 years, after which an employer can apply for derecognition.

8.3.3 Effect of withdrawal of voluntary recognition

It is possible that withdrawal of voluntary recognition will provoke unrest and dissatisfaction amongst the workforce and is also likely to trigger a statutory recognition request. However, unions are not able take any legal action against employers who withdraw voluntary recognition, unless the recognition agreement is a binding contract which has been breached by the employer's withdrawal.

8.3.4 Effect of statutory recognition

If a union achieves statutory recognition it is entitled to negotiate with the employer on behalf of its workers in a particular bargaining unit in relation to pay, hours and holidays. It is also open to the union and employer to agree the matters to be subject to collective bargaining. Recognition can take various forms. For example, a union may be recognised at national or group level, at just one plant or in relation to a specific category of workers and so on. This is known as the bargaining unit. The extent of recognition should be detailed in a recognition agreement between the parties and should specify the grades of worker in respect of whom the union is entitled to act.

8.3.5 The bargaining unit

8.3.5.1 Agreeing the bargaining unit is often the most contentious area of the statutory recognition process as it can have a major influence on whether or not the union will be successful. What constitutes the appropriate bargaining unit is not defined and depends on the individual circumstances of each case. If agreement is not reached the Central Arbitration Committee (the 'CAC') will decide on the appropriate bargaining unit.

8.3.5.2 For example, the CAC may decide that an engineering firm has two bargaining units comprising 1) engineering staff; and 2) office staff. Alternatively, it may decide that there are four bargaining units comprising 1) mechanical engineers; 2) electrical engineers; 3) administrative staff; and 4) management. As the rules refer to percentages of workers within the bargaining unit, rather than the entire workforce, employers should be careful before agreeing to a proposed bargaining unit, especially if they intend to resist recognition. The CAC is a publicly funded body, one of whose roles is to consider and rule on disputes that arise out of statutory recognition procedures.

8.3.6 Request for voluntary recognition

8.3.6.1 In order to commence the statutory recognition process the union must first make a written recognition request to the employer. The request must identify the proposed bargaining unit which the union is seeking recognition in relation to. It must also state that the request for recognition is being made under Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992. The rules deal with the procedure to be followed where more than one union makes a recognition request in relation to the same bargaining unit, however this is outwith the scope of this book. If such a situation arises, advice should be sought.

8.3.6.2 On receiving a recognition request the employer has 10 days to decide on one of the following options:

- agree to recognise the union as being entitled to conduct collective bargaining on behalf of that bargaining unit;
- refuse to recognise the union;
- ignore the request; or
- refuse to recognise the union but indicate a willingness to negotiate, either with or without the assistance of ACAS. A negotiation period of 20 working days is then allowed for the parties to attempt to reach agreement. This period can be extended if both parties agree.

8.3.7 Agreeing to a request for voluntary recognition

If the employer agrees to recognise the union certain rules regulate the collective bargaining process. Such 'semi-voluntary' recognition usually lasts for a minimum of 3 years, after which employers can unilaterally withdraw, again subject to any notice provision in the recognition agreement.

8.3.8 Failure to agree voluntary recognition

8.3.8.1 If the employer refuses to recognise the union or fails to respond within 10 working days of receipt of the request, the union may apply to the CAC. The union may also apply to the CAC if, following the period of negotiation referred to above, agreement is not reached.

8.3.8.2 The CAC can only consider an application if the following conditions are met:

- the employer, together with any associated employer(s), must employ at least 21 workers (or an average of 21 workers in the previous 13 weeks) on the day it receives the request from the union;
- at least 10% of workers in the proposed bargaining unit are members of the union making the application;
- the CAC is satisfied that a majority of workers in the proposed bargaining unit are likely to favour recognition. The parties can submit evidence to the CAC such as a petition from workers in favour of recognition;
- no application for recognition has been made by the union in the previous 3 years in relation to the same or substantially the same bargaining unit;
- the application for recognition must have been received by the employer;
- there cannot be a competing application. The CAC cannot adjudicate between competing applications which relate to the same or overlapping bargaining units;
- the CAC cannot entertain an application if there is an existing recognition agreement under which the union is entitled to conduct collective bargaining on behalf of any workers in the bargaining unit. This can be an agreement with any trade union; it does not have to be the union which is making the current application. Although the CAC has accepted a collective bargaining application where the existing collective bargaining agreement did not cover pay, hours or holidays, citing Article 11 of the European Convention on Human Rights. There are two exceptions to this rule. The first exception is where the union recognised is a non-independent union that was derecognised in the preceding three years. If that is the case, then an application from an independent union can be accepted. The other exception is where the existing agreement is with the same union as is making the current application, and that existing agreement does not cover any of pay, hours and holidays; and
- if the application is made by one or more union, the unions must demonstrate to the CAC that they will co-operate with each other.

8.3.8.3 The employer must supply the following information within 5 working days of being notified that the CAC has accepted the application:

- a list of the categories of workers in the proposed bargaining unit;
- a list of the workplaces at which the workers in the proposed bargaining unit work; and
- the number of workers the employer reasonably believes to be in each category at each workplace. The employer also has the opportunity to put forward any evidence the employer considers appropriate.

8.3.8.4 The union also has a right to ask the CAC to appoint a suitable independent person to handle communications between the union and the workers.

8.3.9 Agreeing the appropriate bargaining unit

8.3.9.1 Where the bargaining unit has not been agreed prior to the application being made, the CAC has 20 days to try to help the parties reach agreement. If agreement is not reached in that period the CAC will decide the appropriate bargaining unit, usually within a further 10 working days.

8.3.9.2 In making its decision the CAC must take into account the following factors:

- the need for the unit to be compatible with effective management (this takes priority over the other factors listed below); and, so long as the size and composition of the unit does not conflict with effective management, the following:
- the views of the employer and of the union;
- existing national and local bargaining arrangements;
- the desirability of avoiding small fragmented bargaining units within an organisation;
- the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and
- the location of workers.

8.3.10 Recognition without a ballot

If the CAC is satisfied that a majority of workers in the bargaining unit are members of the union it must declare that the union is recognised for collective bargaining purposes, unless the CAC:

- is satisfied that a ballot should be held in the interest of good industrial relations;
- has evidence that a significant number of union members in the bargaining unit do not want the union to be recognised; or
- is presented with membership evidence which leads it to doubt whether a significant number of union members in the bargaining unit want the union to be recognised.

Where the majority of the bargaining unit are union members, the burden of proof is on the employer to show that one of the conditions for a ballot to be held is met.

8.3.11 Ballot to decide on recognition

8.3.11.1 If the majority of workers in the bargaining unit are not members of the union or one of the above three conditions are met, the CAC will arrange a secret ballot to determine whether the workers want the union to be recognised for collective bargaining purposes. The ballot will be conducted by a qualified independent person appointed by the CAC and the cost is met equally by the employer and the union.

8.3.11.2 Within 10 working days of being notified that a ballot is to be carried out the employer must provide the CAC with the names and home addresses of all workers in the bargaining unit. The employer must co-operate with the process and this includes giving the union reasonable access to the workers. Both parties must refrain from attempting to influence voting or any other unfair practice. For example, an offer of a pay rise in return for voting against recognition would be a breach of the rules.

8.3.12 Result of the ballot

8.3.12.1 If:

- a majority of the workers who voted; and
- at least 40% of the workers in the bargaining unit vote in favour of union recognition, the union will be granted statutory recognition and will be entitled to conduct collective bargaining on behalf of that bargaining unit. Statutory recognition will remain in force for at least 3 years. After that time the employer or workers can apply to the CAC to derecognise the union.

8.3.12.2 If either, or both, of these conditions are not met then the union is not entitled to be recognised and it cannot re-apply for recognition in relation to the same, or substantially the same, bargaining unit for 3 years.

8.3.12.3 This is best illustrated by way of examples.

8.3.12.3.1 **Example 1**

The bargaining unit comprises 100 workers. 80 workers take part in the vote with 45 voting in favour of recognition. As the majority who actually voted are in favour of recognition AND 45% of all workers in the bargaining unit (45/100) are in favour, the union gains recognition.

8.3.12.3.2 **Example 2**

The bargaining unit comprises 100 workers. 80 workers take part in the vote with 45 voting in favour of recognition. As the majority who actually voted are in favour of recognition AND 45% of all workers in the bargaining unit (45/100) are in favour, the union gains recognition.

8.3.12.3.3 **Example 3**

The bargaining unit comprises 100 workers. All 100 workers take part in the vote with 45 voting in favour of recognition. Although 45% of all workers in the bargaining unit voted in favour, a majority of those who actually voted were not in favour of recognition. As both conditions have not been met the union fails to gain recognition.

8.3.13 Method of collective bargaining

If statutory recognition is granted the method of collective bargaining should be agreed between the parties. ACAS can assist with this process. If agreement cannot be reached the CAC will determine the method of collective bargaining.

8.3.14 Rights on achieving recognition

8.3.14.1 Once a union is recognised, whether that be voluntarily or through the statutory process, its members are afforded certain rights, including rights:

- for its officials, learning representatives and other members to time off work;
- to information from the employer for the purposes of collective bargaining;
- to consultation in the event of collective redundancies;
- to information and consultation and other rights in connection with the transfer of an undertaking. See 10.0 TUPE for further information on the TUPE Regulations;
- to information and consultation under the Health and Safety at Work Act;
- to information and consultation in relation to pension schemes;
- to initiate the process of establishing a European Works Council or equivalent consultative body.

8.3.14.2 Where a union enjoys statutory recognition, it may be entitled to insist that it is consulted by the employer about training.

8.4 Collective bargaining

8.4.1 General

Collective bargaining is the process by which trade unions negotiate with employers on behalf of their members. It is defined as negotiations relating to or connected with one of the following matters:

- terms and conditions of employment, or the physical conditions in which any workers are required to work;
- engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- allocation of work or the duties of employment between workers or groups of workers;
- matters of discipline;
- a worker's membership or non-membership of a union;
- facilities for officials of unions; and
- machinery or procedures for negotiation or consultation relating to any of the above matters, including recognition of the right of a union to represent workers in such negotiation, consultation or in the carrying out of such procedures.

8.4.2 Disclosure of information

8.4.2.1 Employers who recognise a union for the purposes of collective bargaining are required to disclose certain information relating to its undertaking. Employers can insist that requests by union representatives for such information including information relating to use of agency workers are made or confirmed in writing. The employer must disclose information:

- without which union representatives would be impeded to a material extent in carrying out collective bargaining with the employer; and
- which it would be in accordance with good industrial relations practice to disclose for the purposes of collective bargaining.

8.4.2.2 In determining what would be in accordance with good industrial relations practice regard should be had to the ACAS Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes (the Information Code).

8.4.2.3 The Information Code states that in providing information employers are not required to produce original documents for inspection or copying. Nor are they required to compile or assemble information which would entail work or expenditure out of reasonable proportion to the value of the information in the conduct of collective bargaining.

8.4.2.4 Employers are not required to disclose any information which:

- would be against the interests of national security;
- would contravene a prohibition imposed by or under any enactment;
- was given to the employer in confidence;
- relates to individuals, unless they have consented to its disclosure;
- would cause substantial injury to the undertaking (or national interest in respect of Crown employment) for reasons other than its effect on collective bargaining; or
- was obtained for the purpose of any legal proceedings.

8.4.2.5 Due to the varied nature of collective bargaining, the Information Code does not set out a prescribed list of information which should be disclosed in all circumstances. It does provide examples of information which may be relevant in certain circumstances including:

- **Pay and benefits**
  For example, details of the principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, out-workers and homeworkers, department or division giving, where appropriate, distributions and make-up of pay and showing any additions to basic rate or salary; total pay bill; details of fringe benefits and non-wage labour costs.
- **Conditions of service**
  Including policies on recruitment, redeployment, redundancy, training, equal opportunities, and promotion; appraisal systems; health, welfare and safety matters.
- **Manpower**
  Including numbers employed in terms of grade, department, location, age and sex; labour turnover; absenteeism; overtime and short-time working details; manning standards; planned changes in work methods, materials, equipment or organisation; available manpower plans; investment plans.

- **Performance**
  Including productivity and efficiency data; details of savings from increased productivity and output; return on capital invested; sales and state of order book.
- **Financial**
  Including cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.

8.4.2.6 A union may make a complaint to the CAC where an employer has failed to disclose such information or to confirm it in writing. The CAC can either refer complaints to ACAS in the hope of reaching settlement or hold a hearing. If a complaint is upheld the CAC has the power to order employers to disclose information within a given timeframe. A failure to comply with such an order may result in a declaration of terms and conditions which will be implied into employees' (not workers) contracts of employment. Employers will then be bound by these terms and conditions.

8.4.3 Unlawful inducements

8.4.3.1 Employers must not offer inducements to recognised union members to discourage them from negotiating terms and conditions through collective bargaining, nor threaten detrimental treatment or dismissal for refusing an inducement. Whilst the term "inducement" would normally be understood as a positive incentive, in reality, the legislation covers any type of offer or imposition of a pay award, as the case law illustrates.

8.4.3.2 A claim that an employer has made an 'unlawful inducement' can be made by any employee who is also a union member (irrespective of their period of employment) and the potential liability is significant (currently £4,554 per employee). An employer is free to make a direct offer provided it has first followed and exhausted the agreed procedure – the crux of the issue is whether at the time the offers were made there was a 'real possibility' that matters could be determined by way of collective agreement if offers had not been made.

8.4.3.3 Many – particularly long standing – collective bargaining arrangements may not have clear written procedures, or may be based on agreements that have changed over time following mergers between unions or employers.

8.4.3.4 Employers and trade unions should check the clarity of the collective bargaining agreement between them as to when bargaining is still continuing and when it is exhausted and what dispute resolution procedures are in place. It may be advisable to agree new procedures if the existing procedure is not explicit as to when bargaining is at an end and perhaps introducing timescales or a clear process for when either side can declare the point at which it has been exhausted.

8.5 Deduction of union dues

8.5.1 It is open to unions and employers to agree that union membership dues are deducted from workers' wages and paid direct to the union. This arrangement, also known as a check-off agreement, is a relatively common practice especially within larger organisations.

8.5.2 Employers must ensure that no such deductions are made unless workers have given written authority to do so. It is recommended that employers ensure workers sign and date the written authority. As authority does not need to be renewed employers can continue to make deductions from workers' wages unless it is withdrawn in writing.

8.5.3 Where a deduction is made without authority a complaint may be made to an Employment Tribunal within three months of the last deduction. If the complaint succeeds the tribunal will order the employer to repay the amount of the unauthorised deduction to the worker.

8.6 Deductions for the political fund of the union

8.6.1 Some unions operate political funds and ask their members to contribute as part of their regular subscription. This is known as the 'political levy'. A union member must give notice to the union of their willingness to contribute to the political levy.

8.6.2 If a member of a union informs the employer in writing that he or she is exempt from paying the political levy the employer ought to ensure that no such amount is deducted from the employee's wages.

8.6.3 If employees allege that their employers have wrongly deducted a political fund contribution, or refused to deduct union dues, they may make a complaint to an Employment Tribunal within 3 months. The tribunal may make a declaration ordering the employer to pay the claimant the amount deducted or make an order requiring the employer to take steps specified.

8.7 Collective agreements

8.7.1 Once an employer and a union successfully conclude negotiations, they may choose to confirm the results of their negotiations in a written document known as a collective agreement.

8.7.2 A collective agreement is not normally enforceable in law but its terms may become incorporated into individual contracts of employment of those workers covered, and as a result can be enforced as contractual rights.

8.7.3 A collective agreement or parts of a collective agreement can be incorporated into employees' contracts of employment even if they are not union members. The clearest way of establishing if terms are incorporated is to examine individual contracts of employment to see whether there is a specific term expressly stating that the collective agreement is part of the individual's terms and conditions.

8.7.4 Employees' written statement of employment particulars must include a statement as to whether any collective agreements directly affect the individual's terms and conditions. If employers are not party to such agreements then employees must also be told that there is no such collective agreement in force. See 2.3 Statement of employment particulars for further information on the written statement of terms and conditions of employment.

8.7.5 It is also possible for a collective agreement to be incorporated into individual contracts of employment by implication. This is less common than where a collective agreement specifically provides for this but could occur if employers intend the agreement to be part of their employees' contracts. For example, if an employer observes the terms of a collective agreement in practice, this may be sufficient evidence to demonstrate that the employer intends to be bound by those terms. One such situation may be the payment of enhanced redundancy payments.

8.7.6 Where it is intended that a collective agreement be reviewed and re-negotiated from time to time, any incorporation clause in the employees' contracts should reflect the fact that the terms of the agreement may change. That way, employees will be bound by any change, even if they have not individually consented to it. Such a clause might provide that 'your basic rate of pay will be as set out in the pay agreement as negotiated by the company and XYZ, from time to time in force.'

8.7.7 The Supreme Court has recently held that when a collective bargaining agreement with a recognised trade union is in place, employers may only negotiate with staff directly if they have first engaged and exhausted the collective bargaining procedure.

8.8 Ballots and industrial action

8.8.1 General

Industrial action is closely linked to the collective bargaining process. The explicit or implied threat of industrial action is often a major influencing factor in the outcome of negotiations between employers and unions.

8.8.2 Right to take industrial action

In general, there is a right to participate in and organise industrial action, however that right is subject to certain qualifications. If very specific rules are not followed then workers may be unprotected against any action, including dismissal, taken by their employers in response to the industrial action. Industrial action is classified as either unofficial or official. Official industrial action is further classified as being protected or unprotected action. The categories are important in determining the level of protection, if any, afforded to workers taking part in such action. Due to the complexity of the law in this area it is recommended that legal advice is sought before taking any action against workers in connection with industrial action.

8.8.3 Unofficial industrial action

Industrial action is unofficial in relation to employees unless (1) they are members of a union and it has authorised or endorsed the action, or (2) they are not members of a union but the industrial action has been authorised or endorsed by at least one of the unions involved, or (3) none of the participants is a member of a union.

Where employees take part in unofficial industrial action they have no right to claim unfair dismissal.

The Employment Appeal Tribunal (EAT) has confirmed that there can be protection against detriment for taking part in trade union activities (including taking part in unofficial industrial action). In that case, the strike had been officially organised, however the EAT held that the 'activities of a trade union' or 'trade union should not be construed as applying only to protected industrial action that has been officially organised by a trade union. Therefore, the claimants would still have been protected under the legislation even if their action was unofficial.

When engaging with employees during industrial action, whether officially organised or not, care should be taken to avoid any actions that might constitute detrimental treatment regarding protected activities associated with the industrial action, even if the legitimacy of the industrial action itself is being challenged.

8.8.4 Official industrial action

If the above three conditions are met the industrial action is official. As stated, official industrial action is either protected or unprotected.

8.8.5 Protected industrial action

8.8.5.1 Where organisers are acting in contemplation or furtherance of a 'trade dispute' the industrial action is protected, unless it falls within one of the following categories:

- non-peaceful picketing;
- action to enforce union membership;
- action in support of unofficial strikers;
- secondary action which is not lawful picketing;
- pressure to impose a union recognition requirement;
- official industrial action which has not been balloted;
- official industrial action in respect of which the required notice has not been given to the employer.

8.8.5.2 A trade dispute is defined as a dispute which relates wholly or mainly to one or more of the following matters:

- terms and conditions of employment, or the physical conditions in which any workers are required to work;
- engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- allocation of work or the duties of employment between workers or groups of workers;
- matters of discipline;
- a worker's membership or non-membership of a union;
- facilities for union officials; and

- machinery for negotiation or consultation, and other procedures, relating to any of the above matters including the recognition by employers of the right of a union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

8.8.5.3 In some cases the dismissal of employees during protected industrial action is automatically unfair (generally speaking where the dismissal is during the first 12 weeks of their participation). It is important to note that this 12 week protection period is extended in a number of circumstances, including where the employer has 'locked out' employees or has failed to take reasonable steps to try to settle the dispute. Employees in these circumstances do not require the minimum continuous service normally required to bring unfair dismissal claims on this basis. See 12.3.2 Qualifying period for further information on the minimum qualifying service for unfair dismissal claims. In addition, the normal time limit of 3 months for making a claim to an Employment Tribunal is extended to 6 months from the date of dismissal.

8.8.6 Industrial action which is official but not protected

Industrial action which is official, as defined in section 8.8.4, will not be protected if it falls within one of the categories set out in section 8.8.5.1. Employees dismissed for participating in industrial action which is official but not protected cannot claim unfair dismissal for this reason unless the employer discriminates by treating employees differently by reason of a protected characteristic. If an employer dismisses all employees who participated in the unprotected industrial action then there is no discrimination and thus no unfair dismissal provided the appropriate dismissal procedures are followed (see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair for guidance on dismissal procedures and 6.4.9.1 Definition of a Disabled Person for further information on protected characteristics and discrimination).

8.8.7 Ballot for industrial action

As stated, official industrial action which does not have the support of a ballot or where the required notice has not been given to an employer is unprotected. Prior to the ballot there should be no call by the union for its members to take part in industrial action to which the ballot relates. Nor should the union authorise or endorse the action prior to this date. Participating in unprotected industrial action leaves employees open to being fairly dismissed. Note that there is no requirement to hold a ballot in relation to unofficial industrial action.

8.8.8 Notice of the ballot

8.8.8.1 The union must take such steps which are reasonably necessary to give written notice of the ballot to the employer not later than 14 days before the ballot commences. Such notice must include the intended date of commencement of the ballot and certain information on the categories and number of employees concerned. This information need not include employee names.

8.8.8.2 The union must also provide a sample voting paper to the employer not later than 3 days before the ballot commences. The voting paper must be framed in such a way as to require a 'Yes' or 'No' answer as to whether voters wish to take part in or continue to take part in a strike or industrial action short of a strike. The ballot paper must include details about the reason for the dispute, the type of action proposed and when the action is expected to take place. Failure to comply with these requirements does not deprive the industrial action of the support of the ballot, however, it renders the industrial action unprotected.

8.8.9 Appointment of a scrutineer

Unless there are 50 or fewer members entitled to vote in the ballot, the union must appoint an independent scrutineer. The scrutineer must make a report to the union within four weeks of completion of the ballot. In general, the report must state whether the scrutineer is satisfied with the conduct of the ballot. The union is responsible for ensuring that the scrutineer carries out its function. It is also responsible for ensuring that there is no interference with the carrying out of the scrutineer's function.

8.8.10 Entitlement to vote

The union must ensure that all its members who it reasonably believes will be called on to take industrial action are entitled to vote in the ballot. Only union members are entitled to vote. As a result non-union members and members of other unions may be called on to take industrial action without being balloted. Industrial action will not be regarded as having the support of a ballot, and will therefore not be protected, if:

- a member who it was reasonable to believe at the time would be induced to take part in industrial action;

- was not afforded entitlement to vote in the ballot; and
- was subsequently induced to take part in the industrial action.

However, accidental failures in relation to entitlement to vote or failures to send out ballot papers which are on a scale unlikely to affect the result of the ballot will be disregarded.

8.8.11 Single and aggregate ballots

Those entitled to vote may not all have the same workplace. In this situation a separate ballot will normally take place in each workplace. The union may, however, hold an aggregate ballot of two or more workplaces in certain circumstances. One such instance is where all such workplaces are affected by the same dispute, i.e., each workplace contains at least one union member who is affected by the dispute.

8.8.12 Conduct of the ballot

The ballot must be conducted so far as reasonably practicable in secret and no interference or constraints should be imposed upon voters by the union or its members.

8.8.13 Communicating the result of the ballot

If a strike ballot is issued then at least 50% of those entitled to vote must take part. The union must as soon as is reasonably practicable after holding the ballot inform the employer and those entitled to vote of the number of:

- the number of individuals entitled to vote;
- votes cast in the ballot;
- 'Yes' votes;
- 'No' votes;
- spoiled papers;
- whether the 50% participation threshold was reached.

In a well-publicised dispute between British Airways and its cabin crew, British Airways relied on an alleged technical breach of this requirement to prevent strike action. Whilst this was overturned on appeal it demonstrates that it is possible to engage the rules in an effort to avoid or delay strike action.

8.8.14 Duration of effectiveness of the ballot

A ballot ceases to be effective 6 months from the date of the ballot. If industrial action does not commence during such a period a fresh ballot will be required otherwise the action will not be protected. It is, however, open to the union and employer to agree that the ballot will be effective for a longer period up to a maximum of 9 months from the date of the ballot.

8.8.15 Notice of industrial action

If the result of the ballot is that a majority of those voting are in favour of industrial action the union must give the employer formal written notice of the industrial action. Notice must be given within the period running:

- from the date the employer is informed of the result of the ballot;
- up to 14 days prior to the intended date of commencement of the action.

8.8.16 The period of industrial action

Advice on coping with industrial action is outwith the scope of this book. Needless to say it is a difficult time for those involved and can be immensely damaging to an employer's business. It is therefore strongly recommended that legal advice is sought from Scottish Engineering at an early stage.

8.9 Employment protection and trade unions

8.9.1 General

Workers and/or employees are afforded certain protections in relation to their union membership or activities.

8.9.2 Protection from dismissal

8.9.2.1 The dismissal of an employee is unfair if the reason or principal reason is that the employee:

- is, or proposes to become, a member of an independent trade union;
- took part or proposed to take part in the activities of an independent trade union; or
- made use of union services at an appropriate time.

8.9.2.2 If employees are dismissed because the employer learns of their union activities in a previous employment (e.g. as a trade union activist) there would be a serious risk that an Employment Tribunal would find that the reason for dismissal will be the employer's expectation of continued involvement in union activities. Therefore, the principal reason for the dismissal would be deemed to be due to the employee proposing to take part in union activities and hence the dismissal would be automatically unfair regardless of his or her length of service.

8.9.2.3 Dismissal of employees because they are not members of any union or particular union or because they have refused or proposed to refuse to become or remain members of a union is automatically unfair regardless of his or her length of service.

8.9.2.4 A dismissal is also automatically unfair where employees are selected for redundancy because of union membership/non-membership, union activities or the making use of union services.

See 12.3.2 Qualifying period for further information on qualifying service for unfair dismissal claims generally.

8.9.3 Protection from detriment

8.9.3.1 Employers must not subject workers to any detriment (by any act, or deliberate failure to act on the part of the employer) on the ground that they have taken certain steps in relation to statutory union recognition. See 8.3 Union recognition for further information on statutory recognition. Protection against detriment exists where workers:

- act to promote or oppose recognition of a union by their employer;
- indicate support for or opposition to recognition of a union by their employer;
- act to secure or prevent the ending of bargaining arrangements;
- indicate support for or opposition to the ending of bargaining arrangements;
- campaign in the run up to a workers' ballot;
- canvass for votes or for abstentions in a workers' ballot;
- vote in a workers' ballot; or
- propose, or fail to propose, to decline to do any of the above.

8.9.3.2 In order to qualify for protection workers must behave reasonably. Employers must also not subject workers to any detriment with the purpose of:

- preventing or deterring workers from becoming or seeking to become a member of a Trade Union, or penalising them for doing so;
- preventing or deterring workers from taking part in Trade Union activities outside the worker's working hours or during working hours at a time agreed by the employer; or
- compelling workers to become a member of a Trade Union

A complaint may be made to an Employment Tribunal within 3 months by workers who have been subject to a detriment on one of the above grounds. If the complaint is successful, the Tribunal may award compensation that it considers just and equitable in the circumstances having regard to the infringement.

8.10 Information and consultation

8.10.1 General

The Information and Consultation of Employees Regulations 2004 provide that employers with 50 or more employees may be required to provide information and consult with employees on certain matters. It is unlikely that these rights will be utilised by employees whose employer recognises a union. A recognised union will, as a matter of course, obtain such information and consult with the employer as part of the collective bargaining process. See 8.4 Collective bargaining for further information. The Regulations do, however, provide employees with a useful mechanism to engage with their employers in the absence of a recognised union and may lead to employees' bargaining power being strengthened.

8.10.2 Valid employee request

8.10.2.1 An obligation under the Regulations does not arise unless employees make a 'valid request' to their employer. In order for a request to be a valid request it must:

- be sent to the employer or the CAC in writing;
- specify the names of the employees making the request; and
- be made by at least 10% of the employees of the undertaking.

If a number of separate requests are made by employees within a period of 6 months, these requests when taken together must have been made by at least 10% of employees.

8.10.2.2 The 10% criterion does not apply where it would give a result of less than 15 employees. In these circumstances the request needs to be made by at least 15 employees to be valid. Example: an undertaking consists of 100 employees. As 10% of 100 equates to less than 15 employees, in order for the request to be valid it would need to be made by at least 15 employees (more than 10%).

8.10.2.3 The 10% criterion also does not apply where it would give a result of more than 2,500 employees. In these circumstances the request need only be made by 2,500 employees to be valid. Example: an undertaking consists of 30,000 employees. As 10% of 30,000 equates to more than 2,500 employees, in order for the request to be valid it would need only be made by 2,500 employees (less than 10%).

8.10.3 Negotiations to reach agreement

On receipt of a valid employee request, employers must, unless they have a pre-existing agreement (see 8.10.8 Pre-existing agreement), make arrangements for employees to elect or appoint negotiating representatives. Employers must then negotiate with such representatives in order to reach a 'negotiated agreement'.

8.10.4 Negotiated agreement

A negotiated agreement must be in writing and cover all employees. It must provide for information to be passed to, and for consultation to be carried out with, employees or elected employee representatives. In order for the agreement to be valid it must be approved by:

- all the negotiating representatives; or
- a majority of negotiating representatives and either 50% of employees or, if there is a ballot, 50% of employees who voted in the ballot.

The agreement must also provide that, where information is to be provided about the employment situation, the employer is to provide suitable information relating to the use of agency workers. Once the agreement is approved, employers are required to provide information and consult with employee representatives on matters set out in the negotiated agreement.

8.10.5 Standard information and consultation provisions

8.10.5.1 Where employers and employees fail to reach agreement the Regulations provide a fallback position in the form of 'standard provisions'.

8.10.5.2 The standard provisions stipulate that employers must provide representatives with information on:

a. the recent and probable development of their business and the economic situation;
b. the current and probable future situation and structure with regard to employment including the use of agency workers and in particular whether any jobs are at risk of redundancy; and
c. any decisions likely to lead to substantial changes in the work of the organisation or in contractual relations, such as a TUPE transfer. See 10.0 TUPE.

8.10.5.3 In addition, employers must consult with employee representatives on the matters referred to in (b) and (c).

8.10.6 Excluded information

Employers are not required to disclose confidential information or information which, if disclosed, would seriously harm the functioning of, or be prejudicial to, the employer's undertaking.

8.10.7 Duty of co-operation

Both parties are under an obligation when negotiating or implementing a negotiated agreement (or 'standard provisions') to work in a spirit of co-operation and to have regard to each other's rights and obligations.

8.10.8 Pre-existing agreement

8.10.8.1 If a pre-existing written agreement (approved by employees) governing consultation and provision of information is already in place this may be sufficient to allow employers to decline a request for a 'negotiated agreement'. If the request for the negotiated agreement is made by less than 40% of employees, employers are permitted to hold a ballot to determine whether they can rely on the pre-existing agreement. However, if such a request has been made by more than 40% of employees the pre-existing agreement cannot be relied upon.

8.10.8.2 The purpose of the ballot is to determine whether employees endorse the request for a negotiated agreement or not. The request will be endorsed if:

- at least 40% of the employees employed in the undertaking; and
- the majority of the employees who vote in the ballot vote in favour of endorsing the request. This formula is similar to that applicable to ballots in relation to statutory recognition. See 8.3.12 Result of the ballot for examples. Employers can only rely on the pre-existing agreement if the outcome of the ballot is such that employees do not endorse the request for a new negotiated agreement. Where information is to be provided about the employment situation under a pre-existing agreement, it must include information relating to the use of agency workers.

8.10.9 Remedies

8.10.9.1 Where employers do not comply with the terms of a negotiated agreement (or standard provisions) a complaint may be made to the CAC. Complaints may be made by employee representatives or, where no such representatives are appointed, employees themselves. If the complaint is upheld the CAC will make a declaration to that effect and may order the employer to comply with the negotiated agreement or standard provisions.

8.10.9.2 The CAC is restricted to making declarations and orders and cannot impose financial penalties. However, the Employment Appeal Tribunal (EAT) does have the power to impose such penalties. Following a declaration from the CAC a complaint may be made to the EAT. This must be made within three months of the declaration by the CAC. The EAT must impose a financial penalty on the employer unless it is satisfied that the default resulted from a reason beyond the employer's control or that there is some other reasonable excuse. The maximum penalty is £75,000 and is payable to the Secretary of State. In the first reported case under these provisions a penalty of £55,000 was imposed on the employer for failure to comply with the Regulations.

8.11 Minimum Service requirements

8.11.1 In July 2023 the Strikes (Minimum Service Levels) Act 2023 came into force and gives the Government the power to introduce Regulations to mandate minimum service levels for certain public services e.g. education.

8.12 Trade Union Act 2016

The Trade Union Act 2016 made some significant changes to Trade Union Activity. The main provisions are:

- Where the majority of those balloted work in public services, at least 40% of those entitled to vote must support the action. Previously there was no required minimum number of members voting in favour for a ballot to be considered valid, apart from a simple majority of those who voted.
- Unions are required to use a transparent opt-in process for the political fund element of trade union subscriptions.

The main provisions were introduced from 1 March 2017:

- If a strike ballot is issued then at least 50% of those entitled to vote must take part. Previously there was no minimum number of members required to participate in a ballot in order for it to be considered valid.
- The ballot paper must include details about the reason for the dispute, the type of action proposed and when the action is expected to take place.
- Members entitled to vote must be provided with specific details about the result of the ballot, such as the number of votes cast, those in favour etc.
- Two weeks' notice to be given to employers of any industrial action, which was an increase from the previous 7 days.
- Mandate for industrial action limited to 6 months after the date of the ballot.
- Public sector employers prevented from paying workers' trade union subscriptions by deduction from their wages unless certain criteria are satisfied.
- Measures introduced on picketing, to tackle intimidation of non-striking workers.

Where appropriate, the changes applicable for employers have been referred to within this chapter at the relevant sections.

Chapter 9

Data protection

9.0 Data protection

9.1 Introduction

Since the introduction of the Data Protection Act 1998 organisations that process personal information (known as 'Data Processors') have been required to do so in a fair and proper manner. Failure to comply with the relevant legislative requirements may give rise to a claim for damages and may also constitute a criminal offence.

The Data Protection Act 2018 (DPA) has significant implications for employers in terms of changes to how they process and handle data.

The DPA requires Data Processors to comply with six principles, which are broadly put to ensure that information is:

- lawfully, fairly and transparently processed;
- processed for limited purposes;
- adequate, relevant and limited to what it is necessarily required for;
- accurate and up-to-date;
- not kept for longer than is necessary; and
- secure, including protection from unauthorised use and deletion.

GDPR also requires Data Processes must also process information in an accountable manner and ensure there are procedures in place to be able to implement and demonstrate that this is the case.

9.2 Further information

The DPA is a complex piece of legislation and it covers many areas outwith the employment field. This chapter touches on some of the issues that face employers, however it is not intended to be a comprehensive guide. Further information, can be obtained from the Information Commissioner's Office website at www.ico.gov.uk. Specific advice can be obtained from Scottish Engineering.

9.3 Guidance and overview for employers

9.3.1 There is guidance available on the ICO website at www.ico.org.uk.

9.3.2 The DPA applies to personal information about:

- job applicants (both successful and unsuccessful);
- former applicants (both successful and unsuccessful);
- current and former employees; and
- current and former agency, casual, contract staff, volunteers and others.

For simplicity this chapter will use the term 'workers' unless referring to one of the specific categories.

9.3.3 Personal information

9.3.3.1 Only personal information or 'personal data' is covered by the DPA. Personal data is information about a living person. Not all information about a person is personal data for the purposes of the DPA. However, if a person can be identified from the data in question, it is likely to be "personal data". Identification of a person can either be direct or indirect when taken with other information which the employer has access to. For example, a spreadsheet containing staff numbers, salary and bank details could be personal data as the employer is able to link workers to their salary and bank details via the staff number and therefore identify individuals from that information.

9.3.3.2 The DPA applies to the processing of personal information which is:

- wholly or partly automated; or
- non-automated but forms, or is intended to form part of a 'filing system'.

9.3.3.3 A 'filing system' is defined by the DPA as being any structured set of personal data which is accessible according to specific criteria, whether held by automated means or manually and whether centralised, decentralised or dispersed on a functional or geographical basis. The filing system can be in electronic, paper or other formats such as microfiche. Therefore, a pile of papers filed in date or alphabetical order which included personal data would be covered by the DPA.

9.3.3.4 It may, however, be both safer and easier for an employer to treat all information as personal information unless it has a particular reason not to.

9.3.4 Processing information

9.3.4.1 The DPA applies to personal information that is subject to 'processing'. Processing includes holding, amending, using, disclosing and destroying the personal data.

9.3.4.2 Examples of personal information likely to be covered by the DPA. These include:

- details of a worker's salary and bank account held on computer;
- an email in relation to an incident involving a named worker;
- information contained within a supervisor's notebook where there is an intention to place that information into the worker's computerised personnel file;
- an individual worker's personnel file where documents are filed in date order; or
- a set of annual leave cards where there is an individual card for each worker and the cards are kept in alphabetical order.

9.3.4.3 Examples of information unlikely to be covered by the DPA. These include:

- information on salary structure broken down by grade but where individuals are not named or otherwise identifiable; or
- a report containing results of exit interviews where responses are anonymised and it is impossible to trace the results back to any particular individual.

9.3.4.4 Employers must only use processors that provide sufficient guarantees to implement appropriate technical and organisational measures to ensure that their processing meets the requirements of the DPA. Further, employers must engage processors under written contracts with provisions (within a standalone contract or as part of a wider contract) stipulating that the processor meet specific requirements as set out in the DPA.

9.3.5 Consent

9.3.5.1 One of the biggest changes under the GDPR and the DPA relates to when employers can use consent as a legal basis for processing personal data. The situations where it is appropriate to ask for consent will be limited and consent statements will need to reflect this accordingly. The DPA requires that consent:

- must be a clear affirmative action: opt-in rather than opt-out and no pre-ticked boxes;
- should be separate from other terms and conditions and not a precondition of signing up to a service;
- provides granular options for different processing operations; and
- is easy to withdraw.

Under the DPA, consent will not be appropriate unless the employer can offer employees a genuine choice over how their personal data is processed.

There will be many existing employment documents/statements with implied consent. For example, a statement providing that an employee "hereby consents to the use of my personal data by X by signing the declaration below...". These statements need to be reviewed to allow employees to actively consent or be replaced with an appropriate privacy notice.

9.3.6 Privacy notices

9.3.6.1 One the new rights of data subjects under the DPA is the "right to be informed". This encompasses the requirement to provide individuals with fair processing information through a privacy notice. Under the DPA privacy notices / policies must include:

- identity and contact details of the controller and data protection officer (if appointed);

- purpose of processing and legal basis;
- legitimate interests of the controller or third party, where applicable;
- any recipient or categories of recipients of personal data;
- details of transfers to third country (outside the EU) and safeguards;

Employers must ensure that employees are provided with the information set out above at the point of collecting personal data – for example, within an application form to be completed by a prospective employee.

9.3.7 Reporting requirement

9.3.7.1 The DPA has introduced a new obligation to report relevant data protection breaches to the Information Commissioner's Office ("ICO") within 72 hours of the occurrence of the breach and to the affected individual without undue delay.

9.3.8 Data protection impact assessments

9.3.8.1 The GDPR places a requirement on employers to undertake data protection impact assessments when undertaking:

- relevant new personal data processing activities and using new technologies;
- processing on a large scale of sensitive data or of personal data relating to criminal convictions and offence; or
- 'a systematic monitoring of a publicly accessible area on a large scale'.

The conducting of a data protection impact assessment is required when there is likely to be a high risk of potential harm to workers as a consequence of the processing of their data.

9.3.9 The four parts to the Code

9.3.9.1 The ICO previously produced an Employment Practices Data Protection Code ("the Code") as guidance to help employers comply with the Data Protection Act 1998.

With the introduction of the DPA the Code has not been updated and is no longer used by the ICO.

However, the Code was split into four parts:

- Recruitment and Selection;
- Employment Records;
- Monitoring at Work; and
- Information about Workers' Health.

These areas of focus remain relevant for employers. Each of these is considered in the following sections.

9.4 Recruitment and selection

9.4.1 By its very nature the recruitment and selection process involves employers collecting and using information about workers. The DPA provides certain safeguards to ensure that the correct balance is struck between the requirements of the employer and the job applicant's right to privacy.

9.4.2 Advertising and Applications

9.4.2.1 Adverts and application forms should include the name of the organisation to which the applicant will be submitting their information and, unless it is self-evident, details of how the employer will use that information. If the information will be used for a purpose other than recruitment, such as for marketing purposes, or will be passed to a third party, this should be made clear. The applicant should be provided with a privacy notice or directed to where they can access it on the organisation's website.

9.4.2.2 The employer should only request personal information that it will use to make a decision on whether to employ the applicant. So, for example, banking details should only be requested from successful applicants.

9.4.2.3 Requests for information regarding criminal convictions must be justified and the application form should make clear that 'spent convictions' do not have to be disclosed, unless the advertised job falls within the Exceptions Order to the Rehabilitation of Offenders Act 1974.

9.4.3 Verification

9.4.3.1 Verification is the process of checking that details supplied by applicants, for example qualifications, are accurate and complete. It also includes employers following up references provided by applicants and, where appropriate, confirming criminal convictions with the Criminal Records Bureau and/or carrying out Disclosure Scotland checks as appropriate.

9.4.3.2 The signed written consent of the applicant must be obtained if the employer intends to verify information by contacting a third party. If any discrepancies arise following verification checks the applicant should be given an opportunity to respond.

9.4.4 Interviews

Personal information obtained during the interview, such as interview notes, may be retained where it is necessary for the recruitment process or for the purpose of responding to challenges to the fairness of the process, for example a sex discrimination claim. Notes can be recovered by successful and unsuccessful candidates.

9.4.5 Retention of recruitment records

9.4.5.1 Information on applicants should be kept secure and should not be retained for longer than is necessary. However, applicants can make a claim, for example of sex discrimination, against the employer following the recruitment process. It is therefore important that the employer does not dispose of information and records relating to the recruitment process whilst there is still a reasonable possibility of a claim being made.

9.4.5.2 If the employer routinely retains applicants' details on file in the event that future vacancies arise then this should be clearly stated on the application form. Applicants should be given the opportunity to object to this.

9.5 Employment records

9.5.1 Introduction

Whilst employers are permitted to collect and use information about their workers, the DPA attempts to ensure that this is balanced with workers' right to privacy.

9.5.2 Workers' right to access information

9.5.2.1 Workers have a right to access information that their employer holds about them. This is known as a 'subject access request'. If a subject access request is made, the employer must provide the worker with all information requested that it holds on the worker within one month of receiving the request unless exemptions apply. If the request is complex or multiple requests are received from the worker then an extension of up to 2 months is permissible. An employer must ensure that the worker is informed in writing of the extension within one month and provide a reason for why the extension is required.

An employer must ensure that in the response any codes or other unintelligible terms are explained. Note that only information subject to the DPA needs to be disclosed to a worker. An employer can no longer charge up to £10 to deal with a subject access request. A charge of a "reasonable fee" can only be made in circumstances where the request is manifestly unfounded or excessive. The response time for the subject access request cannot be delayed as a consequence of awaiting receipt of payment.

9.5.2.2 The information should be provided in hard copy or electronic format, unless this would place an unreasonable burden on the employer or, if the worker agrees, to receive the information in an alternative format.

9.5.2.3 Certain information is excluded from a subject access request. This includes information relating to management forecasting or management planning, which does not need to be disclosed if it is likely to prejudice the employer's business. This is likely to include details of proposed restructuring, redundancies, mergers etc. There may be circumstances where it is reasonable for the employer to withhold information that would enable a third party, such as another worker, to be identified. A confidential reference may not need to be disclosed by the organisation that provided the reference. However a reference may require to be disclosed by the recipient.

9.5.3 Recommendations for employment records

It is recommended that:

- workers are made aware of the nature and source of information held about them, how the employer will use it and whether the employer will disclose it to any other person or organisation;
- workers are informed about their rights under the DPA, and in particular their right to make a subject access request;
- where information is likely to change, for example name, address, next of kin and bank details, workers should be asked to confirm the accuracy of the information on an annual basis;
- employment records are stored securely and can only be accessed by workers who are authorised to do so;
- if employment records are to be taken out of the workplace, steps should be taken to keep the information secure. For example, a laptop computer containing personal information should be password-protected;
- where personal information is sent by fax or e-mail, the employer should ensure that there is a secure system for doing so;
- unless the employer is under a legal obligation to do so, they should only disclose information about a worker where it is right to do so in all the circumstances. For example, an employer who discloses information to a relevant authority in relation to a criminal or tax investigation or to comply with an order of a court in relation to legal action is unlikely to be breaching the DPA in these circumstances;
- those responsible for dealing with disciplinary and grievance procedures should not have unrestricted access to all information held about a worker under investigation. The information should only be accessed or used if it is directly relevant to the purpose for which the information was originally obtained and should be proportionate to the seriousness of the matter under investigation;
- where a third party processes information on workers, such as an external payroll company, the employer should ensure that the third party has adequate systems in place and warrants to comply with the DPA and actual checks are made by your organisation; and
- records which are to be disposed of are securely and effectively destroyed. This is especially the case in relation to computerised information that may not be completely and securely removed simply by pressing the 'delete' key.

Employment records

9.5.4 Monitoring at work

9.5.4.1 Monitoring of workers includes:

- use of CCTV and cameras;
- monitoring of e-mails to check for inappropriate use;
- monitoring of telephone calls; and
- monitoring of access to websites.

9.5.4.2 The DPA permits monitoring of workers so long as the monitoring is reasonable in the circumstances, the employer can justify the levels of monitoring being used and other alternatives have been considered. However, this has to be balanced against an individual's right to private life under the Human Rights Act, which can also include a person's business and professional activities. For example, if there is no evidence of a safety issue then an employer would likely not be justified in using CCTV for protecting the safety of property or employees. In addition, where monitoring involves the interception of communications, such as email or telephone calls, employers should ensure that they comply with the Regulation of Investigatory Powers (Scotland) Act 2000. See 9.10 Interception of communications for further information.

9.5.4.3 Workers should be informed of the nature and reason for any monitoring and adequate notices should be displayed to bring this to the attention of visitors and customers. So long as the monitoring is justified the employer does not need to obtain the consent of their workers.

9.5.4.4 There may be exceptional circumstances where covert monitoring (i.e. undercover surveillance) is justified. Covert monitoring should normally only be carried out where the employer has grounds to suspect criminal activity or equivalent malpractice and that the investigation would be hampered if individuals were notified. Other information collected in the course of covert monitoring that does not relate to criminal or equivalent activity should be ignored and if possible deleted. That is unless it reveals information that no employer could reasonably be expected to ignore.

9.6 Information about workers' health

9.6.1 Information about a worker's health falls within the special categories of personal data, previously referred to as sensitive personal data (9.7 Special categories of personal data). An employer must have a lawful reason for processing such information and comply with one of the following conditions:

- have the express written consent of the worker;
- the information must be necessary to enable the employer to meet its legal obligations in connection with employment, for example, compliance with health and safety legislation;
- processing of the information is necessary to protect the vital interests of the worker;
- processing is of information made public by the worker;
- processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the worker, medical diagnosis;
- the information must be in connection with actual or prospective legal proceedings; or
- the worker has given explicit consent to the processing of the medical information.

9.6.2 It is recommended that:

- sickness and injury records should be kept separate from absence and accident records. Absence and accident records provide a summary of the nature and length of the absence and nature of the accident without providing information on the health of the worker. This allows records to be checked without accessing sensitive information concerning the full details of the sickness or injury;
- where sickness and injury records are held, the employer must ensure that at least one of the sensitive personal data conditions is met; and
- information on sickness or injuries should not be disclosed without the worker's consent unless there is a legal obligation to do so.

9.7 Special categories of personal data

9.7.1 The GDPR has introduced special categories of personal data, which are broadly in line with what was known as sensitive personal data. Special categories data is more sensitive so requires additional safeguards to protect the worker.

The special categories of personal data include information relating to a worker's:

- racial or ethnic origin;
- political opinions;
- religious beliefs or philosophical beliefs;
- trade union membership (within the meaning of the Trade Union and Legal Relations (Consolidation) Act 1992);
- physical or mental health or condition;
- sexual life or sexual orientation; and/or
- genetic or biometric data (for identification purposes)

Unlike sensitive personal data defined by the Data Protection Act 1998, information relating to any criminal offence committed or alleged to have been committed, the disposal of such proceedings or any sentence are not included within the special categories of personal data and are dealt with separately by the DPA.

9.7.2 Before an employer is permitted to process special categories data they must have a lawful reason for doing so and comply with one of the following conditions:

- have the express written consent of the worker;
- the information must be necessary to enable the employer to meet its legal obligations in connection with employment, for example, compliance with health and safety legislation;
- processing of the information is necessary to protect the vital interests of the worker;
- processing is of information made public by the worker;
- processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the worker, medical diagnosis;
- the information must be in connection with actual or prospective legal proceedings; or
- the worker has given explicit consent to the processing of the medical information.

Employers should refer to Schedule 1 Part 1 of the DPA for specific conditions relating to processing for the purposes of employment and health.

Special categories of personal data

9.8 Data protection fee

9.8.1 From 25 May 2018, the Data Protection (Charges and Information) Regulations 2018 requires every organisation or sole trader who processes personal information to pay a data protection fee to the ICO.

9.8.2 An employer will be exempt from having to pay the fee if they are processing the personal data for only the following reasons:

- staff administration (including payroll);
- advertising, marketing and public relations (in connection with their own business activity);
- accounts and records; or
- processing personal information without an automated system such as a computer.

However, if an employer engages in activities such as recruitment and training then they will not be exempt from paying the data protection fee.

9.8.3 The fee payable is subject to tiered structure:

Tier 1 – micro organisations
The employer has a maximum turnover of £632,000 or no more than 10 members of staff. The fee for tier 1 is £40.

Tier 2 – small and medium organisations
The employer has a maximum turnover of £36 million or no more than 250 members of staff. The fee for tier 2 is £60.

Tier 3 – large organisations
If you do not meet the criteria for tier 1 or tier 2, you have to pay the tier 3 fee of £2,900.

Further information and guidance can be found on the ICO's website at by clicking here.

9.9 Powers of the information commissioner

9.9.1 Introduction

9.9.1.1 The Information Commissioner is an independent public body whose responsibilities include protection of personal information. It has a wide range of powers in relation to Data Protection matters including the power to take enforcement action, issue information notices and the power to impose monetary penalties.

9.9.1.2 The Information Commissioner does not have the power to obtain compensation on behalf of individuals however, an individual who suffers a loss as a result of a breach of the DPA may raise an action for damages in the civil courts against those responsible for the loss incurred as a result of the breach. The remainder of this section considers the main powers of the Information Commissioner under the DPA.

9.9.1.3 In circumstances where a disgruntled employee commits a breach of the DPA as part of a "personal vendetta" against their employer, recent case law has shown that an employer may not be held liable vicariously for the actions of the disgruntled employee, on the basis that an employee committing a breach as part of a personal vengeance would not be considered to have been acting in the course of their employer's business.

9.9.2 Enforcement notices and 'stop now' orders

9.9.2.1 The Information Commissioner has the power to ask employers to remedy breaches of the DPA. Where an organisation fails to remedy any such breach the Information Commissioner may issue an enforcement notice ordering specified steps to be taken, for example to comply with a subject access request. See 9.5.2 Workers' right to access information for further information on subject access requests.

9.9.2.2 Alternatively, a 'stop now' order may be issued requiring an employer to refrain from taking specified steps, for example from carrying out covert surveillance.

9.9.2.3 Such a notice or order will usually only be issued where the breach has caused, or is likely to cause, damage or distress to an individual. A failure to comply with enforcement notices and 'stop now' orders is a criminal offence. An organisation that is the subject of such a notice or order has a right of appeal to a First–tier Tribunal (Information Rights), formerly known as the Information Tribunal.

9.9.3 Information notices

The Information Commissioner has the power to serve an information notice where it reasonably requires information to determine if an organisation is complying with the DPA. Such a notice requires the organisation to provide certain specific information within a specific timescale. Failure to comply with an information notice is a criminal offence. An organisation that is the subject of such a notice has a right of appeal to the First–tier Tribunal (Information Rights).

9.9.4 Monetary Penalty Notice

9.9.4.1 Since 6 April 2010 the Information Commissioner has held the power to serve a monetary penalty notice on an organisation which has committed a serious contravention of the Data Protection legislation. The higher maximum amount, is £17.5 million or 4% of the total annual worldwide turnover in the preceding financial year, whichever is higher. In practice, the higher maximum amount can apply to any failure to comply with any of the data protection principles, any rights an individual may have under Part 3 or in relation to any transfers of data to third countries.

If there is an infringement of other provisions, such as administrative requirements of the legislation, the standard maximum amount will apply, which is £8.7 million or 2% of the total annual worldwide turnover in the preceding financial year, whichever is higher.

9.9.4.2 The introduction of GDPR and the DPA has increased the powers of the Information Commissioner, requiring organisations to pay up to €20m or 4% worldwide annual turnover for the preceding financial year, whichever is higher. The level of the penalty depends upon the severity of the breach by an organisation, with the Information Commission having reference to specific statutory considerations such as the nature, gravity and duration of the failure, the category of personal data affected by the failure and whether the penalty would be effective, proportionate and dissuasive. The organisation has a right of appeal against the penalty and/or the amount of the penalty. Appeals are made to the First–tier Tribunal (Information Rights).

9.9.4.3 Controllers involved in processing personal data that infringes the GDPR and/or the DPA will be liable for any damages that the processing causes. A processor will be liable for the damages caused by processing where it has not complied with obligations of the GDPR/DPA that are specifically directed at processor or where the processor has acted outside or contrary to lawful instructions of the controller. The recent high profile Wm Morrisons Supermarkets Plc case in England, whereby a worker uploaded personal data of 100,000 employees to the internet, highlighted the risk organisations can face as a consequence of the actions of their workers. Although an English case, it is expected that the decision would be reflected in any Scots court case arising from the same or similar facts.

9.9.5 Prosecutions

Prosecutions for offences committed under the DPA in Scotland, such as failure to comply with an enforcement notice, are brought by the Procurator Fiscal Service. Prosecutions for offences committed in the rest of the UK are brought by the Information Commissioner.

9.9.6 Other powers

In addition to the above powers, the Information Commissioner may conduct assessments to check whether organisations are complying with the DPA. It may also carry out audits to ensure that organisations are following good practice in processing personal data.

Powers of the information commissioner

9.10 Interception of communications

9.10.1 Introduction

9.10.1.1 Employers may have a need to monitor telephone calls or emails within the workplace. This may be on an ongoing basis, for example, routinely recording telephone calls for training or quality control purposes. It may also be on an ad-hoc basis, for example monitoring emails of an employee suspected of divulging confidential information to competitors. In addition to Data Protection considerations (see 9.5.4 Monitoring at work) employers should ensure that they comply with the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIPA') and associated regulations. This is a complex piece of legislation and what follows is a brief summary of the implications of its main terms for employers.

9.10.2 Interception of communications

9.10.2.1 RIPA makes it a criminal offence for a person to intentionally and without lawful authority intercept in the UK any communication in the course of transmission by a telecommunication system. Telecommunication system includes an employer's telephone, internet and email system.

9.10.2.2 A person convicted of such an unlawful interception is liable to up to two years imprisonment and/or an unlimited fine. Individuals may also raise a claim in the civil courts. Investigatory Powers Commissioner's Office may impose a financial penalty of up to £50,000. This applies where the Commissioner considers that a person has, without lawful authority, intercepted in the UK any communication in the course of transmission by a telecommunications system, but no criminal offence has been committed.

9.10.3 Meaning of interception

9.10.4 Essentially, interception of a communication in the course of transmission by a telecommunication system occurs where a person:

- modifies or interferes with the system or its operation (e.g. attaches a recording device); or
- monitors transmissions either wirelessly or directly via the system, in such a manner as to make some or all of the contents of the communication available, while being transmitted, to anyone other than the sender or intended recipient of the communication. Making a communication available while being transmitted is extended to include communications which are diverted or recorded by a third party so as to be available to a person after the conversation has ended or the email sent.

9.10.4.1 Examples of interception are:

- A telephone system which records employee telephone calls to allow a manager to listen to them at a later stage;
- Intercepting emails at the server gateway in order to read, save or print the contents or copy them to another email account before releasing the emails to continue to the intended recipients;
- The setting up of a rule on an email account, by an administrator, to automatically copy emails sent to or by an employee to another email account (known as mirroring);
- A manager listening in to a telephone call of an employee as the call takes place.

9.10.4.2 Examples that are not interceptions:

- The recording of a telephone conversation by one of the parties to the call. For example, by putting the call on speaker phone and recording the conversation using a dictaphone. This does not constitute interception as the conversation is recorded by a party to the conversation;
- Accessing an employee's email account to read emails stored in the inbox, sent items or any other part of the system. This does not constitute interception as it takes place after the emails have been sent or received; however as outlined above this could be a breach of the Data Protection Act if personal emails are accessed without consent.

Interception of communications

9.10.5 Lawful authority

9.10.5.1 It is only where an interception is made without lawful authority that an offence is committed. Lawful authority in the employment context includes where both the sender/caller or recipient of the communication have consented to its interception.

9.10.5.2 In addition, subject to some detailed provisions employers are legally entitled to intercept communications transmitted over a private telecommunication system for various business purposes including:

- monitoring or keeping records of communications;
- for the purpose of preventing or detecting crime; or
- for the purpose of investigating or detecting unauthorised use of the telecommunication system so long as:
- the system is provided for use wholly or partly in connection with the business (e.g. an employer's telephone or internet/email system);
- all reasonable efforts have been made to inform every person who may use the system that communications may be intercepted; and
- any such interception is carried out by, or with the express consent of, the system controller (typically someone in a managerial position such as an IT manager).

9.10.5.3 A private telecommunication system includes an employer's telephone system and extends to email and internet based communications made through a telephone network.

9.10.5.4 Employers may therefore lawfully intercept telephone calls or emails made or received via their telephone system for the above purposes so long as they take all reasonable steps to bring this to the attention of employees and customers. This should typically be achieved by including such a warning in a greeting message before telephone calls commence. Employers are also advised to put in place a communications policy to inform employees that all communications, including personal calls/voicemail messages/emails/internet use, may be monitored and/or recorded.

9.11 Social media within the workplace

9.11.1 Introduction

A large proportion of the working population use social media and networking sites and do so to communicate socially with work colleagues. This raises many difficult issues for employers. Many employees believe that as long as postings are made on their own time on their own phone or computer then the content is none of their employer's business. In short there can be a misplaced belief in privacy or the right to privacy. Some employees do not understand their own settings and so postings that are intended to be private are made public.

It can be difficult for an employer to know if use of social media sites has been during or out with the working day, or whether it can discipline an employee for comments or pictures posted on the internet on private computers or mobile phones during non working hours. One of the most important measures that an employer can take in combating these difficulties is to put in place a detailed and carefully worded policy that sets clear parameters for employees in relation to social networking activity in and out of work.

9.11.2 Social networking policy

A clear policy setting out the rules on social networking will avoid uncertainty for both the employer and the employee as to what is or is not permitted. An employer can rely on a clearly worded policy of which the employee is aware in support of disciplinary action.

9.11.2.1 What should a policy contain?

The policy should not just set out the rules for use of the internet (both in and out with the workplace) but should also set out the extent of monitoring which the employer may carry out in relation to employees in the workplace. Monitoring can include recording telephone calls, recording internet usage, reading emails etc.

Internet and Social Media Policies should set out:

- restrictions on using certain social media or other sites using the employer's network during work time;
- whether the employee is permitted to make reference to the employer by name on networking and other sites (e.g. on twitter, LinkedIn etc) and if so, the type of comments that he or she is not permitted to make.
- the type of comments on the internet or social media sites that will be treated as public;
- guidelines on the use of social media particularly with a view to protecting confidential information and data protection;
- a warning not to attribute any personal views to the employer;
- a prohibition on comments which constitute bullying, harassment or discrimination;
- confirmation that breach of the rules may lead to disciplinary action up to and including dismissal;
- an explanation of monitoring which the employer will carry out;

9.11.2.2 Policy must be understood by employees

It is not sufficient for an employer to have a policy. If its content is not made known to employees then they will still be able to argue ignorance if they are taken to task for online conduct. There should be consultation with staff before the policy is finalised. When the policy is introduced, all staff should receive training on its content and should sign to say that the training has been received. That way the employer has proof that the employee has been made aware of the content of the policy and the possible consequences of breaching it.

9.11.3 Inappropriate or unacceptable conduct

Generally, with the blurring of work and private life, employers are finding it difficult to know when they can take action for social networking activity. Just because an employee's misconduct occurs out with the workplace or working hours does not necessarily mean that the employer has to disregard or accept that conduct. This applies to an employee's conduct in the use of social media, networking sites and the internet.

There can be a link between the employer and the employee where the employee often expressly identifies who his or her employer is. If there is a clear link between the employer and employee and the postings are not restricted or private then inappropriate comments or posting can give rise to disciplinary action in certain circumstances. If there is no clear link to the employer and the conduct appears to be private in nature then the employer will have to consider whether the conduct has an impact on the employee's ability to do his or her job or the conduct brings it into disrepute before deciding whether it merits disciplinary action.

Ultimately it is for each employer to set the parameters of acceptable conduct on social networking sites having regard to the nature of its business. Conduct which may justify an employer taking disciplinary action includes:

- Explicit sexual content or references which potentially brings the employer into disrepute;
- Disclosure of confidential information;
- Bullying and harassment of other employees online;
- Derogatory comments made about the employer or its clients or employees.

If the emails are private but sent to work email addresses and impact on work-related matters, then the employee is likely to have no expectation of privacy.

In 2023 an Employment Tribunal found that an employee did not have a reasonable expectation of privacy in relation to Facebook posts where they contained discriminatory and derogatory comments. Whilst these posts were restricted only to his 'friends', it was well known that views expressed this way could still be shared more widely.

9.11.4 Miscellaneous issues

9.11.4.1 Fair Disciplinary Process

An employer considering disciplinary action must follow its disciplinary procedure and/or apply the principles of the ACAS Code of Conduct on Disciplinary matters as it would with misconduct occurring in the workplace. It must conduct a full investigation and invite the employee to a disciplinary hearing (see 11.0 Disciplinary and grievance) before deciding on a disciplinary sanction.

9.11.4.2 Human Rights

An employee's rights under the European Convention of Human Rights will also have to be considered, and in particular the right of freedom of expression and the right to privacy. Some comments and blogs will be so public that the right to privacy is not engaged. The right to freedom of expression will have to be balanced with the employer's right to protect its business. This is a difficult area. Most employees believe that what they do on their own time is no concern of their employer. The IT or social networking policy is an important way of educating employees that their behaviour outside work can have a detrimental impact on their employer's business, particularly where the employer's name is used in a public online exchange.

9.11.4.3 Extent of Audience

If any comments or other online actions have the potential to be read and viewed by a large audience then this will clearly indicate that the conduct is not private. Some comments however will be so potentially harmful to the employer's business or demonstrate an employee's unsuitability for a role so clearly, that the scope of the potential readership may not be such an important factor.

9.11.4.4 Bringing Employer into Disrepute

Additionally, online conduct may bring the employer into disrepute having regard to the nature of its business. For example online exchanges between construction workers about extreme consumption of alcohol and the prevalence of workplace hangovers may well damage the employer's reputation on health and safety which in turn could have a serious knock on effect on its ability to win work. All such cases turn on their own facts. If you are in any doubt about whether or not your employee's conduct may bring your business into dispute you should call Scottish Engineering.

9.11.4.5 Bullying and Harassment

Some comments can amount to bullying or harassment. If so, the employer can treat such comments in the same way as it does any other breach of its policy on workplace bullying. This is particularly so as the employer may be vicariously liable for an employee's comments which are made during the course of his or her employment.

9.11.5 Data Protection

Employers should bear in mind that by reviewing data and monitoring employees on social media, it may be processing the data of the employees such that the principles of the DPA will be engaged (see earlier in this chapter for further information on Data Protection). The employer must also ensure that it does not monitor or search email or internet use in a way which contravenes the Regulation of Investigatory Powers (Scotland) Act. The employer will need to ensure that the method of gathering information is compliant with this legislation. If information is gathered in an unlawful or illegal manner then a court or tribunal may refuse to consider the information as evidence.

9.11.6 Further Guidance

ACAS has developed guidance for employers on social media in the workplace and employers can have regard to that when considering what to put in their policies and how to conduct a disciplinary action. This guidance can be accessed at www.acas.org.uk.

Chapter 10

TUPE

10.0 TUPE

10.1 Introduction

10.1.1 The Transfer of Undertakings (Protection of Employment) Regulations 2006, more commonly referred to as the TUPE Regulations, are designed to protect employees in the event a "relevant transfer" takes place. The 2006 Regulations have subsequently been amended by the Collective Redundancies & Transfer of Undertakings (Protection of Employment) Amendment Regulations 2014. Where there have been changes, this chapter will highlight the position under the old Regulations and the position under the new regulations. Under the Regulations there are 2 types of relevant transfer. There is a traditional type of TUPE transfer known as the transfer of an undertaking or part of an undertaking e.g. the sale of a business from Company A to Company B. There is also what is known as the "service provision change" type transfer where activities previously carried out by a client are either contracted out to a third party supplier or re-tendered between suppliers. A service provision change would also apply if the service was bought back in-house from the supplier to the client. In some cases it is self-evident that a TUPE transfer has taken place. In other circumstances it is far less apparent. This chapter will set out basic guidance for employers on how to recognise when a TUPE transfer is to take place.

10.1.2 Subject to certain exemptions in relation to pensions, the TUPE Regulations put a new employer in the old employer's place. For all practical purposes it is as if the employee had always been employed by the new employer. The TUPE Regulations also ensure that the vast majority of terms and conditions of employment of transferring employees stay the same. The TUPE Regulations impose an obligation on both the new employer and the old employer to inform and consult with representatives of their employees affected by the transfer.

10.1.3 With limited exceptions, the new employer takes over all rights and obligations arising from or in connection with the contracts of employment. The limited exceptions include certain pension liabilities and criminal liability. There are obligations on the old employer to provide certain information to the new employer about the employees who will transfer with a view to letting the new employer know what employees it is taking on and what terms and conditions they work under.

10.1.4 There are further provisions which protect employees against dismissal and/or changes to the terms and conditions of their employment for any reason related to the transfer.

10.2 When do the TUPE regulations apply?

10.2.1 The Regulations apply to 'relevant transfers' which normally occur when:

- a business or part of a business (referred to as an 'undertaking' in the TUPE Regulations) is transferred from one employer to another as a going concern – this is known as a 'business transfer'; and/or
- a party engages a contractor to do work on its behalf or reassigns such a contract or takes work back in-house. This is referred to as a 'service provision change'.

In the TUPE Regulations, the existing employer is referred to as the "transferor" and the new employer, following transfer, is known as the "transferee".

10.2.2 The TUPE Regulations will only apply where there is a sale of the shares of a company in very exceptional circumstances. When shares are sold, the ownership of the company changes however the identity of the employer does not. It does not matter that the change of ownership may indeed have an impact on the future terms and conditions and job security of the employees. The TUPE Regulations are more frequently engaged on the sale of assets in a business.

10.2.3 As stated above, there are two broad types of relevant transfer. The first is a business transfer and the second is a service provision change. The next section will set out the requirements for both types of transfer.

10.2.4 In what *may* be significant to the operation of TUPE, a recent case, which is subject to appeal, saw the employment Tribunal extend TUPE protection to workers in addition to employees. Whilst Tribunal decisions are not legally binding on other Tribunals, a decision of this nature could have real implications for the operation of TUPE going forward. For the time being, employers should think very carefully about who should be informed and consulted in any TUPE process.

10.3 Business transfers

10.3.1 The TUPE Regulations do not automatically apply to all business sales. There are certain requirements which must be fulfilled. There is a two-step test in order to establish whether there has been a relevant transfer:

STEP 1

Is there an identifiable business entity? A business transfer must involve the transfer of an undertaking (or part of an undertaking) which is 'an economic entity which retains its identity' after the transfer has taken place. An 'economic entity' means 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

STEP 2

Is there a transfer of that economic entity so that it retains its identify in the hands of the transferee?

10.3.2 The TUPE Regulations apply where whole or part of the business transfers and the business will be operated as a going concern after the transfer. Additionally, the economic entity needs to retain its identity after the transfer. For example, a purchaser buys a care home for the elderly, but immediately refurbishes the premises and opens the premises as a hotel. This would not be a TUPE transfer as the business was not bought as a going concern and it did not retain its identity after the transfer.

10.3.3 Although retention of identity post-transfer is a key factor, there are situations where businesses are transferred and are subsumed into the business of the purchaser. Even in those situations the TUPE Regulations can apply. That appears at first sight to be contradictory. If identity is not retained post-transfer then it cannot be a relevant transfer. It must be remembered that when businesses are transferred with the intention of the acquired business being rationalised into the new employer's existing structure, that rationalisation process rarely takes place right away. It can sometimes take months or even years for an acquired business to be properly rationalised into the purchaser's business. It is more common for the acquired business to retain its identity for a period of time post-transfer. In those circumstances identity is retained at the point of transfer and therefore the TUPE Regulations apply. It does not matter that at some point further down the line that identity may be lost.

10.3.4 If the operation of the business stops for a substantial period after the transfer it is less likely that the TUPE Regulations will apply. This is because the business will not operate as a going concern after the transfer. A relatively short period of closure for refurbishment would not necessarily prevent a TUPE transfer taking place even though there is no work for the employees to carry out immediately.

10.3.5 The suspension of activities following transfer is but one factor to consider when assessing whether identity has been retained. Other factors to consider include:

- What assets are transferring e.g. plant and machinery, buildings, stock;
- The value of the assets being retained and transferred at the time of the transfer;
- Whether customer lists and customers contracts are being transferred;
- Whether other employees are going over and if so, what they are doing in the hands of the new employer;
- Whether goodwill goes over;
- The similarity in activities before and after transfer.

10.4 Service provision changes

10.4.1 One of the main clarifications brought in by the 2014 Regulations concerns service provision changes. Service provision changes concern relationships between contractors and the clients who hire their services. Examples of these are labour intensive services such as office cleaning, workplace catering and security contracts.

10.4.2 Service provision changes normally occur in three ways:

- where a service previously undertaken by an organisation is awarded to a contractor. This is often referred to as 'contracting-out' or 'outsourcing';
- where an organisation terminates its contract with an existing contractor and assigns it to a new contractor. There is a change in the identity of the contractor. This is often referred to as 're-tendering'; or
- where a contract with an outsourced contractor is terminated and the organisation brings the services back 'in house'. This is normally referred to 'contracting-in'.

10.4.3 The TUPE Regulations only apply to those changes in service provision where there is 'an organised grouping of the employees... which has as its principal purpose the carrying out of activities concerned on behalf of the client'. Therefore, the TUPE Regulations apply to the employees who are assigned to the dedicated team that carries out the activities that are to be transferred. Employees do not have to work exclusively on the activities in order to be assigned to the dedicated team however the greater proportion of an employee's working week that is spent on the activity, the more likely it is that he or she will be assigned to that activity. A fuller explanation of the legal test applied to establish who is assigned to the organised grouping of employees is set out at 10.8 Which employees are transferred?.

10.4.4 There needs to be an 'organised grouping of employees' to give rise to a service provision change. If, for example, a client engages a contractor to provide a courier service but the collections and deliveries are carried out each day by different couriers on an ad-hoc basis rather than by an identifiable team of couriers dedicated to that client, there is no 'organised grouping of the employees' and therefore no 'service provision change'.

10.4.5 It should be noted that there is no service provision change and, therefore, no relevant transfer where: -

- A client buys services from a contractor on a one off basis over a short period of time. For example, a client engages a catering company to provide catering for an event that takes place over the course of one week;
- Where the arrangement between a client and the contractor is wholly and mainly for the supply of goods (not services) for the client's use.

10.4.6 For there to be a service provision change the 'activities' which are carried out before the transfer by one person must be carried out after the transfer by another. The activities do not need to be carried out in exactly the same way for a service provision change to occur. Following the changes brought by the 2014 Regulations, the test is whether the activities undertaken before and after the transfer are 'fundamentally the same', with the 'activities' themselves being defined in a commonsense and pragmatic way so as to allow for the comparison. This applies to all transfers after 31 January 2014 and reflects current case law.

In addition, to the activities remaining fundamentally the same, the principal purpose of carrying out those activities must remain fundamentally the same.

10.4.7 In some cases it will be reasonably clear whether the TUPE Regulations apply. In other cases it can be extremely difficult to properly identify whether or not there will be a TUPE transfer. It is essential that expert advice is taken on this area to avoid the risk of claims.

10.5 The TUPE regulations – territorial application

The TUPE Regulations only apply to certain geographical areas. These can be summarised as follows:

- Business transfers occur where the business is situated in the UK immediately before the TUPE transfer, irrespective of where the business is transferred to;
- Service provision changes can only occur where there is an organised grouping of employees situated in Great Britain immediately before the service provision change.

The TUPE Regulations apply regardless of whether there is any agreement between the old and new employer setting out the 'governing law' – e.g. an agreement states that its terms will be subject to the laws of France. This would not prevent a TUPE transfer taking place in the UK. It also does not matter if some of the staff are employed outside the UK, the issue is where the business is situated and/or where the services are being carried out.

The TUPE Regulations are derived from a piece of European legislation known as the Acquired Rights Directive. That Directive has effect in other European countries in various other guises so transfers to the UK from other European countries may be caught by those countries own local legislation implementing the Acquired Rights Directive.

10.6 The effect of the TUPE regulations - transfer of employees

10.6.1 Where a relevant transfer occurs, the contracts of employment of the employees who work in the business or who are assigned to the service being transferred are automatically transferred to the new employer. It is as if the employees had always been employed by the new employer and the new employer effectively steps into the shoes of the old employer. With one exemption in relation to pensions, the existing terms and conditions of employment of transferring employees pass to the new employer. The employees' continuity of service is also protected e.g. the employee has 3 years' service with Company A; on transfer to Company B he retains this service and the clock does not get set back to zero.

10.6.2 Difficulties can arise in relation to contractual terms or benefits which have not been incorporated in the written contract and/or where the written contract has not been updated and does not reflect the current position. Such terms can come as a nasty surprise to the new employer. For example, a contract of employment does not specifically state that an employee is entitled to a Christmas bonus of £200 each year, however over the last 5 years the old employer has paid the bonus to its staff. It could then be argued that the employees have an implied contractual right to the Christmas bonus. The new employer is unaware of that right because there is no written evidence of it. Post transfer, the employees who have transferred claim the bonus and the new employer may have to pay the bonus. Prudent employers would be advised to carry out very careful investigations and due diligence exercises in advance of any transfer to establish the written and verbal contractual terms which they are likely to inherit.

10.6.3 There may also be certain policies and procedures which form part of the employees' contracts of employment even though they are contained in separate documents.

10.6.4 Difficulties can also arise where bonus and commission schemes are linked to the old employer's profitability or financial systems. It can be difficult, if not impossible, for the new employer to replicate the old employer's scheme on a like-for-like basis. It is normally sufficient for the new employer to provide a scheme which is similar to the old scheme (if possible). If not, the alternative may be to buy-out the employees' rights. However, legal advice should be taken before doing so.

10.6.5 If the old employer has entered into a collective agreement with a trade union recognised by it, then the general position is that the new employer, post-transfer, automatically takes over that collective agreement. Anything done by the old employer under or in connection with it, in relation to a transferring employee by the transferor pre transfer, shall be deemed to have been done by the new employer post-transfer. The new employer is not required to observe the terms of the collective agreement in respect of any workers who are not employed in the undertaking at the time it was transferred.

Following the changes brought in by the 2014 regulations, any transferor who is not involved in any post-transfer changes will not be bound by them. Effectively, there could be 2 collective agreements in place post-transfer. Employers should consider seeking advice if they are unsure how collective bargaining and collective agreements will apply.

The effect of the TUPE regulations - transfer of employees

10.7 The transfer of liabilities

10.7.1 Not only does the new employer inherit the employees on their existing terms and conditions of employment, it also takes over all historical liabilities arising from those contracts other than any liabilities under criminal law.

10.7.2 This means that where an employee has, for example, been subjected to sexual harassment, or has had an accident at work, the new employer is legally responsible for these claims in all respects as if they had been the employer at the time. For this reason it is very important that a new employer tries to find out as much as possible about the employees it is to inherit so that it can attempt to put in place contractual provisions with the old employer to deal with the inheritance of such liabilities.

10.7.3 The new employer should also be mindful of ongoing disciplinary or grievance procedures concerning transferring employees. Where an employee is the subject of disciplinary proceedings and the hearing has not taken place, the new employer is able to continue the process. The same rule applies to grievances. There may well be practical issues with this e.g. if not all witnesses to a disciplinary act transfer in assessing the case this leaves the new employer in a potentially problematic situation. The same principle applies to some types of negotiation which have started before the transfer but have not been completed; for example wage negotiations.

10.8 Which employees are transferred?

10.8.1 The TUPE Regulations only apply to the contracts of those employees who are employed by the old employer immediately before the transfer and are assigned to the organised grouping of resources or employees which is the subject of the TUPE transfer. Non-employed agency staff or third party contractors are not covered. It is likely that given the extended definition of "employees" in the TUPE regulations that workers may also be covered by the TUPE Regulations.

10.8.2 Whether an employee is 'assigned to the organised grouping' depends on a number of factors including:

- the time spent working in different parts of the business/services;
- the value of the respective parts of any work undertaken by the employee to the business/services as a whole;
- the extent to which an employee's wages are split between different parts of the business/services; and
- whether an employee's contract of employment provides for work to be split between different parts of the business/services.

10.8.3 If the assignment of an employee to a particular part of the business or services is only temporary, the TUPE Regulations are unlikely to apply to that employee. The key question in relation to assignation is does the employee in question effectively belong to that part of the business. An employee who is temporarily assigned to a particular part of a business to cover holidays or a peak in demand cannot be said to belong to that part of the business because he or she has only been assigned temporarily. He or she normally works in another part of the business. It has recently been confirmed that if an employee has given notice of termination of employment and that notice is still running as at the date of transfer this does not mean that the employee will be deemed to be assigned on a temporary basis. That employee will still be deemed to be assigned to the relevant part of the business and will transfer to the new employer. If there is a temporary cessation of employment, such as a temporary closure of the undertaking or an organised grouping has been temporarily laid off prior to the transfer, those workers may still transfer if they are still deemed to be an organised grouping immediately prior to the transfer. This type of temporary cessation of employment would include instances of workers on sickness absence or holiday.

10.8.4 Careful consideration must also be given to employees who carry a more centralised role for example, an HR Director. It may be difficult for such employees to argue that they are assigned to a particular part of the business transferring, when in fact they are responsible for a number of areas of the business. In practice, whether that employee transfers will come down to the particular facts of his or her case.

10.8.5 An employee who is dismissed in advance of the transfer for a reason related to the transfer is still regarded as being employed 'immediately before the transfer'. Although this rule seems illogical, it is designed to prevent selling businesses slimming down the undertaking that is to be sold to make it more attractive to the purchaser. In such circumstances the dismissed employee will have a claim against the transferee.

10.9 Objecting to the TUPE transfer

10.9.1 The TUPE Regulations are designed to protect employees and they cannot be forced to transfer against their will. They have a right to object to the transfer to the proposed new employer. In advance of a transfer, if an employee makes it clear that he or she does not wish to transfer to the new employer then that employee's contract will terminate at the date of the transfer. Subject to our further comments at 10.9.2, an objection is akin to a resignation with the employee having no right to redundancy pay, notice or to claim unfair dismissal. The employee must convey to either his current employer or the proposed new employer – by words, writing or actions - that he or she does not wish to transfer to the new employer. It must be more than simply expressing general reservations. Should any employee indicate that he or she does not wish to transfer, it is best practice to have this confirmed in writing. The objection must be intimated prior to the transfer. Only in rare circumstances will a post-transfer objection be valid.

10.9.2 The TUPE Regulations also state that employees are entitled to resign where the transfer involves a substantial change to their working conditions which would result in a material detriment (this is referred to as a "Regulation 4(9) claim)". Such a claim, if successful is treated as a dismissal in law. This right is separate and distinct from the prohibition of variation of contractual terms. A number of cases in this area have related to a proposed relocation following a transfer where the new employer is based elsewhere. Prior to the introduction of the 2014 Regulations it was possible for an employee to claim that this was a substantial change to their working conditions to their material detriment and they could make a Regulation 4(9) claim to an employment tribunal for automatic unfair dismissal. Depending on when the employee resigned and at what point they objected, they may well have had a claim against the old employer, the transferor. This seemed unfair, as it was not the old employer proposing the change. Nevertheless, cases indicated that if the employee objected prior to the transfer, in these circumstances it was the old employer who was sued because the employee's objection prevented the transfer happening. Following the changes brought in by the 2014 regulations, a change of workplace now qualifies as an Economic, Technical or Organisational (ETO) Defence and so employees would be unsuccessful in claiming automatic unfair dismissal. It was different if the employee does not object prior to transfer but remained in employment until after transfer. If the new employer seeks to make substantial changes post transfer, then the employee is entitled to resign post transfer and make a Regulation 4(9) claim against the new employer.

10.9.3 This right exists independently of an employee's right to claim constructive dismissal where the new employer proposes unilaterally to vary a contractual term which would take effect post transfer.

10.10 Information and consultation

10.10.1 'Affected' employees might include:

- Individuals who are being transferred to the new employer; or
- Employees of the old employer who are not to transfer but whose jobs might be affected by the transfer e.g. the loss of one part of the business may lead to redundancies in the remaining parts and/or a change in the duties of those employees remaining;
- Employees of the new employer whose job roles or job security may be affected by the transfer. A transfer may result in a new employer having too many employees carrying out a variety of jobs and it is commonplace for such new employers to undertake redundancy exercises in the immediate aftermath of a transfer. In those circumstances the new employer's existing employees and those who transferred in must be treated in the same way. This type of scenario may place an obligation on the new employer to consult with its existing employees in advance of a transfer.

10.10.2 The obligation is for employers to inform and consult with elected representatives of the affected employees. The old and new employers must consult with representatives of a recognised trade union, if there is one and where its members are affected employees. If there is no recognised trade union, then the employer has a choice. The employer can either use existing employee representatives appointed or elected by the affected employees otherwise than for the purpose of TUPE consultation but who have authority from the employees to receive information and to be consulted about the transfer. Alternatively, the employer can arrange for an election of employee representatives to represent the affected employees. The TUPE Regulations set out detailed rules that regulate these elections; care should be taken that the rules are followed.

There may be a mixture of representatives, e.g. in a factory, the trade union may represent the shop-floor staff but not the office staff. As such, trade union representatives would represent the shop-floor workers but an election may be required to elect representatives for the office staff.

10.10.3 2014 Changes

10.10.3.1 Following the introduction of the 2014 Regulations there is an exemption for the need to inform and consult with representatives for Microbusinesses. To qualify for the exemption, the business: must have less than 10 employees, must have no existing representatives for the purpose of TUPE consultation; and must not have invited any representatives to be elected. This exemption applies to transfers after 31/01/14/ This allows businesses to inform and consult directly with affected employees. It does not exempt any organisation from their duty to inform and consult. It simply removes the need to meet and consult with representatives.

10.10.3.2 The 2014 Regulations also introduced the ability for incoming employers (the transferee) to collectively consult with affected employees on matters including redundancy before the transfer if the transferor agrees. This also applies to transfers after 31/01/14. Employers would need to carefully consider any redundancy pools and should ensure a fair procedure is followed to avoid unfair dismissal claims. It would be prudent to seek legal advice if this option is being considered.

10.11 What information must be provided and when?

10.11.1 Unlike a collective redundancy situation, the TUPE Regulations do not prescribe a specific time limit during which the information and consultation exercise must take place. The TUPE Regulations simply state that the information and consultation must be carried out 'long enough before the relevant transfer' to enable the employer of any affected employees to consult the appropriate representatives. Case law indicates that this must be in good time to allow sufficient consultation to take place.

10.11.2 The information must be 'delivered' or 'sent by post' to the elected representatives. The relevant employer must inform the representatives of: -

- the fact that a relevant transfer is to take place, approximately when and why;
- the likely legal, economic and social implications of the transfer for the affected employees;
- whether the current employer envisages taking any "measures" in connection with the transfer which will affect the employees and if so, what measures are envisaged or where no measures are envisaged, confirmation of that;
- the transferor must also tell employee representatives about any measures that the new employer is proposing in relation to those employees who will be transferred (and again, where no measures are envisaged, notice of this). The new employer is obliged to tell the old employer about such measures;
- the Agency Workers Regulations 2010 also introduced the requirement to tell employees of "suitable information" relating to the use (if any) of the number and type of agency workers by the employer.

"Measures" is not defined in the Regulations but would include any action, step or arrangement that may affect the employees e.g. a proposed change to pay-date or proposed redundancies.

10.12 When and how must consultation be conducted?

10.12.1 Unless an exemption applies, the old and new employer must inform and consult with representatives of their affected employees who may be affected by the transfer or any measures taken in connection with the transfer. These exercises are carried out independently of each other

10.12.2 Formal consultation under the TUPE Regulations is only required where the employer of the affected employees is proposing measures. In some instances the outgoing employer does not itself propose measures although the incoming employer will be. In such cases, the old employer has a duty to inform its employees about the measures of the new employer but does not need to (and cannot) consult on another employer's measures.

10.12.3 Consultation must be undertaken with a view to seeking the agreement of the employee representatives to the proposed measures.

10.12.4 The representatives and candidates for election have certain rights to enable them to carry out their functions properly. They must be given access to the affected employees and must be provided with such accommodation and facilities as are appropriate to carry out their duties. They must be allowed reasonable paid time off during working hours to carry out their duties.

10.12.5 It must be emphasised that consultation is a two way process. During the consultation exercise, the employer must give proper consideration to any representations made by the employee representatives. The employer does not have to reach agreement with the representatives regarding the measures. It is sufficient that the employer enters into the consultation process with a view to seeking agreement to the proposed measures. If the employer does not agree with the representatives' proposals, it must give reasons.

10.13 Employee liability information

10.13.1 The TUPE Regulations require an old employer to provide a new employer with specified information to assist the new employer in understanding the rights, duties and obligations that exist in relation to those employees.

10.13.2 In relation to each of the transferring employees, the old employer must supply the following information:

- the employees' identity and age;
- information contained in the statement of employment particulars as required by Section 1 of the Employment Rights Act 1996;
- information relating to collective agreements which apply to the employees;
- any disciplinary action taken by the old employer in the preceding two years;
- any grievances raised by transferring employees within the preceding two years;
- any legal action taken by those employees against the old employer within the previous two years; and
- Instances of potential legal action which may be brought by those employees where the old employer has reasonable grounds to believe that such action might occur.

10.13.3 Formerly the information had to be provided to the new employer at least 14 days before the transfer. From 1 May 2014 this has been increased to a minimum of 28 days before the transfer. If it is not reasonably practicable to provide the information within that timescale, it must be provided as soon as reasonably practicable after that deadline.

10.13.4 This information must be updated up to the transfer date. The information must be provided in writing or in other forms which are accessible to the new employer (e.g. electronically). The specified information may be given in instalments and can also be provided via a third party such as a solicitor.

10.13.5 Quite frequently, the old employer may be asked to provide more information than that required under the TUPE Regulations. Before doing so, the old employer should consider any GDPR/ Data Protection Act 2018 issues that may arise on doing so.

10.13.6 Failure to provide the information, either on time, accurately or at all, may result in a claim by the new employer against the old employer for compensation. The TUPE Regulations state that in assessing compensation regard should be had to (a) the term of any contract between the parties, and (b) any loss suffered by the new employer (subject to the duty of the new employer to mitigate its loss); the legislation goes onto say that a minimum of £500 per employee should be paid (unless the tribunal considers it just and equitable to award a lesser sum). It should be noted that compensation will not be awarded where inaccurate information has been provided but there was no obligation under the TUPE Regulations to provide said information. However, the new employer may have recourse for any loss caused by this through contractual remedies.

10.14 Remedies for failure to inform and consult

10.14.1 Elected or trade union representatives have a right to raise an employment tribunal claim where an employer has failed to comply with the information and consultation requirements. Any such complaint should be lodged with the employment tribunal within three months of the date of the transfer.

10.14.2 An affected employee has a right to raise a claim if there are no elected or trade union representatives.

10.14.3 The employer may try and argue that there were "special circumstances" which made it not reasonably practicable for the employer to carry out the exercise. Case law however suggests that this can be a high hurdle for an employer to jump.

10.14.4 Compensation for claims for failure to inform and consult can amount to up to 13 weeks' gross pay, uncapped, per employee. This award is punitive against the employer and, unlike unfair dismissal, does not seek to compensate employees for any loss they have suffered.

10.14.5 It should also be noted that a claim for failure to inform and consult can be raised against both the old and new employers. A new employer can therefore be liable for an old employer's failure to inform and consult. In these circumstances, the Employment Tribunal is entitled to award compensation on a joint and several basis and it will be a matter for the Tribunal to fairly apportion the compensation between the old employer and new employer.

10.14.6 Similarly, where a representative or candidate for election has been dismissed, subjected to any other detriment, unreasonably refused time off, denied time off and/or pay for time off to carry out duties he or she can complain to an employment tribunal within three months of the date of the alleged detriment/action complained of.

10.15 Occupational pensions

10.15.1 Certain rights arising out of membership of occupational pension schemes do not transfer to the new employer. Any benefits that relate to old age, invalidity or survivors contained within an occupational pension scheme do not transfer. Other benefits arising out of an occupational pension scheme that do not relate to those three matters can in certain circumstances transfer. In past cases, enhanced redundancy or early retirement benefits have transferred to new employers because such benefits do not relate to old age, invalidity or survivorship. Accordingly, any prospective new employer should be very careful to carry out adequate investigations on the range of rights and benefits that arise for transferring employees out of occupational pension schemes.

For Automatic enrolment, the NEST scheme is established under trust and constitutes an occupational pension scheme for these purposes (see 19.0 Pension benefits for further information).

10.15.2 Pension rights not derived from an occupational pension scheme

Not every pension provision in place between employers and employees arises out of an occupational pension scheme. Many employers simply agree to pay a monthly contribution to a private pension scheme designated by the employee. Such a contractual right does not arise out of membership of an occupational pension scheme and therefore such rights transfer to the new employer. In those circumstances the pension contribution is treated in the same way as any other contractual payment made to an employee, such as monthly membership of a gym.

10.15.3 Pensions Act 2004 - changes

The Pensions Act contains obligations on new employers in relation to TUPE transfers to provide some form of pension arrangement for employees who were members of or eligible to be members of the old employer's scheme. The rights provided by the new employer do not have to be the same as the previous arrangement with the old employer. A minimum standard is set out in the Pensions Act.

If the transferring employee has been a member of or is eligible to be a member of a defined contribution or money purchase scheme, then the new employer is required to put in place a similar scheme with matching contributions up to a maximum of 6% of basic pay. If the scheme of the old employer is not a money purchase scheme then the replacement arrangements must satisfy a general statutory test and be substantially equivalent to the scheme that was in place previously.

Where a transferring employee has not been a member of the old employers scheme and the receiving employer is already subject to the duty to automatically enrol, the employer will have to automatically enrol all eligible transferring employees.

If the transferor has not reached its staging date but the transferee has, employees need to be enrolled in a qualifying scheme. In the opposite situation ie the transferor has auto enrolled employees but the transferee has not yet reached its staging date, it appears that the transferee employer will not need to auto-enroll until it itself has reached its staging date, but the position is uncertain.

10.16 Transfers from insolvent businesses

10.16.1 The TUPE Regulations make special provision for situations in which an old employer is subject to insolvency proceedings. Broadly, there are two forms of insolvency proceedings recognised under the legislation – terminal proceedings and non- terminal proceedings - which form the insolvency proceedings take is significant as they have very different effects.

10.16.2 Non-terminal proceedings or what is described as "relevant insolvency proceedings" under the Regulations means insolvency proceedings which have been opened by the old employer not with a view to the liquidation of the assets and which are under the supervision of an insolvency practitioner. These may include administration, administrative receiverships and voluntary arrangements.

10.16.3 Where there is a TUPE transfer and the old employer is subject to relevant insolvency proceedings, certain of the old employer's pre-existing liabilities to the transferring employees do not pass to the new employer. These debts concern any obligations to pay the transferring employees:

- statutory redundancy payments;
- arrears of pay;
- pay in lieu of notice;
- holiday pay;
- basic award in connection with a claim for unfair dismissal.

10.16.4 The other main concession is that there is greater scope for a new employer to vary the terms and conditions of employment of the transferring employees. This is permitted even if the reason for the change is related to the transfer and is not any economic, technical or organisational reason entailing changes in the workforce (see 10.20 Economic, technical or organisational defence) provided that pre-conditions are met. These pre-conditions are:

- The old employer or the new employer or the insolvency practitioner must agree the variations with the Trade Union representatives where a Trade Union is recognised.
- Non-union representatives are permitted to agree variations. However, there are further requirements. The agreement which records the variations must be in writing and signed by each of the non-union representatives. Before the agreement is signed, the employer must provide all the affected employees with a copy of the proposed variations and any guidance which they reasonably need in order to understand the changes.

10.16.5 Crucially, the sole or principal reason for the variation must be the transfer itself or a reason connected with the transfer which is not an economic, technical or organizational reason entailing changes in the workforce; AND the variations must be made with the intention of safeguarding employment opportunities by ensuring the survival of that part of the undertaking or business.

10.16.6 The other form of insolvency proceeding recognised under the Regulations are terminal proceedings. This is where the old employer is subject to bankruptcy proceedings or analogous insolvency proceedings with a view to liquidation of the assets. If subject to terminal proceedings, significant parts of the TUPE Regulations are disapplied. In particular, the parts relating to automatic transfer of employees and the enhanced protection against both dismissal and changes to terms and conditions. This leaves the purchaser with much more freedom to pick and chose which, if any, employees it takes on.

10.16.7 Following a Court of Appeal decision in 2011, it was decided that as a matter of principle, pre-pack administrations could never be terminal proceedings as the very intention of a pre-pack is to rescue the company as a going concern.

10.17 Effect on collective bargaining

10.17.1 Where an independent trade union is recognised by the old employer, such recognition will transfer to the new employer provided following the transfer the transferred grouping of employers maintains an identity distinct from the rest of the transferee's business.

10.17.2 There is nothing to prevent the new employer taking steps to de-recognise the trade union unless that union was recognised via the statutory recognition procedure. If that is the case then the statutory procedure for de-recognition must be invoked.

10.17.3 Whilst an employer can withdraw from the collective agreement that it inherits under the TUPE Regulations, it will still be bound by the terms of the collective agreements which have been incorporated into the contracts of the transferring employees at the point of transfer.

The employer will only be bound however by the terms preserved at the date of transfer. Contractual changes which occur as a result of agreement between the transferor employer and the union pursuant to the collective agreement after the transfer do not apply to the transferee and it is not bound to alter the contracts of the employees who have transferred because of subsequently re-negotiated terms.

This point was recently determined by the European Court of Justice who found in favour of the new employer's 'static' approach to collective agreements i.e. the terms negotiated post transfer, by means of a negotiation to which the new employer is not a party will not bind the new employer and has been codified in the 2014 Regulations.

10.17.4 Another change introduced by the 2014 Regulations allows the transferee to make changes to any collective agreements 1 year after the transfer provided the changes are no less favourable. (This applies to changes after 31/01/15)

10.18 Changes to terms and conditions of employment

10.18.1 With the purpose of the TUPE Regulations being the protection of the employees' rights, strict limitations are imposed on the ability of the new employer to vary contractual terms and conditions of employment of employees who transfer. The TUPE Regulations also prohibit the old employer making changes to the terms and conditions of the employees who will transfer in anticipation of the transfer taking place.

10.18.2 Variations to the contracts of employment of transferring employees are void and unenforceable where the reason for the variation is:

- The TUPE transfer itself; or
- A reason connected with the transfer which is not an 'ETO reason'. See 10.20 Economic, technical or organisational defence.
- Following the 2014 Regulations, an incoming employer may be able to vary contracts of employment upon a TUPE transfer where the contracts of employment provide for this. Where there is a relevant ETO defence entailing a change in the workforce AND the employee agrees, incoming employees may also make some (limited) changes to terms and conditions of employment. If in doubt, legal advice should be sought before any changes are made

10.18.3 The TUPE Regulations do not provide any guidance to indicate what period of time must elapse after the transfer before it is safe to assume that the transfer did not impact, directly or indirectly, on the new employer's reason for changing the terms or conditions of employment. The question is not how long but rather is the change related to the transfer or not.

10.18.4 It does not matter that the employee has agreed the change or that the revised terms and conditions as a whole are more beneficial to the employee who has transferred. Any change to the employee's terms and conditions which is made by reason of the transfer is void and unenforceable. In practice, an employer is unlikely to face any legal challenge to positive changes to an employee's terms and conditions. It is only those detrimental changes that are likely to be challenged.

10.19 Tupe and unfair dismissal

10.19.1 Prior to the 2014 Regulations, dismissal of an employee where the sole or principal reason was:

- the TUPE transfer itself;
- a reason connected with the transfer which was not an 'ETO' reason, was automatically unfair regardless of whether it took place on, before or after the date of transfer.

Following the introduction of the 2014 Regulations, if the reason for the dismissal is the transfer but there was an ETO reason the dismissal may be fair.

There is no longer any reference to "reasons connected with the transfer".

10.19.2 If an employer is successful in establishing an ETO defence that does not necessarily mean that the dismissal is fair. It simply means that a dismissal is not automatically unfair. The employer must still show that it acted reasonably in all of the circumstances. It should be noted that employees still require 2 years qualifying service in order to raise a claim for unfair dismissal for a reason connected with a TUPE transfer.

10.20 Economic, technical or organisational defence

10.20.1 As detailed above, it is possible to lawfully dismiss an employee or to vary his or her terms and conditions of employment if the dismissal or variation is for 'an economic, technical or organisational reason entailing changes in the workforce' of either the old employer or the new employer.

10.20.2 In relation to dismissals, a common ETO reason is dismissal by reason of redundancy. The TUPE Regulations state that a critical component of the ETO defence is that 'changes in the workforce' take place. This means that there has to be a change (usually a reduction) in the number of employees. However, other non-numerical changes can suffice provided the employer can show a substantial change in the functions carried out by the employees in fundamental areas of the business as a result of the transfer.

10.20.3 It should be noted that where an employer wishes to establish an ETO defence, the ETO reason must be relevant to its establishment. An old employer cannot dismiss employees as redundant simply because the new employer indicates that it intends to make the transferring employees redundant once the transfer occurs. In that situation the old employer does not have an ETO reason. The ETO reason for the redundancies rests with the new employer and it is the new employer who should effect the redundancies.

10.20.4 The comments above in relation to 'changes in the workforce' equally apply to the ETO defence for varying employee terms and conditions of employment.

10.20.5 Following the introduction of the 2014 Regulations, it is now possible for a change of workplace to qualify as an ETO defence (see paragraph 10.9.2). It is now also possible for the ETO defence to apply where the reason for the dismissal is the transfer itself (rather than "reasons connected" with the transfer). Employers would still need to ensure such dismissals are fair to avoid unfair dismissal claims, but such dismissals are no longer automatically unfair

10.20.6 This is a particularly complex and difficult area and if an employer is considering relying on an ETO reason for a dismissal or change in contractual terms, legal advice should be sought.

10.21 Who is liable - the old employer or new employer?

10.21.1 Where employees transfer to a new employer, the employees should generally make any employment related claims against their new employer rather than their old employer. This general rule relates to claims which are connected to employment with the old employer.

10.21.2 Except for claims relating to failure to inform and consult (where the tribunal may award joint and several liability), the old employer is generally absolved of all liability to any of the employees who continue to work for the new employer and whose contract of employment has transferred. Where an old employer has dismissed an employee for a reason related to the TUPE transfer, liability for that dismissal will pass to the new employer. Where an old employer has discriminated against an employee or has perhaps made unlawful deductions from wages, again liability for those claims would pass to the new employer.

10.21.3 If, however, the old employer dismisses an employee before the transfer for a reason entirely unrelated to the transfer, e.g. gross misconduct, then that dismissal is not automatically unfair under the TUPE Regulations (although it may be unfair in terms of general unfair dismissal legislation). In these circumstances the employee must pursue any unfair dismissal claim against the old employer. This is because the dismissal for a non-TUPE related reason means that the dismissed employee is not employed immediately before the transfer.

10.21.4 If an employee resigns and objects to the transfer because the new employer indicates an intention to change their terms and conditions of employment which is to their detriment, then liability remains with the old employer as the objection stops the transfer going ahead. (see 10.9 Objecting to the TUPE transfer)

10.22 Contracting out of TUPE

10.22.1 The general rule is that parties are not allowed to contract out of TUPE. This means, for example, that a buyer and seller of a business cannot agree as part of their commercial bargain that the TUPE Regulations do not apply to the transaction. Similarly, it is not open to old or new employers to agree that certain employees transfer whilst others remain behind.

10.22.2 Settlement agreements are sometimes used as an attempt to circumvent or contract out of the TUPE Regulations. The circumstances in which settlement agreements are enforceable in connection with TUPE disputes under the TUPE Regulations is unclear and employers should take legal advice before entering into such agreements.

Chapter 11

Disciplinary and grievance

11.0 Disciplinary and grievance

11.1 Introduction

11.1.1 Fair and consistent application of disciplinary and grievance procedures lies at the heart of good management. It also assists employers in ensuring that they do not fall foul of unfair dismissal rules. In order for a business to operate efficiently and therefore profitably, employees must understand the standards of behaviour that are required of them and the likely consequences of not meeting those standards. In addition, employees have to understand what rules and procedures they are expected to follow in the course of their employment. This chapter should be read in conjunction with Chapter 12 which contains detailed guidance on how to avoid unfairly dismissing an employee.

11.1.2 Grievance procedures and the proper handling of those procedures ensure that employees have an appropriate means of registering complaints or dissatisfaction with some aspect of their employment and to have the complaint resolved fairly and promptly. This chapter sets out the basic procedures and principles that employers should follow in order to ensure best practice and also to guard against unfair or constructive unfair dismissal liability.

11.1.3 Reference to disciplinary matters in this chapter relates to acts of misconduct as opposed to capability and/or performance issues. In practice, there can be overlap between behaviour that is properly regarded as misconduct and other behaviour that relates to an employee's performance or capability. The correct processes to be followed in respect of performance and capability are set out in Chapter 12.

11.2 Some general disciplinary considerations

11.2.1 ACAS Code of Practice

The ACAS Code of Practice in relation to disciplinary and grievance matters is designed to assist employers, employees and their representatives in dealing with disciplinary matters and grievance in the workplace promptly and fairly. Tribunals pay close attention to the extent to which the processes followed by the employer have complied with the ACAS Code. An employer who departs from the general guidance contained in the Code without good reason runs the risk of liability for unfair dismissal.

If an employer fails to follow the Code without justification then that employer risks the employee's compensation being increased by 25% if his or her tribunal claim is successful. Conversely, if a Tribunal feels an employee has unreasonably failed to follow the guidance set out in the code it can reduce any award by up to 25%.

11.2.2 Internal procedures

It is good practice for employers to develop their own written rules and procedures. Statements of terms and conditions of employment issued to employees must contain either disciplinary and grievance procedures or information to enable the employee to access the procedures if they are not contained within the body of the contract document itself. Disciplinary procedures should set out the types of behaviour and conduct that the employer regards as misconduct and gross misconduct. Ideally, examples of the types of behaviour that would attract those labels should be incorporated into the document. The document should also set out the basic procedures that the employer will follow in disciplinary situations. The procedure should also set out the range of sanctions or penalties that the employer may impose together with general guidance as to the type of misconduct that will attract a particular penalty or sanction. The procedure should also set out the rules governing appeals against disciplinary sanctions.

The procedure should contain some guidance or information on which grades of management or staff have the authority to dismiss.

11.3 Disciplinary investigations

11.3.1 The nature and extent of an investigation into possible misconduct will depend very much on the nature of the misconduct itself. Some cases will involve detailed examination of documents and the taking of witness statements from a number of employees. In other situations, the only investigatory step is to interview the alleged wrongdoer. A thorough and well-documented investigation into the facts of a particular case underpins a fair and reasonable process.

11.3.2 Who should investigate? Ideally the individual who investigates an allegation of misconduct should not then subsequently chair the disciplinary hearing and make a decision on whether a sanction or penalty is appropriate. In smaller businesses it is not always possible to separate these two functions. An investigator subsequently chairing a disciplinary hearing does not necessarily render any disciplinary sanction imposed unfair. The guiding principle is that if an investigator chairs the disciplinary hearing, then that individual must be capable of impartiality and objectivity at the point of chairing the hearing, notwithstanding prior involvement in the investigation. Best practice is to separate these two functions wherever possible.

11.3.3 Written records

It is important for an employer to maintain written records of investigations. This will assist in the handling of the disciplinary hearing and any subsequent appeal that may become necessary. An employer is required to ensure that an employee fully understands the detail of the allegations he or she faces. It is easier to do that if the detail of the evidence and allegations are in writing. Again, the extent and formality of written documentation will depend on the nature of the investigation itself. Best practice is to incorporate all investigatory material into one report with all relevant documents or statements being attached to that report.

11.3.4 Witness statements

11.3.4.1 Most investigations require employers to seek views, input or evidence from employees other than the alleged wrongdoer. It is prudent for any information obtained from other employees to be presented in the form of a written statement so that there can be no debate or confusion at a later stage of the disciplinary procedure about what that employee's evidence is. Some employers obtain signed written statements from employees although strictly speaking this is not a mandatory part of the fair procedure. If a statement is signed that will discourage a witness from changing or withdrawing his or her statement. A witness should always be advised of why the statement is being taken.

11.3.4.2 Difficulties can arise when employees express concerns about the alleged wrongdoer finding out about their involvement in the investigatory process. Employees sometimes fear reprisals or general damage to their working relationship with a colleague or superior. Written statements can be anonymised in order to protect the identity of the employee however, often the identity of the employee is effectively disclosed by the content of the statement.

11.3.4.3 Difficulties can arise in using anonymised statements. It is sometimes said that if statements are anonymised, the alleged wrongdoer is prevented from properly responding to the statement. For example, it may be a relevant consideration that an individual who provided a witness statement had a grudge against the employee who is subject of the investigation. That might reduce the weight that the employer places on that statement. If the identity is not disclosed then the employee can be prevented from casting doubt on information provided as a result of the poor relationship with that other employee. The guiding principle in these situations is that as long as the employee has had full and proper disclosure of the nature of the allegations that he or she faces, then the fact that some or all of the witness statements are anonymised does not necessarily render the process unfair. This can be a difficult area for employers and advice should be taken if such issues arise.

11.3.5 Interview with alleged wrongdoer

It is essential to incorporate into the investigation a meeting with the alleged wrongdoer in order to put the allegations to him or her. This ensures that the employer has sought input from the alleged wrongdoer before it is decided that he or she has a case to answer at a disciplinary hearing. Again, best practice is for a written record to be kept of responses made by the employee during the investigatory meeting. An investigatory meeting should not be confused with the disciplinary hearing itself. Although in practice there can be an element of duplication between an investigatory meeting and a subsequent disciplinary meeting no action should be taken against an employee during or after an investigatory meeting. A disciplinary sanction should only be imposed after the disciplinary hearing takes place.

11.3.6 Conclusion of investigation

Once the employer has gathered all information relevant to the allegations it is then for the employer to decide, on the basis of the evidence gathered, whether or not the employee has a case to answer. If there is a case to answer then the employer must call a disciplinary hearing. If the employer decides there is no case to answer or there is insufficient evidence to justify further proceedings then the matter may be at an end. This should be communicated to the employee in writing without delay.

11.3.7 Informal resolution

The employer may conclude that whilst there is some evidence of wrongdoing, it is not serious enough to justify formal disciplinary proceedings or action. In such cases, it may suffice for the employer to provide the employee with an informal warning as to future conduct. In some cases it may be appropriate to provide further training, coaching or advice on the standard of conduct that is expected. If the informal resolution fails to deal with the problem and the employee commits further acts of misconduct then it will be to the employer's credit that it had tried to resolve the matter without disciplinary action. A brief note should be kept of any agreed informal action for future reference. It is sensible to review the informal action taken to ensure that the required improvement in behaviour has taken place.

11.4 Paid suspension

11.4.1 Paid suspension is not itself a disciplinary sanction. Suspensions in the context of disciplinary procedures should always be neutral in nature. It is not necessarily appropriate for an employee to be suspended in every case particularly if the allegations appear to be less serious in nature. If, however, it appears to the employer that the investigation may be hampered by the employee's ongoing presence in the workplace then it is appropriate for the employee to be suspended, irrespective of the nature of the allegations. If an act of misconduct involves a heated exchange or fall out between colleagues then suspension may be appropriate to allow the employees to calm down. That may avoid possible further conflict. Employers must never suspend employees as a "knee jerk" reaction to allegations. Recent cases suggest that employees, who are suspended in such circumstances, may argue that the suspension is a breach of trust and confidence. It is not a requirement that the suspension be absolutely necessary having considered all the circumstances, but an employer must ensure that they have reasonable and proper cause for taking such action, before suspending. Careful consideration should be given to any decision to suspend an employee.

11.4.2 Suspension – possible gross misconduct

Most employers suspend employees who face allegations of possible gross misconduct. In such cases dismissal is a potential outcome and therefore it is prudent to allow the employee time away from work to consider his or her defence in advance of the disciplinary hearing. There are also cases where the employee's ongoing presence in the workplace during the investigation is not appropriate, for example, if the allegation is one of harassment or victimisation of a fellow employee, or wilful damage to the employer's property. If an investigation might be hampered by the employee's ongoing presence in the workplace then suspension is appropriate.

11.4.3 Pay during suspension

It is generally not lawful to suspend an employee without pay. To do so would likely be a breach the employee's contract of employment. Contractual provisions that seek to reserve the right to suspend without pay will usually be unenforceable. During any period of suspension an employee is entitled to full pay. In addition, suspension is not a sanction in itself and therefore to penalise an employee financially during suspension would be in effect to impose a sanction before the case has been heard..

11.4.4 Written confirmation of suspension

The employer should confirm the suspension in writing. The letter should contain a general statement of the allegations faced and the reason for the suspension. It should also state that suspension is on full pay and, if possible, give an indication of the likely length of suspension.

11.4.5 Conditions of suspension

It is important that the employer clarifies at the beginning of the suspension any conditions that it wishes to attach to the suspension. In certain circumstances it may be appropriate to remind the employee that he or she should not engage in any work related activity. It would be appropriate to remind the employee that he or she should not attempt to contact any clients or suppliers during the suspension. It may be prudent to advise the employee that colleagues, particularly those who may be giving witness statements, should not be contacted. Employers will also have to consider the ongoing use of company mobile phones, laptops and blackberries during the period of suspension, as well as access to the computer systems. If all access for these items is denied during suspension it can give an employee scope to argue that these measures are evidence that a decision to dismiss has already been reached. Employers have to balance these considerations with the risk that its property may be damaged or computer system interfered with. Employers should seek advice in relation to the conditions of suspension.

11.4.6 Duration of suspension

The length of suspension will depend very much on the investigatory steps that the employer has to carry out. It should be no longer than is reasonable for investigations to be properly carried out. If the progress of the investigation is likely to be delayed, for example, by the absence of a key witness on holiday, then that fact should be communicated to the employee.

11.5 Disciplinary hearing

11.5.1 Once the investigation has concluded, if the employer is satisfied that there is a case to answer and that informal action will not suffice then a disciplinary hearing must be convened. The disciplinary hearing provides a further opportunity for the employee to respond to or refute the allegations. In cases where the misconduct is effectively admitted by the employee, the disciplinary hearing provides an opportunity for the employee to put forward any mitigating factors or justification for the behaviour before a sanction is imposed. Accordingly, even in situations where the facts appear to be beyond dispute, it is still essential for a disciplinary hearing to be convened before action is taken.

11.5.2 Written notification

Irrespective of whether or not the employee is suspended, he or she should receive written notification of the date, time and location for the disciplinary hearing. All relevant documentation and witness statements gathered during the investigation process should be sent to the employee at this time, if that has not already been done. The letter should explain the employee's right to representation (see 11.5.3 Representation at the hearing). If, having regard to the nature of the allegations, the employer is of the view that dismissal is a possible outcome then the letter should state that fact. That alerts the employee to the fact that his or her job is at stake which in turn will help to focus the employee's attention on making full responses at the disciplinary hearing. The letter should also identify the individual who is to chair the disciplinary hearing and any other individual who is to attend as a minute-taker or in an advisory capacity from the employer's side.

11.5.3 Representation at the hearing

Employees have a legal right to be accompanied at a disciplinary hearing by either a colleague, an employed official of a trade union or someone certified by the trade union as being competent in accompanying employees to disciplinary hearings. It is common for the representative to be referred to as the 'witness' or 'companion'.

11.5.4 When does the right apply

Employees have the right to be accompanied to meetings that could result in:

- a formal warning being issued to a worker;
- taking of some other disciplinary sanction or other action; or
- the confirmation of a warning or some other disciplinary action.

There is no right to representation at informal discussions, counselling sessions or investigatory meetings.

11.5.5 The role of the representative

The role of the representative is generally to assist the employee in defending the allegations. The representative is allowed to make general statements in support of the employee's position, sum up the case and also to confer with the employee. The representative can also comment on procedural aspects however he or she is not permitted to answer questions which are put directly to the employee.

11.5.6 Other companions

Contracts of employment and internal disciplinary procedures may permit a wider category of individuals (such as a friend or family member) to accompany employees to disciplinary and grievance hearings. An employer should take great care when extending rights of representation beyond colleagues and trade union representatives, though this should be a consideration particularly when the employee concerned has a disability.

11.5.7 Can an employee request any colleague

An employee's request to be accompanied by a colleague must be reasonable. What is reasonable will depend on all the circumstances. Recent case law has confirmed that reasonableness only applies to the request to be accompanied and does not relate to the employee's choice of companion. An employer cannot interfere with the employee's choice of companion. The ACAS Code of Practice has been updated to reflect this change in the case law, therefore failure to allow a companion where a reasonable request has been made could result in the employee's compensation being increased by 25% if his or her tribunal claim is successful.

Chosen companions cannot be compelled to attend hearings or become involved to any extent. That is a matter for the individual and employers should not seek to exert pressure on an employee who has been asked to act as a representative who refuses to become involved.

11.5.8 Timing of hearing

A disciplinary hearing should not take place too soon after the conclusion of the investigation. The employee must be given a reasonable period of time after the conclusion of the investigation to consider the witness statements and other documents gathered during the investigation. What is reasonable will depend on the amount of material that the employee has to understand.

11.5.9 Postponement of disciplinary hearing

11.5.9.1 An employer must agree to postpone a disciplinary hearing upon the request of an employee if the chosen representative is not available at the date and time fixed for the hearing. The employee must propose an alternative date not more than five days from the original date. For these purposes, working days exclude Saturdays, Sundays and some public/bank holidays. The employer must also act reasonably in considering the request even if the requested postponement is beyond the five day period. Failure to do so could render any subsequent dismissal unfair on procedural grounds.

11.5.9.2 Employees often seek postponements for reasons other than the availability of their representative. It is common for postponement to be sought to provide the employee with more time to consider the allegations and evidence with which he or she is faced. Although there is no absolute legal obligation on an employer to postpone in these circumstances, it is prudent nevertheless for a postponement to be granted. This protects the employer from allegations that it did not allow sufficient time for the employee to prepare his or her defence.

11.5.9.3 If an employee facing disciplinary proceedings is medically certified as incapable of attending the disciplinary hearing for a prescribed period then there is little or nothing that the employer can do to progress the procedure until the employee is certified as fit to attend.

11.5.10 Police investigations

11.5.10.1 There may be circumstances whereby an employee's alleged conduct at work or outside of work results in a police investigation and potential criminal prosecution. In such circumstances an employer is not required, by law, to delay any internal investigation or disciplinary hearing.

11.5.10.2 Whether it may be appropriate to suspend the employee until conclusion of the police investigation or criminal process will depend on the circumstances. The employee would be entitled to full pay during suspension, unless the employer has a contractual right otherwise (see 11.4 Paid suspension). However, an employer cannot rely solely on the outcome of external processes and must ensure that it has sufficient evidence to form a reasonable belief to take action or dismiss. This was highlighted in a recent case involving a school teacher who was dismissed following a police investigation into indecent images found on their computer. The police decided not to prosecute as they could not establish that the teacher was responsible for the images as they were found on a shared device. The school requested the evidence against the teacher from the police, and received highly redacted documents that did not confirm the allegations. Fearing reputational damage, the school took disciplinary action and dismissed the teacher. It was held that it was unfair for the school to dismiss the employee as it was not reasonable to dismiss the teacher based on concern that they might have committed the criminal offence.

11.5.11 Employee's failure to attend

What can an employer do if an employee simply fails to attend the hearing without any form of notification? The employer should contact the employee to establish that he or she did in fact receive notification of the date, time and location of the disciplinary hearing. Employers should also seek confirmation of the reason for non- attendance. Another date, time and location should be arranged directly with the employee and confirmed in writing. If the employee fails to attend this subsequent disciplinary hearing without good reason then he or she should be warned that any further failure to attend the hearing will result in a decision being made on the information available.

11.5.12 Conduct of the hearing

At the commencement of the hearing, the chair should make the introductions and establish that the employee has received the investigatory documentation and understands the nature of the allegations. It is recommended that someone accompanies the chair of the disciplinary hearing to take a minute of the hearing (see 11.8.1 Minutes). If the employer has an HR department, it is usual for a member of the HR department to take minutes and act in an advisory capacity. There is no set format for the conduct of the hearing. The guiding principle is that the employee is given every opportunity to respond to the allegations and comment on evidence. The chair may wish to ask a number of questions in relation to explanations given by the employee. Insofar as possible, this should be done in a neutral and non-confrontational fashion. The chair should consider any written material or documents that the employee brings to the hearing in support of his or her case. Depending on the extent of such documentation that may require an adjournment.

11.5.13 Witnesses at the hearing

The ACAS Code of Practice states that employees should be given the opportunity to call relevant witnesses to the hearing in support of their case. If either party intends to call witnesses, then the witnesses should be given appropriate advance notification of the date, time and location of the hearing. Difficulties can arise where witnesses called either by the employer or the employee are reluctant to attend the hearing. In those circumstances, further guidance should be sought.

11.5.14 Conclusion of hearing – adjournment

Once all the allegations have been put to the employee and all relevant material has been presented in response, the hearing is effectively at an end. The chair should always ask the employee or the representative if there is anything else he or she wishes to say. The employee or the representative should be given an opportunity to sum up the case. In straightforward factual cases involving minor misconduct it may be possible for the outcome to be decided and confirmed to the employee at the conclusion of the hearing. In most cases, however, it is more appropriate for the hearing to be adjourned so that the chair can consider the representations made by the employee prior to reaching a decision. It is often the case that the employee or his or her representative raises a factual or procedural issue which requires further investigations. In those circumstances, adjournment is appropriate. The length of the adjournment depends on the reason for it. If the chair simply requires some time to reflect upon the answers and information given by the employee then an adjournment of an hour or two may be appropriate. If, on the other hand, further investigations are required, then it is more appropriate for the disciplinary hearing to be adjourned until another date.

11.5.15 Reconvened hearing

If further investigations are carried out it is often necessary for the disciplinary hearing to be reconvened so that the results of those further investigations can be shared with the employee and his or her responses sought. That is not always the case. It depends very much on the nature of the additional information sought. If the additional investigations carried out are simply clarification of dates, times or minor details of a witness's statement then it is likely that the employer will be in a position to arrive at a decision without reconvening the disciplinary hearing. If, on the other hand, the additional investigations involve matters of substance then it is more likely that a reconvened hearing is appropriate.

11.5.16 Making the decision

At the conclusion of the disciplinary hearing or any reconvened hearing, it falls to the chair to consider all of the information and arrive at a decision. The chair must firstly decide on whether or not on balance the allegations have been proved or proved to some extent. Once the chair is satisfied that the employee is culpable to some extent, consideration must then be given to the appropriate penalty in the circumstances. The chair must consider all relevant background circumstances and also any existing live disciplinary warnings. Consideration should also be given to any mitigating circumstances. Employees often cite personal, domestic or health difficulties as explanations or justifications for acts of misconduct. Employers should weigh up to what extent the behaviour was caused or influenced by such external factors. Account should also be taken of the terms of the disciplinary procedure rules and in particular whether or not a particular type of conduct attracts a particular type of sanction. Regard should also be had to the sanctions imposed on other employees in the past for the same or similar offences. Employers are obliged to adopt a consistent approach to the imposition of sanctions. If an employer wishes to impose a more serious sanction than a particular type of conduct has attracted in the past then it must set out very clearly the justification for doing so. Ultimately the decision must be proportionate to the conduct and must be reasonable in all the circumstances.

11.5.17 Communicating the decision

Once a decision is arrived at, the chair should write to the employee setting out the decision and the reasons for it. The letter should also advise the employee of the period over which the warning will remain live and of the right of appeal and the time period in which that right must be invoked.

11.6 Types of sanction

11.6.1 The sanction imposed depends very much on the seriousness of the conduct and the nature and extent of any mitigating factors. There is a range of possible sanctions available to employers. Employers are more familiar with reference to terms such as verbal, written and final written warning. The ACAS Code however does not make specific reference to these types of warning. The framework of sanctions for misconduct is set out in the ACAS Code.

11.6.2 First formal action – misconduct

In cases of misconduct employees should be given a written warning setting out the nature of misconduct and the change in behaviour required. The warning letter should advise that any further acts of misconduct might lead to further disciplinary action including the imposition of a final written warning. A record of the warning should be kept but it should be disregarded for disciplinary purposes after a specified period.

11.6.3 A final written warning

If the employee has a current warning about misconduct then further misconduct or unsatisfactory performance, whichever is relevant, may warrant a final written warning. A final written warning may also be appropriate where the first offence is sufficiently serious but would not justify dismissal. The warning should also make it clear to the employee that any further misconduct during the life of the final written warning may result in further disciplinary proceedings, possibly dismissal. The warning should also contain guidance on the improvement in behaviour that is required.

11.6.4 Dismissal without notice

It is important to note that it is still necessary for employers to follow a fair procedure even in cases of gross misconduct where guilt appears clear-cut. Dismissal without notice or without payment in lieu of notice is appropriate only for acts of gross misconduct. What is gross misconduct? Behaviour or conduct that is so serious that it undermines the existence of the contract of employment itself is categorised as gross misconduct. Although the range of behaviour that can be regarded as gross misconduct is virtually limitless, disciplinary procedures should set out a series of examples of behaviour that the employer will regard as gross misconduct. Examples (but not necessarily an exhaustive list) of behaviour amounting to gross misconduct are as follows:

- theft or other acts of dishonesty
- (e.g. fraudulent claims for hours which have not been worked on timesheets);
- insubordination;
- acts of violence;
- wilful or negligent damage to an employer's property;
- victimisation or harassment of colleagues;
- offences relating to alcohol or illegal drugs;
- criminal or other behaviour tending to bring the employer's business into disrepute;
- serious breaches of confidence; or
- serious breaches of health and safety rules.

Where a finding of gross misconduct is made, an employer should always consider any mitigating circumstances that should be taken into account when determining the appropriate disciplinary sanction, and not automatically decide to dismiss.

11.6.5 Dismissal with notice

Generally no employee should be dismissed for a first breach of discipline except for most cases of gross misconduct. That said, the courts have held that just because misconduct is considered less serious than gross misconduct does not mean that a dismissal for that reason will be unfair, even if the employee has received no prior warnings. Despite this, employees should generally be given prior warning before dismissal where the conduct is not considered to be gross.

When an employee has a live final written warning and has committed a further act of misconduct not amounting to gross misconduct, dismissal may still be an appropriate and fair sanction. An employee who is dismissed in these circumstances must be given notice of termination of employment or must receive a payment in lieu of notice entitlement. The reason for this is that the act which triggered the dismissal was not in itself an act of gross misconduct and therefore the employer is not entitled to dismiss without notice or payment in lieu of notice. If the dismissal is for misconduct rather than gross misconduct, the employee must either be given notice of termination or receive a payment in lieu of notice.

11.6.6 Demotion

Demotion on a temporary or permanent basis is only a permissible sanction where the employer has reserved the right in the employee's contract of employment to impose demotion as a sanction. If no such right has been reserved, then the imposition of a demotion may give the employee grounds to assert that his or her contract of employment has been breached. That in turn could give rise to a potential claim for constructive dismissal.

11.6.7 Unpaid suspension

It is open to an employer and employee to agree a limited period of unpaid suspension as an alternative to dismissal. This can only be done with the agreement of the employee. Employers may reserve the contractual right to impose a limited period of unpaid suspension. Advice should be taken when considering exercising such a right.

11.6.8 Written reasons for dismissal

It is an integral part of a fair disciplinary procedure that the outcome of the disciplinary hearing is communicated to the employee with reasons to support the decision. There is a legal obligation on employers to provide employees with the relevant qualifying period (please see Qualifying Period) with written reasons for dismissal. Such written reasons must be supplied within 14 days of the request being made, unless it is not reasonably practicable to do so.

11.6.9 How long do warnings last?

There are no prescribed legal time limits for the duration of warnings. However, a useful guide is 3 to 6 months for first formal action and 12 months for a final written warning. Once these periods have expired the warning is no longer 'live' and cannot be taken into consideration when imposing sanctions in any subsequent disciplinary process involving the same employee. Although an employer need not remove warnings from an employee's file when they expire, it should be borne in mind that the Data Protection Act states that personal data should not be kept for longer than is necessary. Warnings will often constitute personal data. If an employee received a written warning ten years ago and has not been in trouble since, the employer must ask itself why it continues to keep the warning on file.

11.7 Appeals

11.7.1 The right to appeal

Employees have the right to appeal against any disciplinary decision. A failure on the part of an employer to advise an employee of his or her right to appeal, or to conduct an appeal, will render a dismissal unfair. It is a fundamental cornerstone of natural justice that the right to appeal is given and any failure to do so may be deemed an unreasonable failure to follow the ACAS Code and result in up to a 25% uplift in any compensation awarded by an Employment Tribunal.

11.7.2 Invoking the right

It is sufficient that an employee indicates to the employer that he or she wishes to appeal against the disciplinary decision or sanction. There is no legal requirement on an employee to set out the precise basis on which the appeal is lodged although it can be helpful to the appeal process that follows if an employee is invited to do that.

11.7.3 Late appeals

Most disciplinary procedures have a prescribed period of time in which an appeal must be lodged. Typically, this is 5 working days from the date of communication of the disciplinary decision. If the employee is, for example, a day or two late in intimating the appeal, whilst from a strict contractual and procedural point of view the employer would be entitled not to hear the appeal, to refuse to do so may be to risk a finding of unfair dismissal. It may be different if an appeal is lodged a significant period of time after the disciplinary sanction is imposed. However, an employer's process is unlikely to be prejudiced by a delay of a few days, particularly if the employee has a reasonable explanation for why the appeal was lodged late.

11.7.4 Who hears the appeal?

The ACAS Code advises that appeals should be heard by an individual who has not been previously involved in the disciplinary process. It is also recommended that, where possible, this person occupies a higher level in the employer's hierarchy than the initial decision-maker. That way it cannot be said that the appeal chair simply arrived at the same conclusion as the initial chair to avoid undermining a superior. With small and family businesses, this is not always possible and on very rare occasions an employer is left with no alternative but for the original decision-maker to also hear the appeal. That is far from the accepted practice and should only happen where there is absolutely no possible alternative.

11.7.5 Appeal as re-hearing

Where a disciplinary sanction has been imposed and the employee appeals citing procedural defects and possible bias or lack of objectivity on the part of the chair of the hearing, it is prudent for the appeal to be conducted as an entire re-hearing of the allegations, rather than simply an examination of the appeal points raised by the employee. Procedural defects that would otherwise render a dismissal unfair can sometimes be rectified by an appeal that takes the form of a complete re-hearing. For example, where an employee is dismissed without proper investigation or inquiry, the dismissal will be unfair unless it can be shown that the subsequent procedure at appeal was sufficiently robust as to provide the overall fairness that the law requires.

11.7.6 Right to representation

An employee who appeals has the same right to representation as with disciplinary hearings. The rules in relation to representation set out at 11.5.3 Representation at the hearing apply equally to appeal hearings.

11.7.7 Outcome of appeal

There is a range of possible outcomes. The original sanction or decision may be upheld. The appeal may be upheld on the basis that the allegations were not proved or that the sanction imposed was too severe in the circumstances. A successful appeal may result in no disciplinary action at all or the imposition of a lesser sanction. One outcome which should not be considered is the imposition of a more serious penalty than was issued at the disciplinary hearing.

11.7.8 The effect of a successful appeal against dismissal

If an employer decides to dismiss without notice or payment in lieu of notice, that dismissal is often referred to as 'summary dismissal'. In cases of summary dismissal, the dismissal takes effect when the fact of the dismissal is communicated to the employee, be that by letter or face-to-face. If a dismissal is with notice, then the dismissal takes effect at the expiry of that notice period. Unless a particular employer's disciplinary procedure provides to the contrary, the contract of employment is therefore terminated and does not continue during the appeal process. What happens therefore if an employee's appeal is upheld and he or she is told they can come back to work? A month or more may have elapsed since the dismissal. In those circumstances the contract of employment is regarded as suspended during the appeal process. When the employee returns, the dismissal in effect disappears and continuity of employment dates from the original start date, not the date of reinstatement. Unless the contract of employment or disciplinary procedure provides otherwise there is no right to back dated pay or wages for the period after dismissal and before reinstatement took effect though in practice employees can be reluctant to return unless repayment of lost wages is made. Employers should ensure that disciplinary procedures spell out very clearly the impact of dismissal and appeals on the existence of the contract of employment.

A successful appeal against a dismissal will automatically result in reinstatement back into employment unless the employee objectively and unequivocally withdraws their appeal against dismissal before the appeal is decided. This remains the case even where the employee expressly says to the appeal decision maker that they do not want to return to work. Therefore, where an appeal against dismissal is upheld, the employee will be automatically reinstated unless there has been a clear indication to the contrary from the employee.

11.7.9 New evidence

Particularly in dismissal cases, it is quite common for an employee to produce evidence or information at or before the appeal hearing which was not presented at the disciplinary hearing. Such information and material should be considered at the appeal notwithstanding the fact that the chair of the disciplinary hearing reached a decision without having that material in mind. Tribunals emphasise that employers should not take an overly legalistic approach to appeal processes and that includes not ruling out information not previously referred to.

11.7.10 Communication of appeal outcome

Once the decision on appeal has been reached, that should be communicated to the employee without delay.

11.8 Miscellaneous disciplinary issues

11.8.1 Minutes

Parties tend to take their own minutes of disciplinary and appeal hearings. Particularly where proceedings are not tape recorded, parties' respective written minutes can differ greatly. Although it is not always possible to do so, it is advisable that employers at least seek to agree a set of minutes with the employee. Much valuable time can be wasted during the appeal process and beyond by the parties disputing over what was said and not said at the initial hearing. A copy of the prepared typed minutes should be given or sent to the employee as soon after the applicable hearing as is possible with an invitation to the employee to propose additions or corrections. If, upon reflection, what the employee proposes strikes the employer as an accurate reflection of what was said at the hearing then there is scope for the parties to have an agreed set of minutes. Of course, this is not always possible and there are often areas in which parties simply cannot agree on what was said. In those circumstances, it is typically the case that the subject matter of the alleged omissions or inaccuracies of the minutes forms part of the appeal process.

11.8.2 Investigatory material – data protection issues

Issues can arise over the lawfulness of material that is gathered during an investigation. For example, if evidence takes the form of e-mails sent or received by the alleged wrongdoer or CCTV footage showing the employee and other third parties, that evidence is required to have been gathered in a way that did not infringe the Data Protection Act or other rules relating to monitoring of employee communications. If material is gathered in an unlawful manner then that in itself can render a dismissal unfair. This is a particularly difficult and technical area and if such issues arise then advice should be taken.

11.8.3 Written record of proceedings

It is prudent for employers to keep a written record of disciplinary proceedings. Such written records may be required if disciplinary action or dismissal is subsequently challenged at an employment tribunal. Records should be kept of all written communications between employer and employee during the process, minutes of hearings and documentary evidence used. Such documents may constitute personal data for the purposes of the Data Protection Act and they must be stored in the manner prescribed by the act. Accordingly, the records must be accurate and confidentiality should be maintained. Documents should not be kept any longer than is necessary and the employee has the right to access the documents by making a data subject access request. A fuller explanation of these issues is contained in Chapter 9.

11.8.4 Covert recordings of meetings

With mobile phones and other portable devices commonly having audio recording functions, it is easy for an employee to covertly record disciplinary hearings which they may look to rely upon at a later date. Whether or not such evidence would be admissible at an Employment Tribunal will depend on the circumstances, but employers would be best placed to try to avoid such a situation arising.

Miscellaneous disciplinary issues

To help do so it is therefore recommended that employers state in their policies and procedures that covert audio recordings at work are not permitted unless expressly authorised. An employer may wish to state that such an occurrence would amount to an offence of gross misconduct. An employer may have a fair reason to justify dismissal if an employee is caught covertly recording. In addition, taking a formal minute of any meeting and making it clear that formal minutes are being taken and will be shared, should also help to argue against any such covert recording being capable of being produced and relied upon at a disciplinary hearing.

If either an employer or employee wish to make an audio recording then best practice would be to obtain consent from the other party, or for the employer to reserve the right to do so in their disciplinary procedure. An audio recording may be useful for producing a minute of a hearing or be considered a reasonable adjustment for a disabled employee (see 6.4.10 Duty to make reasonable adjustments). There are GDPR considerations as to the taking of a recording and the use of the recording. Typically, express informed consent is required, and a record retained of that consent having been obtained.

11.9 Grievance issues

11.9.1 Sound management of the workforce

11.9.1.1 Aggrieved employees tend not to be particularly productive. Their dissatisfaction, if unresolved, can have a knock-on effect on colleagues and generally morale can suffer. Ultimately, if an aggrieved employee cannot satisfactorily resolve his or her grievance then resignation is usually the result as he or she takes up employment elsewhere. Skills and experience are lost to the employer who then has the additional cost of recruiting replacements. The loss of the employee is therefore an expensive event, irrespective of whether or not constructive dismissal proceedings are raised in the wake of the resignation.

11.9.1.2 Grievances often arise out of an employee's relationship with one or more colleagues. It is vital that the employer intervenes to resolve such issues before relationships are irreparably damaged. Productivity suffers as a result of unresolved grievances.

11.9.1.3 A recent case involving an employee who was bullied by his line manager, provides a prime example of the importance of an employer intervening to resolve issues before relationships are damaged beyond repair. In this particular case, the employee was so badly affected by the initial bullying incident that they were signed off work for a period of time with stress. When the employee returned to work, they noticed that he was being treated "coldly" by senior managers (some of whom would completely ignore him). Concerns were raised about the employee's performance at work. The employee offered to resign instead of going through the capability procedure. In their subsequent ruling on constructive dismissal, the Tribunal ruled in favour of the employee, noting that there had been no support or steps implemented in ensuring that the employee's wellbeing was taken into account following the incident and period of bullying.

11.9.2 ACAS Code of Practice on discipline and grievance

The ACAS Code stipulates that it is preferable for employee grievances to be resolved informally without the need for recourse to more formal procedures. This is not always possible, and therefore the guide sets out the recommended procedures to enable the grievances to be resolved fairly and without delay.

11.9.3 Establishing the nature of the grievance

Grievances can arise in a number of ways. Employees can complain informally to their line managers or their feelings can be aired openly in front of colleagues. Employee grievances are not always set out in writing and labelled 'formal grievance'. Grievances which are not specified in writing can be difficult to manage and resolve. Employers should not ignore an employee's obvious feelings of unhappiness simply because the employee has failed to invoke the formal grievance procedure. If an employer becomes aware that an employee is aggrieved at a particular aspect of his or her employment or relationships with superiors or colleagues then it is best practice to sit down with that employee on an informal basis to discuss the nature of the grievance and to establish whether or not the matter is capable of informal resolution. The employee should be asked whether or not he or she wishes the issue be dealt with via a formal grievance procedure. If the employee does wish to pursue a formal grievance then he or she should be invited to set out the factual basis of the grievance in writing.

11.9.4 Grievance procedure

11.9.4.1 It is best practice for employers to have a written grievance procedure and for employees to be made aware of its existence. There is a statutory obligation on employers to advise employees within 2 months of the commencement of employment of the identity of the individual to whom a grievance should be directed.

11.9.4.2 The procedure should set out clearly the way in which the grievance should be raised and the procedural steps that the employer will follow in order to resolve the grievance. The ACAS Code of Practice suggests the following steps should form part of a grievance procedure:

- a grievance should be submitted in writing;
- a meeting to discuss the grievance with the employee in question should be arranged without unreasonable delay;
- the employee should be given every opportunity to explain the nature of the grievance and the resolution which is being sought;
- if the meeting raises issues that require further investigation, then the meeting should be adjourned so that those investigations can be carried out;
- the grievance meeting should be reconvened and any further information obtained through the investigations should be shared with the employee;
- the employer should then reflect upon all of the information and reach a conclusion as to whether or not the employee's grievance is well-founded;
- if the grievance is well-founded then that fact should be communicated to the employee in writing together with the proposed resolution;
- often grievance meetings and reconvened grievance meetings focus on the factual background to the grievance rather than on resolution and it is sensible for an employer, when a grievance is well-founded, to ensure that the resolution of the grievance has been discussed face to face;
- if the employer concludes that the grievance is not well-founded, then that fact should also be communicated to the employee;
- the employee has the right to appeal against any decision that his or her grievance is unfounded or against the proposed resolution;
- the employer should specify the time period for lodging the appeal;
- the appeal should be lodged in writing and an appeal hearing convened without unreasonable delay at a date, time and place notified to the employee in advance;
- the appeal should be dealt with, wherever possible, by a manager with no previous involvement in the matter and preferably at a higher level of seniority than the initial decision-maker; and
- the outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

11.9.5 Representation at grievance hearings

The ACAS Code of Practice summarises the provisions in relation to an employee's right to be accompanied at grievance meetings. The Code outlines as follows:

- workers have a statutory right to be accompanied by a companion at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. This would apply where the complaint is, for example, that the employer is not honouring the worker's contract or is in breach of legislation;
- the chosen companion may be a fellow worker of their choice, an official employed by the trade union of which they are an official or any other official of a trade union who has been reasonably certified in writing as having the necessary experience and training to accompany a worker at a hearing;
- in order to exercise the right to be accompanied, an employee must first make a reasonable request. The ACAS Code of Practice provides that as long as the identity of the companion chosen by the employee falls within the limits set out

- above the employee has the right to request a companion be present regardless of the reasonableness of their choice of individual.
- the companion should be allowed to address the hearing and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and to confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it, or prevent the employer from explaining their case.

11.9.6 Miscellaneous grievance issues

11.9.6.1 Dissatisfaction with resolution

An employer may uphold an employee's grievance but may be unwilling to accept the resolution which the employee seeks. For example, an employee may insist that a colleague is disciplined or dismissed. The employer may be of the view that it would not be appropriate to do that and that an informal resolution would be better. The employer is not compelled to adopt the resolution proposed by the employee simply because the grievance is well founded. In such circumstances the employee should be allowed to appeal the decision to refuse to implement the resolution sought. If an employer refuses to accept the resolution sought by the aggrieved employee it should explain very clearly why that is the case. The employee should be provided with sufficient time to lodge a written appeal against any decision reached or against any flaws they feel were apparent in the hearing process. The employer should include information regarding the lodging of appeals within their written procedures.

11.9.6.2 Vexatious grievances

If, after a grievance process has been exhausted, there is evidence that the grievance was raised for vexatious reasons or in bad faith, it is open to the employer to instigate the disciplinary procedure with a view to investigating the motives behind the raising of the grievance. It is not sufficient to give rise to a disciplinary process that the factual basis of the grievance was rejected. Great care should be taken in such situations. Employees should not be penalised or victimised for raising a grievance. There has to be evidence that the grievance was raised in bad faith, for example, to make trouble for another employee.

11.9.6.3 Overlapping grievance and disciplinary procedures

It is reasonably common for an employee facing disciplinary proceedings to raise a grievance. ACAS guidance suggests that the disciplinary proceedings should be suspended pending completion of the grievance process. If, however, the subject matter of the grievance is effectively the same or is closely related to the subject matter of the disciplinary process then it is appropriate to deal with both issues within the confines of the disciplinary process. For example, an employee who is suspended pending disciplinary proceedings may have a number of complaints about the manner in which the employer has handled the investigation and suspension. The employee may raise those concerns in the form of a grievance against the employer. In essence, the grievance is related directly to the disciplinary process and therefore it would be appropriate for the employer to deal with the employee's complaints regarding procedures followed at the disciplinary hearing and any subsequent appeal.

11.10 Social media

11.10.1 Social Media

11.10.1.1 Social media has become a daily part of people's lives and many organisations have also adopted it to communicate with their existing or potential customer base. Even though many employees within the engineering sector will not be required to utilise social media as part of their duties, it is important that employers look to manage social media use both within and outside the workplace to avoid the potential risks that can arise.

11.10.2 Social media use in the workplace

Employees may be required to have access to and update an employer's social media account. These accounts are often an opportunity to reflect the employer's values and ethos. Strict guidelines should be set on what content can be posted and by whom, for example ensuring that authorised individuals are aware that posts cannot reflect their personal opinions. An employer must also have in place mechanisms to retrieve passwords to the social media accounts that may have been set up and operated by a specific employee.

Social media use is often encouraged of employees on platforms such as LinkedIn in order to engage with customers or potential customers. An employer should consider what happens to ownership of the contacts if the employment relationship ends.

Employers often have in place the ability to monitor employees' use of their IT systems, including using social media. Employees must be made expressly aware of an employer's right to monitor their online activity, especially where there is personal use of social media permitted. This is particularly relevant when considering both GDPR (see 9.5.4 Monitoring at work) but also an individual's European Convention of Human Rights under Article 8 9 right to private life). An employee should have reasonable expectation of privacy for any private correspondence they may send at work. However, this does not extend to any messages that an employee may post that are publicly available and case law has focussed on dispelling the commonly held myth that posts to social media accounts that are "private" (in terms of the settings applied on the platform) are also "private" in law and may not be used in disciplinary proceedings; that is not correct. The tribunals and courts are comfortable finding that information posted to the internet is typically "public" and its use typically not a breach of the right to privacy.

11.10.3 Social media use outside the workplace

Although an individual outside the workplace is most likely to use social media for personal use, this in itself can crate risks for employers. If an employee's personal social media account is readily identifiable with their employment, any personal posts they make may result in potential reputational damage to the employer depending on the content. An employer may also be faced with a situation where a disgruntled employee directly or indirectly refers to their employer in posts. An individual's right to freedom of expression under Article10 of the European Convention of Human Rights will be relevant so long as any post or comments do not impact the reputation or rights of others, which will include those of an employer and other employees. Therefore, employers need to make employees aware that personal use of social media outside the workplace may be monitored and, depending on the circumstances, may result in disciplinary action.

11.10.4 Social media and misconduct offences

An employer may want to take disciplinary action against employees in circumstances where they are accused of:

- Using social media for the purposes of bullying and harassment;
- Disclosing confidential information (e.g. customer names, trade secrets or sharing photographs that may include confidential matters);

- Writing critical comments about the employer, other employees or customers; or
- Writing or publishing offensive material which brings the employer into disrepute.

There are no specific rules that distinguish the way an employer should treat social media misconduct (see 12.6 Misconduct). What will be key in such situations is to ensure that the employee was aware that such conduct could result in disciplinary action. This is most likely achieved through implementation of a social media policy.

11.10.5 Social media policy

It is highly recommended that employers put in place a social media policy. Such a policy should include:

- Clear guidance for employees on what they can and cannot say about the organisation;
- Clarity throughout about the distinction between business and private use of social media;
- If the employer allows limited private use in the workplace, it should be clear what this means in practice;
- If employees' use will be monitored and to what extent; and
- When breaches of the social media policy will result in disciplinary action and what sanctions may be implemented, e.g. up to and including dismissal.

11.10.6 Contracts of employment

An employer should ideally also ensure that their contracts of employment adequately protect and empower the business to deal with social media issues. For example, consideration should be given to actions on termination of employment, including providing passwords to employer social media accounts and the requirement for an employee to remove any business names and contacts acquired during their employment from their private social media accounts. Post termination restrictions may also be used to prevent an employee from re-engaging with such clients for a specific period of time after their employment has been terminated.

Chapter 12

Dismissal - fair or unfair

12.0 Dismissal - fair or unfair

12.1 Introduction

12.1.1 This chapter explores dismissal and in particular how Employment Tribunals approach dismissal cases to assess fairness. With certain exceptions set out in detail below, employees will have gained the right to claim unfair dismissal once they have 2 years' continuous service. If you have any doubt as to the applicable qualified period you must call Scottish Engineering. In both cases Tribunals can award up to £93,878 in compensation depending on the employee's wage loss (or one year's gross pay, whichever is lower) in addition to the basic award of up to £17,130.

The rates are reviewed annually. As of publication, rates for 2023 have yet to be announced.

12.1.2 Additional protection against unfair dismissal can be found in the Equality Act 2010 (see Chapter 6) as well as the rules governing whistleblowing, part-time workers, fixed- term workers and trade union involvement. These issues are dealt with in Chapter 15, Chapter 3, Chapter 2 and Chapter 8 respectively.

12.1.3 This chapter will look at who is eligible to present a claim for unfair dismissal and identifies the issues an employer has to take into consideration when dismissing employees fairly. There are also certain reasons for dismissal which are deemed to be fair reasons and these are explored below. Certain reasons for terminating an employee's employment are automatically unfair and these will also be reviewed.

12.2 Effective Date of Termination

12.2.1 The point at which an employee's employment ends for the purposes of unfair dismissal is referred to as 'the effective date of termination'. It is important to establish the exact point at which an employee's employment terminates because this helps determine how much continuous employment the employee has. Continuous service is relevant to:

- calculating the amount of statutory notice to which an employee is entitled;
- calculating an employee's entitlement to a statutory redundancy payment;
- whether an employee has the relevant qualifying period to claim unfair dismissal; and
- determining the amount of any basic award payable to an employee if he or she is successful in claiming unfair dismissal.

12.2.2 Notice of termination of employment

The Employment Rights Act 1996 states that there are minimum periods of notice of termination which must be given by both employers and employees. Regardless of the contractual position, employers must give no less than the following minimum notice of termination to employees:

Employee's length of service	Notice
Up to one month	'Reasonable' notice
From one month up to two complete years' service	1 week
Two years' complete service and above	1 week's notice for each complete year's service up to a maximum of 12 weeks' notice

Employees are required to give employers one week's notice of termination, regardless of their length of service, unless their contract specifies a longer notice period.

For further information in relation to issues arising out of notice of termination of employment, please see Chapter 14.

The effective date of termination is defined in the Employment Rights Act 1996 as one of the following:

- when notice is given (either by the employer or employee), the date on which the notice expires;
- when no notice is given, the date on which the termination takes effect; or
- if an employee is employed on a limited term contract and the contract terminates because of the limiting event and without being renewed, the effective date of termination is the date on which the termination takes effect.

Where notice is given, it is effective from the date it is received by the recipient unless the contract of employment states otherwise.

12.2.3 Special circumstances

12.2.3.1 The effective date of termination may be adjusted where an employer has given an employee less notice than the minimum required by statute. Where inadequate notice has been given, the statutory minimum notice period (or the balance of the statutory notice period) not given is added to an employee's actual date of termination to produce a new effective date of termination of employment for the purposes of calculating the employee's period of continuous service.

12.2.3.2 This is important when calculating an employee's continuous service to determine whether he or she can raise an unfair dismissal claim. There are certain reasons for dismissal which are deemed automatically unfair reasons. If an employee is dismissed for an automatically unfair reason then that dismissal is regarded as being automatically unfair. With two very limited exceptions, employees do not require a minimum period of continuous service to raise an unfair dismissal claim if they have been dismissed for an automatically unfair reason. Also, an employee who is dismissed after 103 weeks is able to add the one-week's statutory notice to his or her period of service, thereby giving them the required 104 weeks' service to claim for ordinary unfair dismissal. It is therefore important to ensure that where employers propose to dismiss an employee with less than two years' service, they do so before the beginning of the 103rd week of employment. This is a difficult area and if an employer is in any doubt about whether or not an employee has two years' service, advice should be taken. If you are in any doubt as to the applicable qualifying period you must call Scottish Engineering.

12.2.3.3 None of the special circumstances outlined above serve to extend the time limit employees have to raise their unfair dismissal claim, i.e. usually within 3 months of termination. In those circumstances, the effective date of termination will always be calculated in accordance with the Employment Rights Act as noted above at section 12.2.2.

12.2.4 Continuous service and written reasons for dismissal

The effective date of termination can also be extended as above to ensure that employees have the qualifying period to allow them to request a written statement of reasons for dismissal.

12.3 The right to claim unfair dismissal

12.3.1 Only employees are entitled to raise a claim for unfair dismissal. Self-employed people cannot raise unfair dismissal claims although sometimes it is possible for a self- employed individual to prove at an Employment Tribunal that he or she is, in reality, an employee rather than a self-employed worker. For further information see 2.8 Employment status.

12.3.2 Qualifying period

In normal circumstances, the right to claim unfair dismissal is only available to employees with the requisite length of service (see paragraph 12.1.1). If you are in any doubt as to the qualifying period you must call Scottish Engineering. The qualifying period of service does not apply in most cases if the employee has been dismissed for an automatically unfair reason. Peculiarly, with two of the automatically unfair reasons, the employee still requires to have the minimum period of qualifying service. These exceptions are TUPE-related dismissals and dismissal due to spent criminal convictions.

The Defence Reform Act 2014 removes the two year qualifying period when the reason for dismissal is the employee's membership of a reserve force.

12.3.3 Automatically unfair reasons for dismissal

There are also certain reasons for dismissal that are automatically unfair. These are:

- being summoned to or being absent from work for jury service;
- taking leave for family reasons (for example, maternity leave, parental leave, paternity leave, adoption leave or dependency leave);
- performing certain health and safety activities;
- refusing to work on a Sunday (shop and betting employees only);
- certain working time issues where employees are afforded protection under the Working Time Regulations 1998;
- performing any functions as a trustee of a relevant occupational pension scheme;
- performing certain functions as an employee representative under the Transfer of Undertakings (Protection of Employment) Regulations 2006 or the collective redundancies legislation;
- making a 'protected disclosure' (blowing the whistle);
- asserting a statutory right;
- asserting a right under the National Minimum Wage Act 1998;
- any action under the tax credits legislation;
- asserting a flexible working right;
- selection for redundancy on a protected ground;
- performing functions in relation to information and consultation with employees;
- exercising, or seeking to exercise, the right to be accompanied at a disciplinary, grievance or retirement meeting;
- asserting a right as a part-time worker;
- asserting a right as a fixed-term employee;
- a reason related to a 'relevant transfer' (a TUPE transfer) that is not an economic, technical or organisational reason entailing changes in the workforce;
- participating in 'protected' industrial action;
- participating in trade union members' activities, using trade union services, failing to agree not to do so or failing to agree not to negotiate collectively;
- Retirement;
- requesting time off for study or training;
- exercising prescribed rights as an agency worker;
- pensions auto-enrolment where the reason for dismissal was the employer's duties under the regime, or its contravention of those duties.
- a discriminatory reason; and/or
- spent criminal convictions.

12.3.4 Time limit for lodging a claim for dismissal on health and safety grounds

If an employee is dismissed because he or she has been suspended on medical grounds due to the requirements of specific health and safety regulations and/or codes of practice, only one month's service is required in order to claim unfair dismissal.

12.3.5 Time limit for lodging an unfair dismissal claim

Employees must lodge their unfair dismissal claim with the appropriate Employment Tribunal within 3 months of the effective date of termination. There is very limited scope for the time limit to be extended. If the claim is lodged late the tribunal will only allow the claim to proceed if the employee is able to demonstrate that it was not reasonably practicable for the claim to be lodged within the three-month period. Employment Tribunals take a very strict approach to what constitutes reasonable practicability.

12.4 The reason for dismissal - fair or unfair?

12.4.1 Employers must be clear about why they are proposing to dismiss an employee and ensure that the reason is potentially fair. In unfair dismissal claims, the onus is normally on employers to prove two main points: -

- that the reason for the dismissal was fair; and
- it acted reasonably in all the circumstances in treating that reason as sufficient for dismissing the employee.

12.4.2 Potentially fair reasons for dismissal

The Employment Rights Act 1996 specifies categories of potentially fair reasons for dismissing employees. These reasons will be explored in greater depth later in the chapter. If the reason for dismissal falls within one of these categories there is still no guarantee that the dismissal is a fair dismissal but at least the employer has navigated the first hurdle successfully. The second part of the test is dealt with in greater detail in 12.5 Reasonableness of dismissal. The potentially fair reasons are: -

- capability;
- conduct;
- redundancy;
- the employee could not continue to work in the position without contravening a legal duty or restriction which is/was set out in a statute or regulation; and
- some other substantial reason (often referred to as SOSR) of a kind that would justify the dismissal of an employee holding the position that he or she held.

12.4.3 Proving the reason for dismissal

The onus is on the employer to prove that the reason for dismissal was primarily for one of the potentially fair reasons. If an employer cannot show that the reason for dismissal was fair then the claim is lost at that stage without any need for further consideration. The decision must be based on a genuine belief that dismissal was for that particular reason. Where an employer purports to dismiss an employee by reason of redundancy when the real issue is in relation to his or her performance, then the real reason is capability and not redundancy. The employer should never give the incorrect reason.

The reason for dismissal - fair or unfair?

12.5 Reasonableness of dismissal

12.5.1 Once an employer has established that the reason for the dismissal is a potentially fair reason, it must show that it acted reasonably in all the circumstances by treating the reason for dismissal as sufficiently serious to justify the dismissal. It is at this second hurdle that employers tend to have greater difficulty. The behaviour expected of a 'reasonable' employer varies according to the reason for dismissal.

12.5.2 Tribunal's approach to fairness

12.5.2.1 There is a statutory definition of fairness, however it is very broad and provides little practical assistance to employers. In practice, tribunals will look at the procedures followed by employers and the approach taken by the decision-maker to the material gathered during the investigation. In terms of procedures followed, consideration will be given to the size and administrative resources of the employer.

12.5.2.2 Tribunals are not permitted to re-hear the evidence that was before the employer at the time of dismissal and reach its own conclusion of the case. Instead, tribunals are required to review the procedures followed by the employer and consider the decision- making process in order to decide whether or not the decision reached was within what is referred to as the band of reasonable responses. In practice this means that whilst a tribunal may find that a decision to dismiss may not have been a decision it would have taken, if there are no significant factors which make the decision so unreasonable as to be outwith the range of reasonable responses then the dismissal is fair. This principle reflects the fact that employers may legitimately reach different decisions based on the same set of facts. In a particular case one employer may dismiss, whereas another may impose a final written warning. The band of reasonable responses simply reflects the fact that there is not always one remedy that is suitable to a set of circumstances.

12.5.3 Facts discovered after dismissal

It is not open to an employer to argue for the fairness of a dismissal by relying on factual matters which it discovered after dismissal, even if the facts discovered had occurred before dismissal. To illustrate the point, if after dismissing an employee for gross insubordination the employer discovers that the employee had been stealing from petty cash, the employer will not be able to bolster its case for a fair dismissal by bringing in evidence about the alleged theft. A tribunal will only consider the facts and circumstances that were before the employer at the time of dismissal rather than matters which the employer discovered subsequently. It will be open to the employer to use the information about the theft to reduce the compensation awarded to the employee if he or she wins the case. However, that information has no relevance to the fairness of the dismissal.

Reasonableness of dismissal

12.6 Misconduct

12.6.1 Unfair dismissal claims relating to misconduct are the most common types of claim presented to Employment Tribunals. Employees are often found to have acted wrongfully, negligently or inappropriately at work and there are almost limitless examples of 'misconduct'. Misconduct can range from frequent late coming to insubordination and damage to employer property. It is sensible for an employer to set out in disciplinary procedures the types of conduct which it regards as misconduct and gross misconduct. Issues in relation to disciplinary procedures and misconduct are dealt with in detail in Chapter 11. There are only limited circumstances where employers will be justified in dismissing employees for a single act of misconduct. Generally speaking, this is when the misconduct is sufficiently serious that it can be categorised as 'gross misconduct'. Where the conduct falls short of 'gross misconduct' a lesser sanction is appropriate.

12.6.2 Other relevant factors in assessing fairness

In considering whether or not a decision to dismiss is within the band of reasonable responses, tribunals will take into account a number of factors and employers must be able to show that they have weighed up these factors. These factors are detailed below.

12.6.3 ACAS Code in relation to disciplinary and grievance matters

In relation to dismissals for misconduct, in assessing fairness Employment Tribunals look at whether employers have complied with the ACAS Code of Practice. The Code is explored in greater detail in Chapter 11. Employers are also advised to refer to the ACAS handbook on 'Discipline at Work'. The ACAS Code sets out particular principles which underpin the core elements of dismissal procedures to ensure that issues are dealt with fairly. The core principles are that:

- employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;
- employers should act consistently;
- employers should carry out all necessary investigations to establish the facts of any case;
- employers should inform employees of the basis and nature of the allegation, giving an opportunity to put the case for the defence forward in response before any final decision is made;
- employers should allow employees to be accompanied at any formal disciplinary hearing; and
- employers should allow employees to appeal against any decision made.

12.6.4 Disciplinary procedures

Issues relating to disciplinary procedures are discussed in detail in Chapter 11. As a general rule all employers should have a disciplinary procedure in place which should be fair, transparent, specific and clear. Failure to follow a fair disciplinary process will normally mean that an employer has not acted reasonably and therefore the dismissal will be unfair.

12.6.5 Were procedural failures serious?

Not all procedural failures by an employer will render a dismissal unfair. If the procedural failures are minor and have no material bearing on the outcome then Tribunals are entitled to overlook such failures and rule that the dismissal was fair. Obviously significant procedural failures, such as a failure to provide the employee with sufficient information on the allegations, could render a dismissal unfair.

A recent case highlighted highly unusual circumstances whereby a dismissal without any procedure (including any appeal procedure), was deemed to be fair after a complete breakdown in working relations. In the case, it was held that conducting a procedure may have actually made the situation worse. There may be cases (albeit very rare), where procedures may be dispensed with because they are reasonably considered futile by the employer in the circumstances. However, this approach is not generally recommended and advice should be sought from Scottish Engineering should such a situation arise.

12.6.6 Employee's length of service

An employee's length of service may be taken into consideration when deciding whether an employer has acted reasonably. Length of service should not be the deciding factor but employers should bear in mind that this is something that a tribunal may take into consideration. This is particularly so if an employee has a lengthy period of service which is untainted by any form of disciplinary warning or other sanction.

12.6.7 Employee's disciplinary record

Employers are entitled to take into account an employee's current disciplinary record in deciding whether dismissal is the appropriate sanction. For example, where an employee is subject to a final written warning and is guilty of a further act of misconduct, it is normally open to an employer to dismiss. However, employers should not generally take into account expired warnings when deciding whether to dismiss or not.

12.6.8 Consistency

Employers should act consistently when taking the decision to dismiss for particular types of behaviour. For example, if two employees are found guilty of theft but only one of them is dismissed, the employer will have to demonstrate that it was justified in treating one employee differently from the other. It may be a distinguishing factor that the employee who was not dismissed had an unblemished record or was perhaps led astray by the other employee. If there is nothing to distinguish the two cases then the penalty should be the same. It is also important that employers are consistent in terms of treating current issues in the same way as they treated similar situations in the past.

12.6.9 Size and administrative resources of the employer

The size and administrative resources of an employer is a relevant factor in determining whether or not a dismissal is fair. To illustrate how this might work in practice, it is not recommended for one individual to carry out an investigation and to subsequently chair a disciplinary hearing which follows on from that investigation. In small businesses, however, there may only be one director and therefore it might not be possible to separate the investigatory and decision-making functions. Similarly, appeals should be chaired by an individual not previously involved in the disciplinary process and preferably at a higher level of authority in the organisation than the individual who made the initial decision. In small businesses this is not always possible and on occasion, by necessity, an appeal is chaired by the same individual who made the original decision to dismiss. A larger employer with many managers and directors would not be able to justify one individual being involved in two or more capacities.

12.6.10 Summary

In summary, therefore, to establish that a dismissal is fair in misconduct cases employers must have:

- a potentially fair reason for dismissing the employee;
- a genuine belief that the employee is guilty;
- reasonable grounds upon which to sustain that belief;
- carried out a reasonable investigation to allow them to form that belief;
- completed a proper procedure in terms of allowing the employee a fair hearing and an avenue of appeal; and
- ensured that dismissal was a fair sanction in all of the circumstances.

12.7 Capability and qualifications

Generally, dismissals on the grounds of capability fall into two main categories: (1) where an employee is unable to do his or her job through ill-health; or (2) where performance of the job role does not meet the required standard.

12.7.1 Employee is unable to carry out his or her duties

For detailed guidance on how to handle capability issues arising out of ill-health and long-term sickness absences, please see 4.0 Managing sickness and absence. Some basic principles that should be followed are:

- employers must consult employees on long-term sickness absence to gather information about the nature of the employee's illness or reason for incapacity, the causes, the impact the illness has on ability to do the job and the likely length of the absence;
- where the sickness absence is long-term or the employee is unlikely to be able to return to work at all, employers must inform employees of the likely outcome of their continued absence;
- where the employee's condition is likely to be a disability as defined in the Equality Act 2010, employers should ensure that they have considered all reasonable adjustments to the employee's working conditions, job role and work station with a view to facilitating a return to work. For a detailed analysis of issues arising out of the disability provisions of the Equality Act see Chapter 6;
- employers should seek medical information from the employee's GP, the treating specialist or an occupational health specialist. The medical report must provide sufficient information on which an employer can make a reasonable decision about the future employment of the employee. The employer should meet with the employee to discuss the report;
- consideration should be given as to whether the employee would be fit to return if he or she was redeployed to a different role;
- an employer must ensure that they make an effort to explore all other reasonable options to avoid dismissal in instances where the employee's ill health has been caused or aggravated by the employer's actions. Failure to do so may make a dismissal unfair.

12.7.2 Incompetence/poor performance

Employees may be fairly dismissed if they are not sufficiently competent to do the job they have been employed to do. It is prudent for employers to put in a place a formal performance management procedure to be followed if an employee's performance is giving cause for concern. This is separate and distinct from normal annual appraisals. Employers must also give some consideration as to whether the employee could be redeployed to another, more suitable role or should receive training or support. This is particularly important where the performance issues arise out of the fact that the employee has been promoted beyond his or her capability.

Capability and qualifications

12.7.3 Procedural aspects – performance review

No employee should be dismissed for poor performance or lack of competence until his or her failings have been pointed out and a reasonable and adequate period of time has been set-aside for the employee to demonstrate improvement. The period of time that must be given for improvement will depend on the nature of the job and the extent of the deficiencies. It should be long enough to give the employee adequate opportunity to demonstrate improvement. Employers should specify the nature and extent of

the improvement required. Procedural steps and matters to be considered prior to dismissal on the grounds of poor performance or incompetence are as follows:

- the employer must meet with the employee to fully explain the nature of the deficiencies. The employer should consider any explanation for the poor performance or mitigating factors. Specific areas of improvement should be specified;
- the employee should be given a specific time period during which performance and improvement will be reviewed;
- the employer should consider whether any additional support or training may be required to assist the employee in improving performance. This may include increased supervision;
- the employer should consider whether or not the poor performance has been caused by or contributed to by an excessive workload. If that is the case then the employee's workload should be re-assessed to a reasonable level;
- it should be made clear to the employee both during the performance review meeting and in writing that ultimately failure to achieve the required level of performance may result in further review and ultimately dismissal;
- if no improvement is made then a further review meeting should be convened. Deficiencies should be explained and improvement targets set. A further review period should be specified. The employee should be warned that a failure to improve may result in dismissal;
- if there is no improvement then a further review meeting should be convened to consider dismissal. The employee should be advised of his or her right to be accompanied at this hearing. For a detailed analysis of the right to representation see 11.5.3 Representation at the hearing;
- the employer should consider alternatives to dismissal such as redeployment or retraining;
- if the employee is dismissed they should be advised of the right of appeal;
- a full and fair appeal process should be followed.

Unless the performance issue is sufficiently serious to justify a final written warning as a first intervention, the employee should usually be given at least two warnings before the employer moves to dismissal. It is not appropriate for employers to follow a disciplinary procedure in dealing with performance capability issues, however in practice the proper process to follow will mirror the structure of a fair disciplinary process. Accordingly, the employee should usually be issued with some form of written notice that performance must improve and be given a chance to improve before a final warning is imposed.

12.7.4 Performance review meetings and representation

It is advisable that employees be offered the chance to be accompanied at such meetings. This helps guard against allegations that the employee did not understand what was happening or felt intimidated by the process.

12.8 Redundancy

12.8.1 Redundancy is dealt with in detail in Chapter 13.

12.8.2 A redundancy situation is when:

- an employer has ceased or intends to cease to carry on:
  - the business for the purposes of which the employee was employed; or
  - that business in the place where the employee was so employed; or
- the fact that the business no longer has a need, or has a diminished need, for:
  - employees to carry out work of a particular kind; or
  - for employees to carry out work of a particular kind in the place where the employees were employed.

12.8.3 The general considerations that employers must observe when effecting redundancy dismissals are as follows:

- employers should fully inform and consult the relevant employees or their representatives on all aspects of the redundancy process with a view to avoiding the redundancies. This includes holding consultation meetings with the employees on an individual basis subject to their right to be accompanied;
- where a number of employees are to be selected for redundancy out of a larger group, employers must properly identify the different groups and apply fair, reasonable and where possible objective selection criteria against which employees within the groups should be scored. These scores will determine which employees are selected for redundancy;
- employers should consider any alternatives to making redundancies, for example, short-time working/lay-offs, cutting hours or pay cuts. There is no obligation on employers to put these measures in place, or indeed for employees to agree to them;
- there is a duty on employers to take reasonable steps to identify and offer any suitable alternative employment to those at risk of redundancy;

Whilst an employee does not have a legal right to appeal against a redundancy dismissal, it is good practice to afford employees this right.

12.9 Some other substantial reason

12.9.1 'Some other substantial reason' (SOSR) is a residual category of reason for dismissal that captures fair reasons for dismissal which do not fall within the other potentially fair categories. An SOSR dismissal may be fair where the employer proves that the reason is of a kind so as to justify the dismissal of an employee holding the position which the employee held.

12.9.2 Some common examples are:

- where dismissals are made to protect the employer's legitimate business interests, for example, employees refuse to sign up to new terms and conditions of employment that are absolutely necessary to the employer's business such as restrictive covenants or new working hours;
- where an employee is imprisoned. This can also lead to frustration of contract. For further details see 14.7 Frustration;
- where a client or customer states that it will take its business elsewhere unless the employee is removed from working on its account and there is no alternative role to be offered to that employee; or
- where personality differences with the dismissed employee are having a significant impact on the working environment and/or the operation of the employer's business;
- It is important that employers take specific legal advice where an SOSR dismissal is being considered. Employers must still follow a fair procedure when considering dismissing for SOSR. The employee must be invited to a meeting and be given an opportunity to argue against dismissal or suggest alternatives. He or she must be given the right to be accompanied at any such meeting. The employee should be given the right to appeal.

12.10 Right to Written Statement of reasons for dismissal

Any employee who has the requisite service is entitled to request a written statement of reasons for their dismissal from the employer. Employers are not obliged to provide a written statement unless an employee requests one, however, it is best practice to have a full paper trail relating to an employee's dismissal. The written statement must be provided by the employer within 14 days of receiving a request from the dismissed employee.

Chapter 13

Redundancy

13.0 Redundancy

13.1 Introduction

13.1.1 Redundancy is essentially about requiring fewer employees to do work of a particular kind. The full definition is given below at section 13.1.3. The reasons behind the redundancy can be many and varied. On the one hand it could be lack of orders but equally it could be because a piece of equipment is identified which can perform the work of a number of employees.

13.1.2 Whatever the reasons for the redundancy, for the employees concerned, it is a difficult experience. For the employer considering redundancies there are four potential financial consequences (beyond the direct costs of redundancy pay, if due, holiday pay and notice) ie:

a. Penalty for failure to notify Government;
b. Penalty for failure to provide a written particulars of redundancy payment;
c. Protective Award;
d. Compensation for unfair dismissal/unlawful discrimination.

Each of these is considered in more detail below.

13.1.3 Before launching into a redundancy exercise, employers should attempt to identify whether or not a genuine redundancy situation exists. There is a statutory definition of redundancy. An employer dismisses an employee by reason of redundancy if their dismissal is attributable wholly or mainly to either of the following:

- the employer has ceased (or intends to cease) to
  - continue the business that the employee was employed to do; or
  - continue the business in the place where the employee was employed; or
- the employer's requirements for
  - employees to carry out work of a particular kind; or
  - employees to carry out work of a particular kind in a place where they are employed,

have ceased or reduced or are expected to cease or reduce.

A redundancy situation can also arise in cases of frequent lay-off and short time. For further details on short time working and lay-offs see 13.11 Layoffs and short-time working.

13.1.4 As previously stated, the reasons behind a redundancy can vary but typical examples can be:

- the loss of a significant contract or client;
- a general reduction in sales or orders;
- a need to restructure a department or business generally;
- cash flow problems;
- reduction in profitability;
- a decision to move out of a particular area of business or sector of an industry.

The employer will wish to implement a strategy for dealing with any media attention. Typically there will be a single authorised source with a consistent message. That source will either be in-house or, depending on circumstances, perhaps a PR agency will be appointed. Either way, all external queries should be referred to an authorised person.

13.1.5 Just as there can be different reasons for a redundancy, equally there can be a variety of responses such as:

- the closure of a particular office, depot or branch;
- the closure of an entire business;
- the closure of a particular department;
- to reduce the number of employees working in a particular department or area of the business;
- to reduce tiers of management.

Employers should resist any temptation to dismiss employees as 'redundant' when in fact they are not. Employers run the risk of not being able to show the reason for dismissal was fair which in turn would lead to a finding of unfair dismissal. The redundancy should not be seen as a convenient way of substituting for proper management.

13.2 Informing government

Department of Business Energy & Industrial Strategy 'BEIS'
Formerly BIS

13.2.1 When an employer is considering making 20 or more employees redundant in one establishment within a 90-day period it has a duty to inform BEIS of its proposals giving a minimum of 30 days notice. For 100 or more it would be 45 days. This is notification to BEIS, not notice to the employees.

The employer will have to provide BEIS with the required information requested in writing or by submitting a Form HR1: 'Advance Notification of Redundancies', which can be obtained from any Redundancy Payments Office or the Insolvency Service website.

Since March 2015 the fine for failing to notify is unlimited. The HR1 should be copied to the employee representatives (see 13.3.4 Who must be informed and consulted?). In theory, the reason for this is to ensure that the local job centres are aware of the proposed redundancies so they can provide advice, re-training or re-employment to any affected employees but employers are recommended to do this directly as part of their own support measures (see 13.7 Support measures).

13.2.2 What is an establishment?

There is no specific definition of what an establishment is and the concept has evolved as the tribunals and courts have interpreted it. It has however become apparent that an establishment does not need its own administrative or financial autonomy nor is it necessarily limited to the site in question. In most cases, the term has been widely defined in order to ensure that employees are afforded protection under the collective redundancy rules.

An establishment could cover a separate geographical branch of one company or it could cover a number of branches, companies, associated companies within a larger group structure.

Recent case law has held that redundancies are to be considered per establishment rather than across an employer's entire establishments. However, any employer considering making 20 or more employees redundant across different sites should consider taking independent legal advice as to the question of what constitutes an establishment.

13.2.3 The relationship between notification and notice

An employer must notify BEIS of its proposed redundancies and wait the relevant 30 or 45 days before notice to an employee to terminate their employment by reason of redundancy.

13.3 The duty to consult

13.3.1 There are two levels of consultation namely 'collective' and 'individual'. Both are extremely important. Initially we will consider collective consultation which in legal terms applies to the larger scale redundancies of 20 or more or 100 or more employees.

13.3.2 The consultation should begin in 'good time' and is subject to the same minimum period of 30 and 45 days previously mentioned in notification to the Department of Business Energy & Industrial Strategy (BEIS). Failure to collectively consult carries its own penalty of a 'Protective Award' (see 13.8 Protective award). This would be in addition to any individual claims brought e.g. for unfair dismissal. These are minimum periods. Consultation can last for a longer period of time but not less than the prescribed minimum.

13.3.3 Who counts under the collective redundancy provisions?

The provisions apply to all employees regardless of how long they have worked for the employer or how many hours a week they work. The main exceptions are:

- anyone who is not an employee (e.g. self employed contractor, agency staff);
- employees employed for a fixed term contract, unless the employer proposes to dismiss the employee on the fixed term contract before the term has expired.

13.3.4 Who must be informed and consulted?

13.3.4.1 As part of the collective redundancy consultation process, an employer must make sure that it consults the appropriate representatives of any employee who is affected by potential redundancies. Consultation with representatives does not relieve an employer of the obligation of consulting with individual employees as part of its individual consultation obligations.

13.3.4.2 Where there is no recognised trade union or the recognition agreement does not cover certain categories of employees who are at risk of redundancy, the employer must provide an appropriate method of election or appointment of employee representatives. It is important therefore to consider which categories of employees are affected. The employer may have a situation where it is consulting shop stewards on the one hand and elected representatives on the other.

13.3.4.3 The election should be secret and fair. (Detailed rules are given at the end of this chapter). It must take place before the consultation begins.

13.3.5 What information must be provided to the representatives?

13.3.5.1 The information that must be disclosed in writing by an employer to an employee representative is:

- the reasons for the proposals e.g. diminishing work, restructuring of the organisation, cost cutting exercise, relocation;
- the numbers and description of employees it proposes to dismiss as redundant;
- the total number of employees of any such description employed by an employer at the establishment in question;
- the number of agency workers;
- the areas where agency workers are working;
- the type of work agency workers are carrying out;
- the proposed method of selecting the employees who may be dismissed;
- the proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect;
- the proposed method of calculation of any redundancy payments other than those required by statute, that the employer proposes to make. This is generally referred to as a Section 188 letter;

The information is similar, but not identical to, that required for form HR1. Employers should provide both to the stewards/representatives.

13.3.5.2 The purpose of the consultation is for the employer to make the proposals and to consider any points made by the representatives. If the points are rejected, the employer should explain why. There is no strict requirement that the employer agrees to the suggestions, however, consultation should include:

- ways of avoiding the dismissals;
- reducing the numbers of dismissals;
- mitigating the consequences of the dismissals; and
- should be undertaken with a view to reaching agreement.

It becomes more difficult (but not impossible) to argue that the employer approached consultation with this view in mind if all the representatives' suggestions are rejected. Equally, it should be borne in mind that agreement at the collective stage, while indicative and helpful, is not the last word for the employer who should still undertake individual consultation.

The employer should ideally provide employees with updates of meetings with the representatives covering the points that have arisen. It should also consider whether it would be appropriate to create and provide a 'frequently asked questions' sheet.

13.3.5.3 The employer should not give an employee notice of termination by reason of redundancy before the minimum consultation period has elapsed. In practice, representatives often ask that employees be allowed to leave early i.e. during the consultation period. Employers should be aware of the potential financial consequences of agreeing to such a request and at the very least have written evidence of the request and that individual employees were content to leave when they did. If circumstances change during consultation so that redundancies are no longer required, the employer should withdraw the proposals.

13.3.5.4 Where an employer fails to inform or consult as provided for under the legislation a representative or an employee may lodge a claim for a 'Protective Award' at an employment tribunal (see 13.8 Protective award).

13.4 What issues can arise in collective consultation?

13.4.1 Alternatives to making employees redundant

It is sensible for employers to avoid making compulsory redundancies by thinking about alternatives. There is no express legal obligation forcing an employer to apply alternative solutions before turning to redundancy but it would be foolish not to have considered alternatives prior to but certainly during the consultation process. Examples of alternatives to compulsory redundancies could be:

- voluntary redundancies;
- reducing overtime or imposing an overtime ban but, of course, the remaining orders may have their own deadlines that have to be met;
- re-deploying to another department or other part of the business, which may require re-training;
- laying off casual or contract staff – subject to the terms and conditions of their contracts (ie notice provision) and provided that they are not fixed term or part- time employees (which could potentially be unlawful discrimination);
- short-time working or temporary lay-offs; and
- reduction in hours or pay – to be mutually agreed between the parties. This could not be imposed unilaterally by an employer without a risk of a claim from an employee for unlawful deduction of wages, breach of contract and/or constructive dismissal if the employee resigns.

13.4.2 Voluntary redundancy

13.4.2.1 Employers should inform their employees at an early stage of the consultation process if they are prepared to consider volunteers and make clear from which areas. Accepting volunteers lessens the risk of facing a successful claim of unfair dismissal, but does not remove it altogether.

When considering applications many employers utilise settlement agreements in order to minimise the risk of claims.

Employees might find it difficult to 'volunteer' if it will handicap a claim for benefits or under a mortgage protection policy.

Volunteering should be a 2-stage process.
Employers should first of all allow employees who are considering volunteering a fixed period of time to obtain financial estimates of what payments they would receive. That enquiry should be without commitment on the employees' part and should not be allowed to colour the view of managers who may subsequently act as scorers in a selection process.

Thereafter, employees should be allowed a second fixed period to consider the information given and decide whether to choose to volunteer or not.

13.4.2.2 Employers can enhance the amount of redundancy pay on a discretionary basis to encourage volunteers. An enhanced payment could mean:

- paying more than statutory redundancy pay (which may be discretionary or a term may provide for it in either the employer's redundancy policy or the employee's contract of employment);
- removing the two-year qualifying period;
- a combination of any of the above.

The thought of receiving an enhanced payment may make the option of volunteering for redundancy more attractive to an employee. Employers may also consider offering an enhanced voluntary redundancy payment on a first come first served basis to avoid any suggestion of cherry picking the employees it eventually makes redundant.

13.4.2.3 It is advisable for an employer to offer the option of voluntary redundancy to all employees affected within a selection pool to avoid any assertion that they have a pre-determined list of who they would wish to be made redundant. This could ultimately lead to a claim for unfair dismissal by someone who is dismissed in circumstances where volunteers were refused.

13.4.2.4 One potential advantage of voluntary redundancies is that it releases the employer from the need to go through a compulsory redundancy process. It may also be less disruptive or demoralising for the employees. However employers should be aware that voluntary redundancy is still regarded as a dismissal, therefore employees should be consulted about their options and offered the right of appeal against termination of their employment.

13.4.2.5 An employer making enhanced payments is entitled to pay employees a different enhanced payment amount so long as the method of calculating the payment is the same. Employers should be aware that any method of calculation that is based on age or length of service might be directly or indirectly discriminatory on the ground of age unless the prescribed method for enhancement set out in the governing legislation is followed or it is able to objectively justify the method of calculation in the event it is not.

13.4.3 Selection of employees as redundant

If compulsory redundancies are necessary then one of the key issues for consultation will be the proposed method of selection.

When the employer has decided that there is no alternative but to instigate a redundancy procedure, then it must ensure that there is a fair and proper consultation with and selection of the employees who will ultimately be made redundant. In its initial deliberations, an employer will have identified particular roles, establishments or departments which may be at risk of redundancy. Employees who work part time, or on fixed term contracts, must be treated in the same way as full time permanent employees for the purposes of redundancy rules.

13.4.4 Selection pools

13.4.4.1 Having highlighted the pools at risk of redundancy an employer needs to identify those that are in selection pools and those that are not. If an employer is considering making redundant an employee's role that is unique within an organisation such that the work that individual carries out is not the same or very similar to others then by definition that employee is not in a selection pool. It may be that the employer thinks that the role may not be necessary, viable or cost effective. In that case the employer must simply consult with the employee regarding the proposal to do away with that role and the availability of alternative roles for that employee. See 13.4.6, Pool of one.

13.4.4.2 On the other hand the employer may have identified a group of employees who do the same or very similar jobs. The employer may have decided to reduce the number of employees who carry out that work. The employer has therefore identified a selection pool.

13.4.4.3 It is for the employer to set the selection pools however employee representatives' views on the make-up of pools must be considered and the exercise of setting pools must be carried out in a fair and reasonable manner. Such pools should not be set with reference solely to job title. The employer should take account of the work actually done by employees and group together employees whose work is the same or so similar that it is in effect the same. Job titles very often fail to accurately reflect the nature of the work which the employee actually carries out on a day-to-day basis.

13.4.4.4 It may also be necessary to pool employees whose roles are interchangeable. It is important for employers to note that it is not just employees who carry out identical or similar work that should be placed in a selection pool together. It is best to demonstrate this by way of an example. Ten employees work on machine A. Ten work on machine B. All twenty employees can work on either machine. If the employer simply makes redundant all employees who work on machine A those employees could argue that they had been unfairly selected for redundancy because the selection pool did not include those who work on machine B. If the work is truly interchangeable and the employees can carry out each other's jobs without retraining or supervision then it may be best to pool all twenty employees and select for redundancy 10 from that pool.

13.4.5 Geographical pool

Selection pools may also be made up of employees who carry out a particular type of work at a particular site or establishment. In that case the selection will be based on the location of the employees in addition to the work that they carry out for the employer.

13.4.6 Pool of one

Where it is identified that a role which is performed by only one member of staff, a pool of one redundancy situation is created.

Whilst there are many situations were a genuine pool of one situation is present, recent case law has highlighted the importance of ensuring that the selection pool is not too narrow.

Where the selection criteria has the practical effect of making the decision for redundancy (i.e. it identifies a pool of one), it essential that consultation with the affected employee takes place before this decision is made. A failure to do so would leave the employer exposed to an unfair dismissal claim.

13.4.7 Selection criteria

13.4.7.1 Once an employer has established a selection pool, it must consider what criteria it will adopt in order to identify which employees will be retained and which are to be selected for redundancy from that pool. Employers have a wide discretion as to the criteria used, however, like selection pools, the criteria must be fair and reasonable. Criteria should also be non-discriminatory and capable of being applied consistently. In addition, as far as possible, criteria should be precisely defined. Where possible, criteria should be objective although some jobs do not lend themselves well to objective performance measurement and therefore using more subjective criteria may be unavoidable. With roles that do not lend themselves to objective measurement it may be necessary to consider criteria that are largely subjective in nature. Such criteria are job performance, ability to work in a team, efficiency etc. It is extremely important that the scorers themselves understand their roles and what the criteria are intended to measure. Wherever possible there should be hard evidence to support the scores given. Giving someone the lowest score e.g. on 'job performance' can be difficult to justify when there is nothing on the record or in past appraisals to indicate that the person's performance is poor. The scorers should receive training.

13.4.7.2 It is also important when using such subjective selection criteria that they are specifically defined so that employees understand the matters on which they are being measured. Also having more than one person score the employees against such subjective criteria should help guard against allegations of unfairness and is good practice. It is good practice to have another party carry out a check of the scoring.

13.4.7.3 Some examples of objective criteria are as follows:

- attendance record;
- disciplinary record;
- skills/qualifications (this may be industry-specific);
- timekeeping;
- sales or productivity figures.

13.4.8 Attendance or disciplinary records

An employer must make sure that all attendance or disciplinary records are accurate and are used fairly.

13.4.9 Absences

13.4.9.1 It is advisable for an employer to keep a note of the reasons for any absence of an employee. In circumstances where an employee has been on long-term sickness absence or has been absent on various occasions, an employer should investigate matters further.

13.4.9.2 The reason an employer should seek further information relative to an employee's sickness absence is to ensure that any scoring based on his or her attendance record is not discriminatory, ie the reason for an employee's absence was not due to a disability as defined in the Equality Act 2010 (see 6.4.9 Disability).

13.4.9.3 Employers should be sure that absence records have been compiled in a uniform manner and that some records are not incomplete because employees have been allowed to substitute holidays for absences.

13.4.10 Disabled employees

If any employee appears to be suffering from a condition which may be a disability for the purposes of the Equality Act, an employer will need to consider whether it should make any reasonable adjustments to the way it applies selection criteria. An employer is under a duty to make reasonable adjustments to accommodate disabled employees and one such adjustment could be to not take into consideration any period of sickness absence which relates to an employee's disability.

13.4.11 Skills and/or experience

An employer can also consider any formal qualifications or advanced skills an employee has when conducting any scoring. An employer may also take other aptitudes or proficiencies into consideration, which may ultimately benefit its business going forward.

13.4.12 Sales or productivity figures

If an employer has a record of an employee's productivity or sales figures (e.g. recorded targets, sales reports) then those figures can be considered as part of the scoring exercise.

13.4.13 Length of Service

13.4.13.1 An employer should make sure that the selection criteria are not discriminatory and should use length of service with a degree of caution as it will benefit longer serving/older employees. An employer should not operate last in, first out.

13.4.13.2 If an employer uses this as the sole criterion for selection, then an employee may be able to prove that this criterion would put them at a particular disadvantage in comparison to other employees not in the same age group as them. For example, an employee may be able to establish that LIFO affects younger people more so than older because younger employees are usually recruited more recently than older employees and therefore have a lesser period of service. If an employee were able to establish that fact, then any dismissal based solely on LIFO would be indirectly discriminatory on the grounds of age subject to the defences set out at Chapter 6.

13.4.13.3 Reference to an employee's length of service in a redundancy selection process will not be unlawful age discrimination so long as it is:

- a legitimate aim to reward loyalty and create a stable workforce in the context of a fair redundancy selection process; or
- proportionate to use length of service as a criterion because it is just one of many criteria used, and is not determinative of the selection.

13.4.14 Interviews

13.4.14.1 An employer may ask those in the selection pool to interview for the remaining posts available in order to assist with a redundancy situation. As noted above, the employer should as far as possible adopt objective selection criteria that possibly do not depend solely upon the opinion of the person(s) making the selection. An employer should be open with interview candidates as to selection criteria adopted for the process to ensure fairness throughout.

13.5 Automatically unfair selection for redundancy

13.5.1 There are certain criteria that if used by an employer will render any selection for redundancy automatically unfair. If automatically unfair criteria are used then the employee does not need the normal minimum qualifying service period to claim unfair dismissal. See paragraph 12.1.1 for more information on the minimum qualifying period required for unfair dismissal complaints. Furthermore, some of the reasons noted below are not subject to the statutory maximum compensatory award (currently£115,115) and in some cases a minimum basic award of £8,533 applies.

13.5.2 The rates are reviewed annually.

13.5.3 Automatically unfair reasons

If an employer bases any decision to make an employee redundant on the following grounds, the dismissal will be unfair:

- being absent from work pursuant to being summoned for jury duty;
- participation in trade union activities, for membership or non-membership of a trade union, and in respect of trade union recognition or de-recognition;
- carrying out duties as an employee representative or candidate for election for the purposes of consultation of redundancies or business transfers;
- taking part in the election of an employee representative for collective redundancy purposes;
- exercising or seeking to exercise the right to be accompanied at a disciplinary or grievance hearing;
- requesting flexible working arrangements;
- taking action on health and safety grounds as designated or recognised health and safety representative, or as an employee in particular circumstances;
- taking part (or proposing to take part) in consultation on specified health and safety matters or taking part in elections for representatives for employee safety;
- performing or proposing to perform the duties of an occupational pension scheme trustee;

- performing or proposing to perform the duties of a workforce representative for the purposes of the Transnational Information and Consultation of Employees Regulations 1999;
- taking lawfully organised industrial action lasting 8 weeks or less (or more than 8 weeks in certain circumstances);
- asserting a statutory employment right;
- maternity-related grounds or in relation to other rights, (for example for working parents, for example adoption leave and paternity leave);
- by reason of an employee's refusal or proposal to refuse to do shop work or betting work on Sundays (England and Wales only);
- a reason relating to rights under the Working Time Regulations 1999;
- a reason relating to rights under the National Minimum Wage Act 1999;
- a reason relating to rights under the Maternity and Parental Leave, etc., Regulations 1999;
- making a protected disclosure within the meaning of the Public Interest Disclosure Act 1999;
- a reason relating to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
- a reason relating to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002;
- a reason relating to the Tax Credits Act 2002;
- a reason on the grounds of sex, marital status, race, disability, sexual orientation, age or religion or belief.
- a reason relating to cross border mergers; or
- a reason relating to a Transfer of Undertakings

13.6 Alternative work

13.6.1 In any redundancy situation an employer is obliged to establish the availability of alternative work. Employers should be able to demonstrate that it made reasonable efforts to identify vacancies whether within the affected company, group or locality. One matter which may arise in consultation is the order in which alternative jobs are offered.

13.6.2 To illustrate the point, where three individuals have been selected for redundancy from a pool and only one alternative role exists, that role should be offered to the highest scorer of those selected unless there is a compelling reason to offer the role to one of the others. Such a reason might be that one of the selected employees has significantly more experience in a core skill or component of the alternative role.

13.7 Support measures

As part of the consultation process the employer must make clear what it is prepared to do to assist and support redundant employees such as:

a. notification to local job centres;
b. notification to Group and local employers;
c. assistance with preparation of CVs;
d. 'Job Clubs' in suitably located premises with appropriate facilities.

13.8 Protective award

13.8.1 Failure to comply with the duty of election of representatives or duty to consult may lead to a claim for a 'Protective Award'. A Protective Award can be granted by an Employment Tribunal and may be an amount of up to 90-days gross pay for each affected employee. The amount awarded will depend on the extent of the employer's failure and the background circumstances. Tribunal decisions over the years have clarified that a Protective Award is not compensation for the employee rather it is a punishment for the employer. Accordingly, the starting point is for the full 90 days pay to be awarded unless the employer can persuade the tribunal that a lesser amount is appropriate.

13.8.2 The only defence would be if there were 'special circumstances' which rendered it not practicable to comply but the employer nonetheless did as much as was practicable in the circumstances e.g. did not give the 30 days but gave 20. Special circumstances are not defined but have been interpreted as something sudden and unforeseen. Insolvency of itself is not a 'special circumstance'.

13.9 Individual claims

13.9.1 Redundancy is a potentially fair reason for dismissal. As in any other ordinary dismissal (presuming the individual has the requisite period of **qualifying service**) the employer will need to show that its decision was reasonable in order to resist a claim of unfair dismissal. Tribunals expect a reasonable employer to have done the following:

a. attempted to avoid or reduce the number of redundancies;
b. consulted collectively, where appropriate, and individually;
c. had a reasonable method of selection, reasonably applied;
d. considered alternative work.

Unless the employer has done each of these things it is at risk of a claim of unfair dismissal being successful. Tribunals will tend to be suspicious of 'one off' redundancies and will need to be persuaded that 'redundancy' was the true reason for dismissal and that it was not a label to disguise dismissal for say, poor performance.

13.9.2 Where collective consultation is concluded or fewer than 20 employees are proposed as redundant then the next stage is to fully consult with those individuals at risk of redundancy before making any actual redundancy dismissals. When an entire business is closing or a branch depot or office of a business, identifying those who are at risk of redundancy is a fairly straightforward exercise. In a situation where certain posts are being removed or the number of people carrying out a particular role is being reduced, the process is not always so straightforward. Consultation is an important part of the redundancy process and helps employers avoid or resist claims e.g. unfair dismissal. It provides the employer and affected employees with an opportunity to enter into an open dialogue about proposed redundancies. It should be meaningful and it should not be done as a formality otherwise it could lead to successful claims of unfair dismissal.

13.9.3 Individual consultation begins when employees are first informed about the possibility of redundancy. Where there has been collective consultation that provides a basis for the consultation with the individual. If individual consultation is the first step then the matters referred to earlier at 13.3.5 What information must be provided to the representatives? will be relevant. Inadequate consultation will render a redundancy dismissal unfair. Consultation can involve group meetings and will always involve one to one meetings with those at risk.

13.9.4 The purpose of consultation is to enable an employee to understand what factors have led to the redundancy situation arising in the first place. Consultation provides employees with an opportunity to propose measures that would avoid redundancies altogether (see 13.4.1 Alternatives to making employees redundant).

13.9.5 The employer should also explain the process that it proposes to adopt for selecting employees for redundancy. That will enable the employee to challenge the reasons given as not being genuine, the criteria, or the manner in which selection is taking place. If the criteria themselves have already been agreed at collective level the employer should not depart from the agreement. Where the criteria have not been the subject of previous discussion the employer will need to explain the criteria and be prepared to justify the method of selection.

13.9.6 An employer need not accept and implement the suggestions or representations of employees but it is expected to give due and genuine consideration to employee responses. Consultation should always take place before final decisions are taken to make employees redundant. If employees have been scored against colleagues doing the same or similar jobs they should be told their scores and the reasons for those scores. They should also be provided with their colleagues' results (suitably anonymised so as to not reveal names) so that they can argue that they should have scored higher. Ideally, employers should consult on the make-up of selection criteria and the application of those criteria before scoring takes place.

13.9.7 Finally the employer should consult with employees in relation to the existence of alternative roles available within the business (see 13.6 Alternative work) suitable or otherwise. A failure to do so may render a dismissal unfair.

13.9.8 It is envisaged that after any group consultation meeting there will be at least three consultation meetings with the individual. This number is not laid down by law but considering the obligations of a 'reasonable' employer it would be advisable to plan for that amount.

13.9.9 The first meeting is about the employer setting out its reasons and proposals. It will listen to points made. The second meeting should then be arranged. It should be made clear to the employee that that meeting will provide an opportunity to raise any points he or she wish such as the need for a redundancy or the application of the criteria for selection. The third meeting would be to respond to any points raised and, if appropriate, to communicate the fact of dismissal. It is extremely important that the manager responsible has knowledge of alternative work that may be available.

13.9.10 Employees should be informed of their right to be accompanied at each meeting.

13.10 Relationship between consultation and appeal

13.10.1 As an employer is required to act reasonably and follow a fair procedure it would be advisable to offer the right of appeal to an employee dismissed by reason of redundancy. An appeal should not, however, be confused with the consultation process itself. An Appeal takes place after the decision to dismiss. The appeal will be based on the grounds raised by the appellant, as well as a review of the consultation process and its fairness. It should be heard by a manager not involved at any stage in the consultation process. Employers should not treat the appeal process as part of the consultation process, or as an opportunity to remedy failings in the consultation process itself.

13.11 Layoffs and short-time working

13.11.1 An employer may be able to avoid redundancies by utilising layoffs or short-time working.

Layoffs are when no work and pay is provided.
Short-time working is when less than half a week's pay is provided.

Employees (or their representatives) may agree to either of these measures as an alternative to redundancy. If they do not agree and the employer does not have the contractual right to do these things then the employer is exposed to claims of constructive dismissal, breach of contract and/or unlawful deduction of wages. Employees may not agree at all or for a shorter period than the employer might wish because they would rather have the redundancy happen and the remaining employees being on full-time working. If there is agreement then it should be documented and the nature and duration of the change clearly specified.

13.11.2 Even if employers have the contractual right to layoff or put employees on short-time working there are time limits on how long this lasts before employees can resign and claim they were dismissed as redundant, ie 4 consecutive weeks or an aggregate of 6 in 13. If an employee is successful in claiming a redundancy payment, then that will be calculated in the normal manner. An employer will, however, be able to resist a claim from an employee for redundancy pay if it is reasonably expected that the employee will have no less than 13 weeks of uninterrupted employment (ie work without being laid-off or put on short-time) within four weeks of serving notice for a redundancy payment. There are precise notice and counter- notice requirements in this area and members are advised to seek advice from Scottish Engineering.

13.11.3 When is an employer entitled to lay off an employee or put them on short-time working?

13.11.3.1 The first issue for an employer to consider is whether or not it has the contractual right to impose layoffs or short-time working on its employees. Generally, an employer can lay off its employees or place them on short-time in the following circumstances:

- where there is an express contractual right agreed between the employer and employee to do so;
- where there is an express right or an agreement between a trade union and the employer that has been incorporated into the employee's terms and conditions of employment;
- where there is a national agreement for a particular industry that the employer will need to follow and adhere to. Again, the terms of the national agreement will have to be incorporated into the employee's terms and conditions of employment before the employer can exercise its right to impose lay-offs or short-time working;
- where there is an implied right established through custom and practice. The employer would have to establish that such a right is implied through custom and practice by considering a number of factors, such as (for example):

    - when the employer has previously exercised the right;
    - how many occasions the employer has exercised the right;
    - the extent the right was exercised ie for how long and in relation to which employees?

It is difficult for an employer to demonstrate that such an implied rights exists and advice should be sought before implementing layoffs and short-time working on the basis of an implied term.

13.11.4 Statutory guarantee payment

13.11.4.1 It may be that an employee is not due pay for the day in question because of agreement or contractual right. Nevertheless the employee may still be entitled to a statutory guarantee payment from his or her employer. The statutory guarantee payment is subject to a limit based on an employee's normal hourly rate and hours for a normal working day but subject to a current limit of £38.00. The statutory guarantee payment is also subject to a maximum limit of five days in any three-month period. Therefore, an employee who is laid-off in any three-month period is currently entitled to a maximum of £190. .

13.11.4.2 Fixed term employees are entitled to a guarantee payment in the same way as any other employee.

13.11.4.3 Where an employer fails to pay an employee a guarantee payment, he or she can lodge a claim at the Employment Tribunal within three months of the date in which payment was claimed. The qualifying period required by an employee before he or she can lodge a claim is one month.

13.12 Alternative roles

13.12.1 These are relevant in two areas namely defending unfair dismissal claims and in assessing entitlement to a redundancy payment. Each will be considered in turn. Unfair dismissal is potentially the more costly of the two so it is important for employers to be on record as offering the alternative work even if they recognise the employee will probably reject the offer and be due a redundancy payment.

13.12.2 Unfair dismissal

13.12.2.1 Even if an employee is properly selected as redundant ie he or she is displaced from the existing job, he or she will be entitled to claim unfair dismissal if the employer fails to take reasonable steps to offer alternative work (if there is any available) during the consultation process. Discussions regarding possible alternative roles should take place during the consultation process. There is no obligation to create work that does not exist, however, an employer must be able to point to reasonable efforts to identify and offer an alternative role. In many redundancy situations it is self-evident that there are no alternative roles ie the closure of a business. If the employer has, however, searched for alternative employment but there is none, then that will not render the dismissal unfair.

13.12.2.2 Employers should always consider whether any alternative work could be offered to an employee even if the alternative role would involve retraining or redeployment in another department or even another company associated with the employer.

13.12.2.3 Where alternative work is available, an employer should provide the employee with details of the alternative role in order to help the employee decide whether or not he or she wishes to be considered for the alternative role.

13.12.2.4 The obligation is not simply to offer alternative employment that is the same or similar to the role that the employee at risk of redundancy is employed to do. It should also make the employee aware of any alternative employment within the company (or any other associated companies) even though accepting these roles may involve a pay cut, a demotion, retraining or even reasonable adjustments where the employee is disabled (see 6.4.9 Disability).

13.12.2.5 The duty to offer alternative employment to an employee continues up until the effective date of the employee's dismissal. Therefore, even when an employer has already given an employee notice of termination of employment, it should still offer any alternative employment that may become available during the employee's notice period.

13.12.2.6 As a matter of good practice (and as a precaution), an employer should confirm with the employee that it has checked to see if there is any alternative work but that there is none.

13.12.3 Redundancy and maternity leave

Although a woman has a right of return from maternity leave to the job that she left, that clearly becomes impossible if the job has become redundant during the maternity leave. There is no rule therefore that a woman on maternity leave cannot be made redundant. There is however one very important proviso that needs to be borne in mind when an employer is considering making such an employee redundant. If there exists a suitable available vacancy for the employee on maternity leave then that role must be offered to her even in preference to others who face redundancy. This is the case even if the employee is for example in the middle of her maternity leave and not due to return for 6 months. Failure to offer such a suitable alternative role will render the dismissal unfair and discriminatory. The vacancy must be offered as soon as the employer becomes aware that the employee's role is redundant or at risk of redundancy.

13.12.4 Entitlement to a redundancy payment

Where an employee rejects an offer of alternative employment, entitlement to a redundancy payment depends on whether the alternative role is 'suitable' and the employee acted 'reasonably' in rejecting the offer.

Broadly 'suitability' takes account of objective matters such as job content, status, and salary whereas 'reasonableness' is more subjective on the part of the employee and takes account of his or her personal circumstances in relation to such matters as travelling time, hours of working, and location.

13.12.4.1 Any dispute over entitlement to redundancy payment following a refusal of alternative work will be resolved by an employment tribunal.

13.12.5 Other alternative employment considerations

13.12.5.1 An employer should inform employees about the skills, abilities and expertise it is looking for in respect of any alternative role offered. If possible, an employer should confirm all internal vacancies within the company or any associated company in writing e.g. internal memo, notice board, directly to an employee by letter/email or company website/intranet page etc.

13.12.5.2 Whether an alternative role is suitable for an employee will also depend on whether or not he or she has the required skills, abilities and expertise to carry out the duties required by the employer in the new role.

13.12.5.3 Offers of alternative employment should detail the terms and conditions for the role. The employee will then be in a better position to assess how their old job differs from the new one offered. An employer should therefore consider providing the following information to an employee considering an offer of alternative employment:

- job title;
- duties, skills and abilities required;
- hours of work;
- rate of pay;
- holiday entitlement;
- any other contractual benefits (overtime, bonus, car allowance etc).

If there are multiple applicants for a new role then an employer can adopt an interview process, which can include both those at risk of redundancy and external candidates. Unlike for a situation where an employer has reduced requirement for those undertaking a particular role (see section 13.4.12.3), an employer can use a higher degree of subjective criteria in terms of the assessment of suitability of the candidates. As the role is "new" to the candidates, the employer's decision must of necessity be forward-looking, which will especially be the case if the role is at a high level and/or where it involves promotion. That being said, the principles of fairness and reasonableness still apply to this part of the process and candidates should be made aware of the applicable assessment criteria.

13.12.5.4 The offer should also be made before the employee's employment is terminated and the new job must start either immediately or within four weeks of the intended date of dismissal.

13.12.6 Trial periods

13.12.6.1 An employee who accepts an offer of alternative work is entitled to a four-week trial period in order to decide whether the new job is truly suitable without losing entitlement to redundancy pay.

13.12.6.2 If an employee decides and confirms to the employer during the trial period that he or she does not want to accept the role, entitlement to redundancy pay so long as the reason for the refusal of the role is not unreasonable will not be lost. If the employer is of the view that the employee's decision is unreasonable then the employee's decision is then regarded as a resignation and the employee loses entitlement to a redundancy payment. However, the question of whether a refusal is reasonable is different from whether an alternative role is suitable; an employee may have good reason for refusing the role and the employer should take this into consideration; e.g. the role may be suitable but reduction in earnings and loss of status could justify rejection. The question of refusal of a suitable role only arises when the alternative role offered has material difference in terms and conditions, at which point an element of subjectivity with respect to suitability for that *particular* employee will apply in addition to objective assessment of suitability of the role itself compared to the former role undertaken. Further advice should be sought from Scottish Engineering if you have any queries on this point.

13.12.6.3 An employer is also entitled to declare the trial period unsuccessful. If the employer forms the view that the employee is not suited to the role and cannot carry out the role to a satisfactory standard it must communicate that to the employee before the end of the trial period.

13.12.6.4 The employee will not, however, be entitled to redundancy pay when the employer has dismissed for any other reason e.g. on the grounds of gross misconduct. In those circumstances, the employee will forfeit the right to redundancy pay, as the reason for their dismissal will not be redundancy.

13.12.6.5 If an employer decides that it needs longer than a four-week trial period to decide whether the alternative role is both suitable and the employee effective in the alternative role, it may extend the trial period but only for the purposes of training. Take advice from Scottish Engineering if you are considering any trial period as the statutory rights and obligations do not automatically apply.

13.12.7 Bumped redundancies

13.12.7.1 A bumped redundancy occurs when an employee other than the one whose job is at risk of redundancy is dismissed.

13.12.7.2 **Example**

If a skilled person, who would otherwise be redundant, is offered the position of a semi-skilled person, then the dismissal of the semi-skilled person is attributable to the employer's diminishing requirement for skilled employees and, therefore, the dismissal of the semi-skilled person still qualifies as a redundancy dismissal because it is related to redundancy, albeit of another unconnected role.

13.12.7.3 Tribunals have commented that an employer, when considering whether an alternative post can be found for an employee who is in line for dismissal by reason of redundancy, must at the very least consider whether it would be appropriate to dismiss some other employee and offer that job to the potentially redundant employee.

13.12.7.4 An employer will still have to adhere to the general principles of fairness and reasonableness whilst conducting any bumped redundancy. Particular attention will have to be paid to any agreement on the pools of selection to ensure that the 'bumping' is not in breach of that.

13.12.7.5 If an employer cannot show that they have given the issue proper consideration, the dismissal may be unfair. The onus is on the employer to raise the issue during the consultancy process. Bumping' an employee is not straightforward and any employer considering effecting a bumped redundancy should always seek further advice before doing so.

13.12.8 Time off – job hunting

13.12.8.1 Employees who have more than two years' complete service and who have received notice of termination of employment by reason of redundancy are entitled to take reasonable time off during their working hours in order to look for new employment or make arrangements for training for future employment before the end of their notice period.

13.12.8.2 Where an employer has allowed an employee to take time off to look for new employment or make arrangements for training for future employment, the employee will be entitled to be paid no more than 40% of a week's pay.

13.13 Redundancy pay – general

13.13.1 Who is entitled to redundancy pay?

Employees with at least 2 years' continuous service with an employer are entitled to a statutory redundancy payment. If you are in any doubt as to the applicable qualifying period you should call Scottish Engineering.

13.13.2 How much is an employee entitled to?

13.13.2.1 The statutory redundancy payment provided for in the Employment Rights Act 1996 is calculated with reference to an employee's length of service, age and weekly pay. There is no upper-age limi. An employee's weekly pay is capped at a certain limit set by the Government. The current weekly cap is £643.

The weekly cap is reviewed annually.

13.13.2.2 The basic calculation for redundancy pay is:

- half a week's pay for each year of service the employee is under the age of 22;
- one week's pay for each year of service the employee is aged between 22 but under 41;
- one and a half week's pay for each year of service the employee is aged 41+. (There is no upper age limit)

13.13.2.3 The maximum statutory redundancy pay for any redundancies effected on or after 6 April 2024 is subject to a maximum of £21,000. For the purposes of calculating statutory redundancy pay, the maximum length of service to take into consideration is 20 years.

The maximum statutory redundancy pay is reviewed annually.

13.13.2.4 The employer may decide to pay an employee an enhanced redundancy payment. If an employer has offered an employee an enhanced redundancy package then it should make sure that the method of calculation is applied equally to all employees and mirrors the structure of the statutory scheme to avoid possible discrimination claims.

13.13.3 What is a 'week's pay'?

13.13.3.1 A 'week's pay' is a defined term used to calculate a number of different employment rights but in particular an employee's statutory redundancy pay entitlement.

13.13.3.2 A contract of employment will usually contain an express term setting out the employees 'normal working hours' which are fixed, obligatory hours. If a contract does not refer to normal working hours but provides that overtime is payable after a fixed number of hours, then that fixed number will usually count as 'normal working hours.'

13.13.3.3 If the employee's contract of employment sets out 'normal working hours' and the employee's remuneration does not vary with work done, then a week's pay will be the contractual remuneration for working that number of hours during a week.

13.13.3.4 However, if the employee has fixed working hours but his or her remuneration varies depending on the amount of work done during those hours, then a week's pay will be calculated at an average hourly rate of pay in the applicable 12 weeks before the calculation date. Remuneration can include commission or similar payments which vary in amount. Overtime can normally only be taken into account if it is obligatory to both sides under the contract.

13.13.3.5 If an employee is required under his or her contract to work the normal working hours on days or at times which differ over a period so that remuneration for any week varies in accordance with days and times worked then a week's pay will be the remuneration for the average number of weekly working hours at the average hourly rate of remuneration calculated over the relevant 12 week period.

13.13.3.6 If the employee does not have 'normal working hours' then a week's pay will be the employee's average weekly remuneration in the applicable 12 weeks preceding the calculation date.

13.13.3.7 The above is a general overview of how to calculate a week's pay. In cases where there are normal working hours the calculation is straightforward. Where there are no normal working hours it becomes more complicated. It becomes necessary to determine the 'relevant period of 12 weeks' before the calculation can be done. Moreover, the 'calculation date' is a specific determinable date which will differ depending on the circumstances. Specific guidance should be sought.

13.13.3.8 Finally, a week's pay for the purpose of making a calculation of statutory redundancy pay is subject to a statutory limit. Currently this limit is £700 .

The week's pay limit is reviewed annually.

13.13.4 Employee's complete years service and the 'relevant date'

13.13.4.1 Redundancy pay is calculated with reference to the number of continuous and complete years service an employee has at the 'relevant date'.

13.13.4.2 The relevant date could be any of the following:

- the date that the employment ends at the expiry of the notice period
- In circumstances when an employee finishes earlier than the statutory notice period given by the employer, the relevant date will be when the employee's statutory notice would have expired. If the employee is however responsible for changing the date then the new date will be the relevant date;
- if an employee is on a trial period and either the employer or the employee decide that the work is not suitable, the relevant date would be when the original contract would have ended before the trial period began;
- if the employee is not given the statutory minimum notice period, for example, because the employer has paid in lieu of notice, the relevant date for certain purposes is the date on which his or her contract of employment would have terminated if the statutory minimum notice period had been given. On occasions, this may lead to the employee obtaining one further year's continuous service for the purposes of calculating statutory redundancy payment. That occurs in circumstances where the employee would have clocked up another year's service during what would have been the statutory minimum notice period.

13.13.4.3 Where an employer fails to pay an employee statutory redundancy pay when he or she has been dismissed by reason of redundancy, he or she can lodge a claim at an Employment Tribunal within 6 months of the date on which the dismissal takes place.

13.13.5 Taxation of redundancy pay?

Any redundancy or compensation payment of £30,000 or less will not normally be subject to deduction of income tax. Any amount of severance pay that is in excess of £30,000 will be subject to tax deductions.

13.13.6 Other payments

An employee may be entitled to other payments upon termination of employment and these payments will usually be subject to deduction of tax and national insurance contributions. If, for example, an employee is paid any bonus pay, car allowance or pay in lieu of notice then those payments will usually be subject to the usual deductions of income tax and national insurance contributions subject to the wording of the individual's contract of employment.

13.13.7 Insolvency of employer

13.13.7.1 If an employer is unable to pay an employee statutory redundancy pay because it is experiencing financial problems or it is insolvent, the employee may be able to seek payment from the National Insurance Fund. An employee must first write to an employer to seek payment of redundancy pay and if it is unable to pay the employee, then he or she should complete the relevant RP1 form available from the Insolvency Service.

13.13.7.2 The employer will be expected to pay back the payment to the National Insurance Fund as soon as possible.

13.13.7.3 There are other sums that an employee may be able to seek from the National Insurance Fund when an employer has become insolvent. These payments include:

- up to 8 weeks arrears of pay;
- a guarantee payment;
- any payment for time off for carrying out trade union duties;
- remuneration on suspension on medical grounds (ie when an employer suspends an employee in consequence of a provision of an enactment or a recommendation in a code of practice issued or approved under the Health and Safety at Work etc. Act 1974);
- remuneration on suspension on maternity grounds;
- remuneration under a protective award;

- notice pay (subject to the employee's statutory minimum entitlement);
- holiday pay (up to a maximum of 6 weeks); and
- any basic award for compensation for unfair dismissal.

13.13.8 Written particulars of redundancy payment

An employee who is provided with notice of dimissal has an entitlement to receive a written particulars of redundancy payment. This must show the statutory redundancy payment sum and a breakdown of how it was calculated. Where an employer fails to provide this they will be guilty of a criminal offence and liable to a penalty of up to £200. If the employee has written to the employer requesting the statement after not being provided with one, then the employer may face a fine of up to £1,000 if it still fails to produce the statement (the employer will have a minimum of one week from receipt of the notice to comply with the request).

13.14 Termination during notice period

13.14.8.1 If an employee is offered a new job he or she may try to negotiate an early release without losing their right to redundancy pay. Employers may agree to such an arrangement. However, if the employer requires the employee to work out the notice then it can obviously attempt to insist that the employee does so.

13.14.8.2 If an employee refuses, or fails to work the notice period then the employer may decide not to pay them redundancy pay. The employee is still entitled to raise a tribunal claim. The tribunal will decide how much, if any, of the redundancy payment should be paid to the employee.

13.14.8.3 Employers may find that this is more of an issue where employees have notice periods in excess of the statutory minimum notice periods. In circumstances where an employee has approached an employer to be released during the notice period, an employer may consider agreeing to an early release on the basis that it still pays the employee redundancy pay but saves money where it would have paid the employee the balance of his or her notice period.

13.14.8.4 When an employee wishes to be released before the notice period has expired, an employer is only obliged to pay wages or salary for the time actually worked.

13.15 Election rules for employee representatives

13.15.1 The election rules are as follows:

- the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;
- the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees;
- the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees. Before the election the employer shall determine the term of office as employee representative so that it is of sufficient length to enable relevant information to be given and consultations to be completed;
- the candidates for election as employee representative are affected employees on the date of the election;
- no affected employee is unreasonably excluded from standing for election;
- all affected employees on the date of the election are entitled to vote for employee representatives;
- employees are entitled to and may vote for as many candidates as there are representatives to be elected to represent them; if there are to be representatives for particular classes of employees, for as many candidates as there are representatives to be elected to represent their particular class of employee;
- the election is conducted so as to secure that:
    - so far as is reasonably practical, those voting do so in secret and,
    - the votes given at the election are accurately counted
- if an elected representative stands down or ceases to act for any reason the employer should make arrangements for another election to take place.
- if the number of candidates for employee representatives exactly matches the number of vacancies, the employer can treat the candidates as elected without holding a ballot. There is no statutory requirement that a ballot is held in an uncontested election.

Chapter 14

Termination of employment

14.0 Termination of employment

14.1 Introduction

14.1.1 This chapter analyses the various ways in which the employment relationship can come to an end. It is not the purpose of this chapter to deal with whether a dismissal is fair or unfair for the purpose of the law of unfair dismissal. For adetailed analysis of that subject see 12.0 Dismissal - fair or unfair. This chapter will also set out the various rights and obligations of parties upon termination of employment.

14.1.2 Generally speaking, the employment relationship comes to an end in three ways; dismissal; resignation and termination by mutual consent. On very rare occasions, a contract of employment can be terminated by frustration (see 14.7 Frustration). Those circumstances are very limited indeed and advice should always be taken regarding whether a contract may have been terminated by reason of frustration.

14.1.3 Various obligations and rights arise for both employers and employees upon termination. It is important that employers have a clear understanding of those rights and obligations so that contracts of employment are brought to an end lawfully. If a contract of employment is terminated wrongfully then employees have the right to raise breach of contract claims either at court or tribunal.

14.1.4 There are also a number of miscellaneous matters which arise upon termination of employment. Such matters are the right to written reasons for dismissal, requests for references and application of restrictive covenants. This chapter will take a detailed look at all of these miscellaneous issues.

14.2 Dismissal

This chapter is concerned not with the fairness of dismissal but rather the contractual mechanics of an employer bringing the employment relationship to an end. There are a number of ways in which a dismissal can take place as follows:

- when an employer terminates an employee's contract of employment (with or without notice);
- when a fixed term contract expires and it is not renewed by the employer;
- when an employee resigns by reason of the employer's breach of contract – giving rise to a potential claim for constructive dismissal; and
- when an employer gives notice to the employee to terminate the contract of employment and within that notice period, the employee also gives notice to the employer to terminate the contract on an earlier date from that which the employer gave.

14.3 Dismissal with notice

14.3.1 It is customary for employers to specify the applicable period of notice to terminate the employment relationship within the employee's contract of employment. There are however statutory provisions in relation to notice which take precedence over contractual notice periods wherever the contractual periods are less than those provided for by statute.

14.3.2 Many employers simply adopt the statutory period of notice and refer to it in the contract. With senior employees, especially directors, employers tend to incorporate longer periods of notice into the contract of employment, sometimes up to six months.

14.3.3 If a contract of employment makes no reference to a notice period or there is no contract in place at all, the parties usually adhere to the statutory minimum periods of notice. In these circumstances it is potentially open, depending on the circumstances, to senior employees to seek to argue for a period of notice that is longer than the statutory period of notice by way of custom and practice.

14.3.4 Statutory minimum notice period - from Employer to Employee

The statutory minimum notice to be given by an employer to terminate an employee's contract of employment is:

- not less than one week's notice when the employee has been continuously employed for more than one month but less than 2 years;
- if the employee has been employed for two or more years continuously, no less than one week's notice for each year's continuous service up to a maximum of 12 weeks' notice.

If an employee's contract of employment has an express term which provides that less than the statutory minimum notice is required to be given, the statutory minimum notice provisions apply.

14.3.5 Statutory minimum notice period - from Employee to Employer

The statutory minimum notice to be given by an employee to an employer to terminate the employee's contract of employment is at least 1 week if they have been employed for 1 month or more.

14.3.6 When does notice take effect?

14.3.6.1 Whether and when notice to terminate employment has been given are matters of fact. Notice to terminate employment must be clear and unambiguous whichever party is giving notice. If either party gives the other notice to terminate employment orally, the period of notice will commence on the day after it is given. Notice given verbally should always be confirmed in writing.

14.3.6.2 Employers should note that an employee's notice period is not triggered simply because the employee indicates that he or she is looking for a new job or is thinking about leaving. Notice has to be given explicitly.

14.3.6.3 Where an employer gives notice to an employee in writing, the period of notice begins on the date on which the employee receives the letter or e-mail. An employee who is on holiday, for example, during a period when their employer sends a letter giving notice to terminate their employment shall not be deemed to have received such notice until they have read the letter, or are deemed to have had a reasonable opportunity to read the letter.

14.3.6.4 It is important to remember that a contract of employment does not terminate when notice is given, it is when the notice expires. This is the case even if an employee is not required to work during the notice period.

14.3.7 Agreeing a shorter period of notice

Irrespective of who gives notice it is always open to an employer and employee to agree a shorter or longer period of notice although where an employer is dismissing the employee, the agreed reduced notice period cannot be less than the statutory minimum.

14.3.8 Rights during notice period

14.3.8.1 The Employment Rights Act 1996 provides certain rights to employees during their notice period. These rights do not apply to an employee if he or she, or the employer, is contractually obliged to give the other at least one week's more notice than the statutory minimum. Where this does not apply the rights of the employee during the period of notice are governed solely by the contract of employment.

Where the minimum rights do apply, the employee is entitled to normal pay or salary during any part of the statutory notice period irrespective of what is stated in the contract of employment if he or she is:

- ready and willing to work;
- incapable of work because of sickness or injury;
- on maternity leave;
- absent from work wholly or partly because of pregnancy, childbirth, adoption leave or parental leave; or
- on holiday.

14.3.8.2 This means with an employee on sick leave at the time he or she is given notice, even if an employee has exhausted his or her right to contractual or statutory sick pay and is receiving no remuneration at all, if notice is given by the employer to terminate the employment or vice versa, payment of the employee's normal salary or wage is triggered.

14.3.8.3 Any payment made to an employee by an employer in respect of statutory sick pay, maternity pay, statutory maternity pay, paternity pay, adoption pay, statutory adoption pay, holiday pay goes towards meeting the employer's liability for any payment due during the notice period.

14.3.9 Exceptions

An employer is not expected to pay an employee for any part of his or her notice period where the employee is absent by virtue of taking time off for:

- public duties;
- to look for work or arrange training;
- ante-natal care;
- dependents;
- pension scheme trustees activities;

- employee representative duties;
- carrying out trade union duties or activities; or
- when the employee gives notice to terminate employment and after giving such notice, but before the contract terminates, he or she takes part in a strike.

14.3.10 Failure to give proper notice

If an employer fails to give the requisite period of contractual or statutory notice then that employer has wrongfully dismissed the employee. The employee has the right to raise a tribunal claim for the net remuneration that he or she would have received had the requisite period of notice been given by the employer. The claim is referred to as being for breach of contract or wrongful dismissal. The current limit for claims to a tribunal is £25,000. Such claims can also be made in the ordinary courts where there is no upper limit.

14.3.11 Payment in lieu of notice

In cases of dismissal, employers frequently make a payment to the employee in lieu of notice rather than actually having the employee work the notice. This is often to avoid having an unhappy and disgruntled employee continuing to have access to the employer's property, computer system or colleagues. It is equally common for employers to include in the contract of employment a clause allowing it to make a payment in lieu of notice. This is sometimes referred to as a PILON clause. This means that the employer has the contractual right to terminate the employee's contract by paying in lieu of notice rather than allowing the notice to be worked. Where an employer terminates the contract of an employee by making a payment in lieu of notice, it should make it clear to the employee the date on which the contract ends. Most employers when paying in lieu of notice intend for the contract to come to an end immediately. The employee should therefore be told that the contract is at an end immediately and that should be confirmed in writing. Employers should not confuse payment in lieu of notice with garden leave which is dealt with at paragraph 14.3.14.

14.3.12 Payment in lieu without contractual right

It is, however, commonplace for employers to terminate and pay in lieu of notice even when there is no PILON clause in the contract. The main risk of doing this is that the employee will be entitled to treat the employer's action as a breach of contract, which may render other terms and conditions of the contract of employment unenforceable. This would be an issue if the contract contained restrictive covenants. An employer paying in lieu of notice when there is no contractual entitlement to do so is regarded as having committed a breach of contract which arguably frees the employee from any post-termination restrictions. One way round this problem is for the employer simply to sit down and agree with the employee before the termination of employment takes effect that the employee will accept a payment in lieu instead of working notice. This will be tantamount to a variation of the contract of employment and the employee will therefore not be in a position to claim that the payment in lieu of notice represented a breach of contract. If such a variation takes place then the payment in lieu will be a taxable payment. For further information on the taxation of payments in lieu of notice see paragraph 14.3.13. Any employer seeking to reach such an agreement prior to termination should make sure that it is put in writing.

14.3.13 Calculating pay in lieu of notice

If the contract provides for pay in lieu of notice it is advisable for an employer to ensure that an employee's contract sets out clearly how the payment in lieu is to be calculated. Some contracts state that an employee will only be entitled to basic salary/wages if he or she is paid in lieu of notice. Others provide that an employee will also be entitled to any other benefits that may have been due if he or she had worked the notice.

14.3.14 PILON and tax

Where the contract contains a PILON clause, any payment in lieu made to an employee is subject to deduction of income tax and National Insurance contributions. The position had been less clear if payment in lieu of notice was made in the absence of a PILON clause in the contract. On one hand, it was said that such a payment was tax-free up to £30,000 due to the fact that it is a payment of compensation for the failure to give notice. However, with effect from 6 April 2018 all payments representing payments in lieu of notice, whether they are contractual or not, are subject to deduction of income tax and National Insurance contributions.

14.3.15 Garden leave

Garden leave is a term which refers to circumstances where an employee has given notice or has been given notice and the employer does not want the employee to work during the notice period. The employer may be uneasy about having a disgruntled employee at work during the notice period. Alternatively the employer may be worried about an employee's intention to compete after employment has ended. By placing the employee on garden leave the employer limits the opportunities for the employee to gather confidential information or other documents but since the contract of employment continues the employer still has access to the employee for assistance or information. All other terms and conditions of employment continue to apply during garden leave other than the requirement for the employee to attend work. The employee remains at the employer's disposal and the employee must continue to co-operate with work related queries.

14.3.16 Garden leave clause

It is advisable for an employer to have an express term in an employee's contract reserving the right to place the employee on garden leave. If the employer does not have an express right then putting the employee on garden leave is in theory, a breach of contract. In practice this rarely has any consequences for an employer. Most employees are reasonably content to be placed on garden leave so long as they are being paid normal salary and benefits. Nevertheless it is advisable for employers to have an express garden leave clause. This enables the employer to set out clearly for the employee the conditions which attach to the period of garden leave. In particular it is important to regulate such issues as the contacting of work colleagues, clients and other business contacts during garden leave. It is often the case that an employer wants to prevent contact with customers or suppliers during a period of garden leave without express permission. It is also sensible to remind the employee that he or she must remain available to assist with work related queries and issues.

14.3.17 Garden leave and restrictive covenants

Any part of the notice period during which an employee is placed on garden leave will be set off against the post termination restrictions contained in contractual restrictive covenants. For example, if an employee is subject to a restriction from soliciting customers for a period of 12 months from the date of termination of employment but spends his or her 6 month notice period on garden leave the result is that the employer is only able to rely on the restrictive covenant for a period of 6 months from termination of employment rather than the 12 stated in the contract. The reason for this is that the courts have tended to rule that the period of garden leave enables employers to deal with any potential competitive issues and that to have a period of garden leave followed by the full period of restriction is an unnecessary and anti-competitive restraint.

In a recent decision, the High Court confirmed that the absence of a garden leave "set-off" contractual provision would not be fatal for the operation of a restrictive covenant. This was an English law case and specific advice should be sought from Scottish Engineering in relation to the operation and drafting of restrictive covenants (see section 14.10.5). Following a 2020 consultation, the Government has announced its intention to limit the length of restrictive covenants to 3 months though no formal process to implement these changes have yet been made, which this only likely to happen when parliamentary time allows.

14.4 Termination by mutual consent

14.4.1 An employer and an employee can mutually agree to terminate a contract of employment. If a contract is terminated by mutual agreement, no dismissal will have taken place. It must be clear that parties both agreed to the termination.

14.4.2 Often parties attempt to characterise dismissals and resignations as a termination by mutual consent for a variety of reasons. If an employee is placed under any duress or is subject to any coercion to agree to give up his or her employment then it is unlikely that a court or tribunal would regard the termination as being consensual. In the circumstances it would leave scope for the employee to argue that what in fact happened was that he or she was forced to resign against his or her will and that in turn would allow the employee to raise a claim for constructive dismissal. In practice contracts of employment rarely come to an end through genuine mutual agreement. If an employer is considering bringing an employment relationship to an end by mutual agreement advice should be taken.

14.5 Breach of contract

14.5.1 If an employee commits a breach of the material term of a contract of employment or is guilty of an act of gross misconduct then the employer is entitled to terminate the contract of employment without notice or payment in lieu of notice. This is frequently referred to as summary or instant dismissal. Even though the employee's behaviour may entitle the employer to bring the contract to an end immediately without compensation or notice, employers must always bear in mind that the rules governing unfair dismissal apply to any contractual termination and therefore proper procedures should be followed. For further guidance in relation to effecting fair dismissals and following proper disciplinary procedures, see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair.

14.5.2 Of course an employer needs to be satisfied that the employee's behaviour is so serious as to amount to a material breach of contract. If an employee's behaviour falls short of gross misconduct or material breach then the employer is not entitled to dismiss without providing notice. If an employer terminates a contract of employment in circumstances where there is no gross misconduct or material breach then the employee will be entitled to raise a tribunal claim seeking payment of the net remuneration that would have been paid during the notice period. Such claims are often referred to as claims for notice pay or wrongful dismissal. Such claims can also be pursued in the ordinary courts. The maximum amount that an Employment Tribunal can award for breach of contract, notice pay or wrongful dismissal is currently £25,000.

14.6 Constructive dismissal

14.6.1 If an employer is guilty of breach of a material term of a contract of employment that is so serious that it goes to the root of the relationship then in those circumstances the employee is entitled to resign and claim constructive dismissal. It is not every breach of contract on the part of the employer which will entitle the employee to claim constructive dismissal. The breach must be very serious. The breach can be either an express or implied term of the contract. For a detailed analysis of implied contractual terms see 2.5 Implied terms.

14.6.2 Breach of trust and confidence

- Many constructive dismissal claims are based on an allegation that the employer breached the implied duty of mutual trust and confidence. For further details of this duty see 2.5.5.2 Duty of trust and confidence. In these cases the employer's conduct must be of such an extreme and unreasonable nature that in practice it has destroyed or seriously damaged the bond of trust and confidence.
- Some common examples of an employer's breach of the implied duty of mutual trust and confidence are as follows:
- failure to give an employee reasonable support to enable them to carry out the duties of the job without disruption or harassment from fellow workers;
- falsely, and without reasonable cause, accusing an employee of theft;
- undermining the position of a supervisor by reprimanding them in front of his or her subordinates; or
- reprimanding an employee in a degrading, intimidating or humiliating manner.

14.6.3 Resignation must be linked to breach

14.6.3.1 In order to claim constructive dismissal the employee must leave in response to the employer's breach of contract. An employee does not however need to show that the employer's breach of contract was the only reason for the employee's resignation. The breach by the employer must however have played a part in the employee's resignation. For example, the employer may have been guilty of some material breach and at the same time, the employee may have found a new job. Even although the employee has found a new job, it may be that they could still be successful in their claim for constructive dismissal if it is established by the Tribunal that the employer's breach played a part in the employee's resignation. This is quite a complicated area. If faced with a claim for constructive dismissal, appropriate legal advice should be sought.

14.6.3.2 An employee is not able to simply rely on any breach of contract by the employer to justify resigning. The breach must be serious and strike at the heart of the contract of employment. Some common examples of serious or material breaches are:

- an employer unilaterally reduces the pay of an employee;
- an employer unilaterally changes the job duties of an employee; or
- an employer fails to pay full salary during a period of an employee's illness notwithstanding the fact that it is contractually obliged to do so.

14.6.4 Waiving the breach

If an employee works on for a period following the breach without protest then he or she may be deemed to have accepted or waived the employer's conduct or breach and it will be too late to resign and claim constructive dismissal. How long is too long depends on the facts and circumstances of each individual case. Tribunals and courts will not only look at the length of delay in resigning but also the relationship and behaviour between parties during the period of delay. If the employee has made it clear that he or she is working under protest or that the behaviour of the employer is unacceptable then that may point against a waiver of the breach. The Court of Appeal determined that an employee claiming constructive unfair dismissal because of a continuing cumulative breach was entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act, the "last straw", formed part of the series. Nevertheless employees should not wait too long before making their mind up about whether or not to leave.

14.6.5 Anticipatory breach and constructive dismissal

In certain circumstances it is enough that the employer has made it clear that it intends to commit a material breach of contract to entitle an employee to resign and claim constructive dismissal. If, for example, an employee is entitled to 3 months' full pay in the event of ill health absence and the employer writes to the employee after 6 weeks stating that, at the end of a second month, full pay would no longer be paid, the employee would be entitled to resign immediately without actually waiting for the non payment of full pay to occur. This is referred to as an anticipatory breach of contract. For such a breach to take place the employer must have made it completely unequivocal that it intends to breach the contract.

14.6.6 Potentially fair reason for dismissal – defence to a constructive dismissal claim

In certain circumstances an employer may be faced with a constructive dismissal claim when the employee, but for their resignation, would have been subject to dismissal in any event. For example, an employee may resign prior to a disciplinary hearing where the employer has reasonable grounds to dismiss the employee. With such a potentially fair reason for dismissal an employer will have a defence to a claim in the event a constructive dismissal is found to have taken place (see 12.4 The reason for dismissal - fair or unfair?). Specific advice should be sought from Scottish Engineering if a potential constructive dismissal situation arises.

14.7 Frustration

14.7.1 An employment contract may come to an end because it is 'frustrated'. A contract is frustrated when an event occurs that renders the performance of the contract by either party impossible. The event that occurs is usually not the fault of either party and is not reasonably foreseeable at the time the contract began. A contract of employment can also be frustrated if the event that has occurred renders the performance of the contract radically different from that which the parties had originally contemplated.

14.7.2 Frustration through long-term sickness

14.7.2.1 In limited circumstances, an employer may be able to treat a contract of employment as frustrated if an employee is ill for a very long period of time. The illness may have rendered the performance of the contract impossible. An employer should take care before treating a contract of employment as frustrated by reason of ill-health and seek further advice before doing so.

14.7.2.2 It is safer from a legal standpoint to address such a long-term absence by way of a capability dismissal as opposed to relying on frustration of contract. The test of frustration is difficult to satisfy and if it is clear through medical evidence and consultation that an employee is or is in all probability permanently unfit to carry out his or her duties then it is best for the employer to dismiss by reason of the employee's lack of capability. For a detailed analysis of dismissal for long-term sickness absence, see 4.7 Dismissal.

14.7.3 Frustration through imprisonment

A contract of employment may be frustrated when an employee is imprisoned depending on the length of sentence. A prison sentence of a couple of months is unlikely to frustrate a contract of employment. On the other hand a custodial sentence of 3 years or more may well satisfy the test of frustration.

14.7.4 The effect of frustration

If a contract of employment is frustrated, there is no dismissal and employees are not entitled to claim unfair dismissal. It is for that reason that a tribunal will scrutinise the facts and circumstances of a situation very carefully and will be slow to conclude that frustration has occurred. Tribunals will be careful to ensure that employees have not been unjustifiably deprived of their employment rights.

14.8 Resignation

14.8.1 An employee resigns where he or she brings the employment relationship to an end with or without notice. Employees are obliged to give a statutory minimum period of notice of one week however written contracts of employment almost without exception oblige employees to give a longer period of notice.

14.8.2 What notice should the employee give?

The main purpose of requiring the employee to give notice is to allow the employer time to take steps to replace that employee or reallocate that employee's work. With senior employees or employees who are vital to the running of the business it is sensible to have longer periods of notice. This gives the employer a longer period to offset the consequences of the employee's departure. It can also give the employer an opportunity to persuade the employee to stay. With less senior employees or employees who are not difficult to replace employers rarely require more than one month's notice from the employee.

14.8.3 Employer's remedy for employee's failure to give notice

What can an employer do if an employee leaves without giving the required contractual notice or less than the required contractual notice? The employee has committed a breach of contract and the employer has the right to raise a claim for damages. The difficulty is that the employer will have to demonstrate that it has incurred financial loss as a result of the employee's breach of contract. In practice for non-senior employees this can be difficult to do. If, for example, an employee's departure without notice has caused his or her colleagues to work harder without additional remuneration then it is arguable that the employer has not sustained any financial loss at all. If on the other hand the employer has had to employ a temp at short notice and has incurred additional costs then those would be losses which could be pursued against the employee.

14.8.4 Heat of the moment resignations

An employer should always consider the circumstances when deciding whether to accept an employee's resignation and/or whether a resignation can be withdrawn. If an employee appears to resign in the heat of the moment, for example, during a heated discussion or argument with a supervisor, the employer should act reasonably and take into consideration the facts and circumstances surrounding the resignation, before concluding whether or not the employee genuinely intended to resign. For example, it is not uncommon during such a heated argument for an employee to say words to the effect that 'that's it I have had enough of this place, I'm off' and then leave the workplace during the working day. The employee has not used unequivocal terms that indicate very clearly that it is his or her intention to resign. If that employee comes back the following day, apologises for his or her behaviour and confirms that it is not his or her intention to resign then an employer has to consider very carefully the facts and circumstances. To refuse to take the employee back is to run the risk of effecting an unfair dismissal.

If on the other hand unequivocal words of resignation are used by the employee calmly and there are no circumstances which would cause the employer to question the employee's intent, it may be that the employer is justified in accepting the employee's words as a resignation.

If the words used by the employee when giving notice are ambiguous, then the question will be how the words would have been interpreted by a 'reasonable listener', taking into account what was known about the circumstances. Only if an employee gives notice in the form of an unambiguous statement that they mean to leave their employment will the employer be entitled to rely on it.

It should be clear that this is a very contentious area and each case will very much depend on its own particular facts and circumstances. If an employer is in any doubt as to whether or not an employee has genuinely resigned, advice should be taken.

14.9 Other forms of termination

14.9.1 Retirement

The default retirement age of 65 introduced by the Employment Equality (Age) Regulations 2006 has been abolished and there is no longer any such thing as a default retirement age. Employers should generally not operate any default retirement age as doing so is fraught with risk. In extreme cases whereby an employer wishes to maintain a normal retirement age, it will need to be possible to objectively justify why this is required and it will rarely be considered reasonable to take such a blanket approach.

Jobs which require a certain level of physical fitness or robustness or which involve a high degree of physical activity may lend themselves more to the imposition of a default retirement age. However, any employer who continues to retire employees at 65 on the broad general assumption that at that age employees are beginning to slow down and become less productive is likely to be found liable for age discrimination.

Employees of course may well wish to stop working at 65 and they may still refer to stopping work at that age as retirement. In reality the employee at 65 is simply tendering his or her resignation and employers should ensure that employees who are thinking of stopping work at a particular age are aware that they are required to give contractual notice as with any other resignation.

14.9.2 Expiry of a fixed term contract

A termination can come about because of the expiry of a fixed term contract. Rules relating to fixed term contracts are analysed in greater depth in 2.7 Fixed term contracts. The expiry of a fixed term contract is regarded as a dismissal for the purposes of unfair dismissal law. An employee who has been engaged on a fixed term contract (or an unbroken series of fixed term contracts) for the requisite qualifying period (see paragraph 12.1.1) will have the right to claim unfair dismissal as a result of the expiry and non renewal of his or her fixed term contract. If you are in any doubt as to the applicable period of continuous service required for an employee to claim unfair dismissal, you must seek advice from Scottish Engineering. Accordingly, if it appears to an employer in advance of the expiry of a fixed term contract that it will not be renewed, the employer must be clear about the reason for non renewal and should meet with the employee in advance of the expiry of the contract to consult with the employee regarding why it is proposed not to renew the fixed term contract.

In many cases it will be entirely obvious to both parties (a) that the contract will not be renewed at expiry and (b) the reason for that non renewal. An employee may be engaged on a temporary basis to cover maternity leave or may have been engaged to carry out a specific project which is coming to an end. It is best practice, even when an employee has been employed for less than the requisite qualifying period, to meet with an employee prior to the termination of employment in order to (i) confirm the reason for termination and (ii) whether there are any alternatives to dismissal.

If an employer would have renewed a fixed term contract but for problems with the employee's performance or conduct then failure to renew that contract may be regarded as a dismissal by reason of performance or misconduct. This area is far from straight forward and accordingly if an employer has any doubts about how to proceed in relation to the expiry or non-renewal of a fixed term contract, advice should be taken. For further information on dismissing employees fairly, see 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair.

14.9.3 Early termination of fixed term contracts

It is advisable for an employer to include an express term in a fixed term contract that allows it to terminate the contract before the end of the fixed term by provision of notice. If there is no such notice provision in the contract and the employer wishes to terminate the contract prior to its expiry for a reason that is not gross misconduct, then the early termination will be a breach of contract. The employee will be able to raise a claim for his or her net remuneration for the unexpired period of the fixed term. If those circumstances arose half way through a 2 year fixed term contract then the employer could be facing a claim for 1 year's net remuneration subject to the employee's duty to find other work to offset those earnings against the loss. It is clear therefore when putting in place fixed term contracts employers should take great care to set out very clearly the provisions in relation to early termination by notice.

14.9.4 Gross misconduct and fixed term contracts

If an employee is guilty of an act of gross misconduct or commits a material breach of contract the employer is entitled to terminate the contract without any compensation payment. In doing so the employer will be effecting a dismissal and accordingly it should follow the rules and procedures in relation to dismissal set out in 11.0 Disciplinary and grievance and 12.0 Dismissal - fair or unfair. Fixed term contracts do not provide employees with any greater protection against dismissal than employees who are engaged on normal contracts of indefinite duration. The fact that the contract is for a fixed term does not mean that an employer must overlook acts of gross misconduct.

14.9.5 Fixed Term Contracts - Apprentices

14.9.5.1 Some employers may employ apprentices to work alongside experienced staff to gain job specific skills and experience. It is usual for a contract of apprenticeship to state that it will end after a certain period of time or once a specific qualification or standard has been achieved by the employee. In that way, it is very similar to a fixed term contract but the rights of an apprentice differ in a number of respects.

14.9.5.2 An employer is bound by the terms of an apprenticeship in the same way as any other contract and can only terminate such a contract early in certain circumstances eg if an apprentice has stolen from the employer (gross misconduct). However, if an employer terminates the contract before expiry in circumstances where it is not entitled to, the apprentice may be entitled to seek the following damages:

- for loss of earnings (ie the balance of what they would have earned if he or she had continued to be engaged under the apprenticeship contract);
- for loss of training for the balance of the term of the contract;
- for loss of future prospects as a result of the inability to complete the training.

14.9.5.3 It is usual for modern apprenticeship agreements to have the status of contracts of employment and therefore, an employer should bear in mind that an apprentice will accrue the same rights as employees. Therefore, after the requisite qualifying period (see paragraph 12.1.1), the apprentice will accrue the right not to be unfairly dismissed. If you are in any doubt as to the applicable period of qualifying service required for an employee to claim unfair dismissal, you must seek advice from Scottish Engineering. If he or she has been employed for 2 years, they may be entitled to statutory redundancy pay if they are made redundant.

14.9.5.4 The Government is planning to introduce legislation to protect the use of the term "apprenticeship" and to create an offence where a course or training is offered which is not a statutory apprenticeship. N.B This. provision relates to England only.

14.9.5.5 Apprenticeship Levy

An apprenticeship levy on employers came into force from 6 April 2017 set at a rate of 0.5% of an employer's pay bill, where the employer has a pay bill in excess of £3m. Each employer will receive an allowance of £15,000 to offset against their levy payment. The levy is due regardless of whether the employer has apprentices or not.

14.10 Miscellaneous post-termination issues

14.10.1 References

An employer is not obliged to provide a reference for an employee but, if a reference is provided, the employer must ensure that it is true, accurate and fair. If a reference is deliberately or negligently misleading, untrue or inaccurate, the employer may be liable for any financial loss that may be incurred by the party relying on the reference, or the employee.

14.10.2 Reference protocol

It is common practice for employers to only provide basic information in a reference i.e. the name of the former employee, the job title, salary, date of termination of employment and brief outline of the job role. It is sensible for employers to have in place a clear policy or protocol on the provision of references to former employees. Such a policy should clearly set out the grades of employees who are permitted to give a reference on behalf of the employer. The policy should also set out whether or not references may include qualitative performance or character statements. It is sensible for employers to exert centralised control over the provision of references. Accordingly even employees who are permitted to provide references should be obliged to show a copy of that reference to a designated person prior to the reference being released. Often employees who have been dismissed for misconduct or poor performance will try to obtain a positive reference on company headed notepaper from a friend or colleague who still works for the organisation. It is important in avoiding possible liability to the recipients of such references that the giving of unauthorised references is strictly controlled.

14.10.3 References and discrimination

It is unlawful for an employer to refuse to provide a reference or to provide a bad or untrue reference for a reason related to a protected characteristic such as race, disability, gender, age or sexual orientation. Employers are also prohibited from refusing to provide references because an employee has raised some form of discrimination claim or grievance. Former employees have the right to raise discrimination claims in the event that their former employer has refused to give a reference or given an inaccurate or untrue reference for a reason related to the protected characteristic.

14.10.4 Written statement of reasons for dismissal

A dismissed employee who has 2 years' service or more has the right to receive a written statement of reasons for dismissal on request. If an employee is dismissed whilst pregnant or on ordinary or additional maternity leave the requisite qualifying period does not apply and no request need be made. The effective date of termination is defined under the Employment Rights Act 1996 as either the date on which notice of dismissal expires where the dismissal is with notice, or the date the termination takes effect where notice is not given. For further guidance on the effective date of termination of employment see 12.2 Effective Date of Termination. A written statement of reasons for dismissal must be provided within 14 days of receipt of the request. If an employer fails to respond to a request, the employee is entitled to raise a tribunal claim. If the claim succeeds the tribunal may make a declaration of the reason for dismissal and can make an award of up to 2 weeks' pay which is not subject to the statutory cap.

14.10.5 Restrictive covenants

Restrictive covenants are contractual terms which prohibit employees from engaging in certain competitive activities for a specified period after the termination of employment. Although these provisions are usually contained within the contract of employment itself they continue to apply notwithstanding the fact that the contract has come to an end. Generally speaking restrictive covenants are regarded as a restraint of trade and so courts will not enforce covenants which appear to seek greater protection than is reasonably required in the circumstances. The general rule is that employers should draft restrictive covenants no wider than is necessary to protect their legitimate business interests.

Following a 2020 consultation by the Department for Business, Energy & Industrial Strategy (BEIS), in May 2023 the Government announced an intention to restrict the duration of post termination restrictions to 3 months, however there has been no progress on this, with changes to be implemented only when 'parliamentary time allows'.

14.10.6 Drafting restrictive covenants

It is unwise for employers to insert one standard set of restrictive covenants into the contracts of employment of all employees. What is appropriate for a director may not be appropriate or reasonable for a manager lower down the hierarchy. A prudent employer will assess which employees could potentially pose a competitive threat when they leave. The particular risks or threats posed should be clearly identified and clear and precise covenants should then be drafted to protect the employer from those competitive risks.

14.10.7 Restricted activities

Restrictive covenants typically fall into 4 separate categories as follows:

- prohibition against disclosure of confidential information;
- prohibition of soliciting business from customers;
- prohibition on enticing away former colleagues; and
- prohibition on working for competitors.

Employers should be very careful not to seek a longer period of restriction post termination than is necessary. Unless there are very special circumstances it is unlikely that a court will enforce a covenant that has a restricted period of longer than 12 months. It is also important for employers not to seek to prohibit a former employee from working in its particular industry in too wide a geographical area. If a restriction on working for competitors or in the same industry applies to a wide geographical area then the employee may be able to argue that the covenant prevents him or her from earning a living which in turn might persuade the court not to enforce the covenant.

14.10.8 Enforcing restrictive covenants

Covenants can be enforced by way of interdict and damages. If an employer discovers that an employee is soliciting business from its customers in breach of a non-solicitation clause the employer can seek a court order prohibiting the former employee from continuing to engage in such activities. If the employer can demonstrate that it has lost orders or revenue as a result of the breach of the non-solicitation clause then it can seek an award of damages also. Courts scrutinise restrictive covenants very carefully and for this reason it is essential that employers take advice at the point of drafting restrictive covenants and in the event that the employer wishes to obtain an interdict against a former employee.

14.10.9 Notice of termination and restrictive covenants

If the employer terminates a contract of employment of an employee without giving notice but instead makes a payment in lieu without the benefit of a contractual right to pay in lieu of notice then that is deemed to be a breach of contract. That employer will be unable to enforce restrictive covenants even if they are drafted narrowly and would otherwise be enforceable. The reason for this is that the employer's wrongful dismissal is regarded as a material breach of contract and that in turn frees the employee from any post termination contractual restrictions. It is essential therefore that employers reserve the contractual right to terminate employment by paying in lieu of notice in respect of employees whose contracts also contain restrictive covenants.

14.11 Settlement and COT3 agreements

14.11.1 Employers like to have comfort and certainty that departing employees will not raise court or tribunal claims. There are only two methods of ensuring that no post termination claims are raised. If an employer enters into a Settlement or COT3 Agreement with a departing employee then that acts as an absolute bar to the employee raising claims. It does not however prevent an employee from pursuing a claim in respect of personal injury where the condition was not apparent at the date of the termination or any potential claim in relation to accrued pension rights. Advice should be sought where TUPE is a material factor in the termination. It is standard practice for employees to seek an ex gratia or compensatory payment in return for signing a Settlement or COT3 Agreement. Any form of written undertaking from an employee regarding refraining from raising claims that is not either a Settlement or COT3 Agreement does not act as a barrier to subsequent claims being raised. Accordingly, if after discussion an employee agrees to include a brief paragraph in his or her resignation letter agreeing not to raise any form of claim that will not stop the employee subsequently bringing some form of claim.

14.11.2 Protected conversations

Section 111A of the Employment Rights Act was introduced on 29 July 2013. From that date, it became possible for employers to hold confidential, "without prejudice" conversations with employees with whom they did not have existing disputes, with a view to agreeing a mutual termination of their employment. Protected conversations are used by employers in situations where there is a proposal to enter into a settlement agreement.

Importantly, the protected status only applies to preventing disclosure of the circumstances and discussion surrounding settlement negotiations where an employee later brings an unfair dismissal claim. The protection is not afforded where there are claims for discrimination, for example. In addition, the employer must not engage in improper conduct during the protected conversation period. Although not defined, improper conduct may be placing undue pressure on an employee to sign, or any acts harassment or discrimination for example.

Employers should review the ACAS Code of Practice on Settlement Agreements prior to engaging in any protected conversations, and seek legal advice as may be necessary. The Code of Practice can be found at www.acas.org.uk.

A case in 2022 highlighted the importance of taking care when issuing purported "without prejudice" correspondence to ensure that the contents will in fact be protected if a dispute ultimately leads to a claim being raised. An employment tribunal held that a letter was not covered by the "without prejudice" rule as a result of a number of exaggerated allegations included within it. The decision was appealed by the employer and was upheld, however the employment appeal tribunal noted that the employer had 'sailed close to the wind' and was close to having lost the protection.

This case serves as a reminder to employers that simply using the words 'without prejudice' in correspondence will not automatically prevent the correspondence from being used in the future. There are rules and limits to the application of the rule. For example, the protection will only exist where there is a genuine existing dispute to settle and the rule will not apply where it is acting as a cloak for perjury, blackmail or impropriety.

14.11.3 Settlement Agreement conditions

In order for a Settlement Agreement to be legally binding, it must comply with the following:

- it must be in writing;
- it must relate to a particular dispute or claim;
- the employee must have received advice from a relevant independent advisor, usually a lawyer or suitably certified trade union representative;
- the relevant independent advisor must be covered by professional indemnity insurance in respect of the advice given;
- the relevant independent advisor must be identified in the agreement; and
- the agreement must state that the above conditions are satisfied.

If any one of these conditions is not met then the Settlement Agreement is unenforceable and it is therefore advisable for employers to seek legal advice when drafting and negotiating the terms of a Settlement Agreement as it will need to be tailored to the specific circumstances relating to the settlement that has been negotiated.

14.11.4 COT3 Agreement

A COT3 Agreement is a settlement agreement negotiated with the assistance of an ACAS conciliator. It is a bar to employees raising employment claims against employers. If an employer wishes to record its settlement arrangements with an employee in the form of a COT3 agreement then it should contact ACAS at an early stage of negotiations. A COT3 Agreement can be entered into either before or after an employee brings an Employment Tribunal Claim and in certain circumstances where a claim or potential claim has been intimated to the employer suggesting or intimating that Tribunal proceedings are likely to be raised by that employee.

Employers should be aware that from 6 April 2016 a penalty notice can be issued in circumstances where there is failure to pay a sum due under a COT3. The financial penalty is 50% of the amount of the settlement sum which remains unpaid on the date specified in the warning notice, subject to a minimum penalty of £100 and a maximum of £5,000.

14.11.5 Settlement Agreements and tax

It is common for employers to insert post termination restrictive covenants into Settlement agreements, particularly where none have been incorporated into the contract of employment. HMRC's view is that the compensation or severance payment received by the employee will not only be in return for a waiver of claims but the acceptance of termination restrictions. If parties do not apportion a particular part of the severance payment to the giving of the restrictive covenant then the danger is that HMRC will itself decide on an appropriate sum which may be well in excess of what either party envisaged. A payment in return for the acceptance of restrictive covenants is regarded by HMRC as a taxable payment and therefore if parties are not careful to apportion a specific sum to the restricted covenants a part of the payment that might otherwise have been tax free will be assessed as taxable.

14.11.6 Settlement payment

Any settlement payment that is less than £30,000 and is not made under a term of the employee's contract of employment will normally be exempt from deductions of tax and National Insurance contributions. However, that may not be the case with regards to pay in lieu of notice with reference to HMRC's view on automatic PILONs – see 14.3.13 Calculating pay in lieu of notice. Employer National Insurance contributions will be payable on sums paid over the £30,000 allowance but no employee National Insurance contributions will be due. As there have been recent changes to the tax treatment of post termination payments, advice should be sought before the conclusion of any agreement with an employee.

Chapter 15

Whistleblowing

15.0 Whistleblowing

15.1 Introduction

Legislation to protect 'whistleblowers' was introduced in 1999 in the wake of a number of disasters (such as Piper Alpha and the Zeebrugge ferry) and financial scandals (such as the Barings Bank collapse). It emerged from the subsequent enquiries that employees had information which could have averted the disasters but did not raise their concerns for fear of being dismissed or victimised by their employers. In an attempt to encourage workers to raise such concerns the Government introduced legislation to protect workers who 'blow the whistle' on their employers within the Public Interest Disclosure Act 1998 ('PIDA'). PIDA protects workers who disclose information which relates to unlawful acts or failures to act, in specified manners.

The provisions are relatively complex and there is no limit to the amount of compensation that can be awarded. Awards are typically high with a number being in excess of £1 million. It is therefore strongly recommended that legal advice is obtained before employers take any action against workers who disclose information which may be caught by PIDA.

Interim relief is available for employees dismissed because a protected disclosure was made. See 16.5.3 Requests for orders for more information on interim relief.

15.2 Extent of protection

15.2.1 Workers - protection against detriment

Protection under PIDA is available not only to those who are employees but also to workers. Workers are protected from being subjected to any detriment as a result of making a protected disclosure i.e. 'whistleblowing' (see 15.3 What is a protected disclosure?). Whilst workers who are not classed as employees are unable to claim unfair dismissal, the termination of their contract for making a protected disclosure is also a detriment. It should be noted that PIDA extends the definition of 'worker' beyond the normal definition in the Working Time Regulations. See 15.2.3 Extended definition of worker for further information about the extended definition of workers.

15.2.2 Employees - protection against dismissal and other detriment

Employees are protected from being dismissed and subjected to other detrimental treatment as a result of making a protected disclosure. Such a dismissal is automatically unfair and employees are not required to have the required minimum period of continuous service (2 years') to bring a claim of unfair dismissal. If you are in any doubt as to the applicable qualifying period you should call Scottish Engineering. (See 12.3.3 Automatically unfair reasons for dismissal for further details).

15.2.3 Extended definition of worker

15.2.3.1 The definition of worker is extended for the purposes of the whistleblowing regulations only, and includes:

- employees;
- apprentices and trainees;
- home workers whether or not they contract to perform work personally;
- agency workers and personal service companies;
- any person who contracts to perform personally any work or services for another party (excluding a client or customer of any profession or business);
- secondees;
- certain categories of NHS practitioners; and
- police officers.

15.2.3.2 Unlike the Working Time Regulations (see 15.2 Extent of protection) the definition of worker for the purposes of PIDA explicitly includes home workers who do not contract to personally carry out the work. This is in response to the likelihood that such workers are not covered by the Working Time Regulations definition. All home workers, including those who, for example, are assisted by family members are covered by PIDA.

Extent of protection

15.3 What is a protected disclosure?

15.3.1 General

15.3.1.1 In order for a disclosure to be protected workers must:

- actually disclose information (a threat to disclose is not enough);
- make a 'qualifying disclosure' (see paragraph 15.3.2 for further information); and
- make the disclosure to an appropriate person (see 15.4 Who should disclosures be made to? for further information).

15.3.1.2 In order to be a qualifying disclosure, the worker reasonably believes that the disclosure is "in the public interest", which has been defined by case law as being a belief that other persons will be interested in the disclosure. If a worker makes a disclosure where his or her motivation is a personal grudge held against the employer such a disclosure may not be protected, even if the subject matter of the disclosure is true.

15.3.2 Qualifying disclosure

15.3.2.1 One of the requirements for workers to be afforded protection is that they make a "qualifying disclosure". In order to make a qualifying disclosure, workers must have a reasonable belief that the disclosure tends to show one or more of the following 'relevant failures':

- that a criminal offence has been, is being or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health and safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged; or
- that information tending to show any of the above failures has been, is being or is likely to be deliberately concealed.

The wrongdoing can be past, present, prospective or merely alleged. It may concern the conduct of the employer, an employee or some third party, either in the UK or elsewhere.

15.3.2.2 Note that reference to 'reasonable belief' does not mean that the information needs to be true nor does the worker have to prove it is true. What is important is that the worker subjectively believes it is true and viewed objectively, this was reasonable. For example, a worker may have a reasonable belief that his or her employer has committed a fraud and makes a disclosure to that effect. If it subsequently emerges that no fraud was in fact committed the worker will still be protected so long as the belief was reasonable.

15.3.2.3 In relation to relevant failures which have not yet taken place, it is not enough for a worker to have a reasonable belief that a failure might occur. The worker must believe that a relevant failure is likely to occur. So, for example, a worker who thinks there is a possibility that his or her employer will evade tax is unlikely to be protected if a disclosure is made. The worker must believe that it is likely to happen and have reasonable grounds for this belief.

15.3.2.4 Disclosures do not have to be about employers. For example, a worker who makes a disclosure about a crime which has been committed by a client of the employer will be protected.

15.3.2.5 Disclosures may refer to alleged failures which take place outside of the United Kingdom. Equally the law governing such failures may be that of another country. Disclosures in these circumstances will be afforded the same protection as those relating to failures taking place in or territory being governed by UK law. So, for example, a worker in the UK who discloses information relating to a criminal offence committed in Spain would still be protected provided the rest of the conditions in PIDA are satisfied. There must be sufficient connection to the UK in order for PIDA to apply.

15.3.2.6 A disclosure still qualifies for protection where the person to whom the disclosure is made is already aware of that information. So, for example, a worker will be protected if he informs his employer that a serious breach of health and safety regulations has occurred even if the employer is already aware of the breach.

What is a protected disclosure?

15.3.3 Non-qualifying disclosure

15.3.3.1 Workers who commit an offence by making a disclosure are not protected under the Regulations. So, for example, a worker who makes a disclosure in breach of the Official Secrets Act will not have made a qualifying disclosure and will not therefore be protected from dismissal or detriment.

15.3.3.2 Workers are only protected from dismissal or detriment as a result of an actual disclosure. Where workers are dismissed or suffer a detriment as a result of actions other than the disclosure itself, they will not be protected. So, for example, a worker who breaks into his or her employer's office will not be protected if dismissed for the unlawful entry. It will not matter if the actions were an attempt to uncover evidence of wrongdoing. Nor will it matter if such evidence was uncovered.

Where a worker is dismissed on conduct grounds, it will not matter that the conduct closely related to a whistleblowing disclosure when assessing fairness. In a recent case an employee was dismissed because of her behaviour, manner and approach, in raising concerns relating to a matter which constituted a whistleblowing disclosure. The dismissal was not automatically unfair under the whistleblowing provisions because it related to the workers conduct (her behaviour, manner and approach) and not the disclosure itself.

It should be noted that different tests apply in relation to dismissal and detriment. When dealing with dismissal the question for an employment tribunal to determine is whether the employee's disclosure was the sole or principal reason for dismissal. The question for an employment tribunal in cases of detriment is whether the employee's disclosure materially influenced the detrimental treatment of the employee.

This is an important but not always obvious distinction. It is therefore easier for an employee to succeed in a whistleblowing claim which is based on detriment than one based on dismissal.

15.3.3.3 Where a legal adviser discloses confidential information received in the course of providing legal advice to a client, the solicitor is not protected. The information provided to the solicitor is 'privileged'. An example of this would be where a client, in the course of obtaining legal advice, informs his or her solicitor of a fraud committed by the employer. If the solicitor subsequently informs the police and, as a result the solicitor is dismissed, then there would be no protection under the regulations. The client employee is, however, protected. See 15.4.4 Disclosure to a legal advisor for further information.

What is a protected disclosure?

15.4 Who should disclosures be made to?

15.4.1 General

PIDA is designed to encourage workers to make disclosures to their employers in the first instance. Only where this is not appropriate should workers make a disclosure to anyone else. This is to ensure that matters are initially raised with employers and external parties are not involved without good reason.

15.4.2 Disclosure to employer or other responsible person

15.4.2.1 Workers can make disclosures which they reasonably believe to be in the public interest to:

a. their employer; or
b. another person, where workers reasonably believe that the relevant failure relates solely or mainly to (1) the conduct of that person, or (2) any other matter for which that person has legal responsibility.

15.4.2.2 In certain circumstances disclosures are deemed to be made to employers. Where employers have a whistleblowing procedure authorising workers to make a disclosure to another person, a disclosure in line with the procedure will be treated as if it is made to the employer. So, for example, a health and safety representative who makes a disclosure to the Health and Safety Executive in compliance with the employer's health and safety policy will be treated as making the disclosure to the employer.

15.4.3 Disclosure to a prescribed person

15.4.3.1 PIDA contains a list of prescribed persons to whom disclosures may be made. Disclosures made to an appropriate public authority on the list of prescribed persons will be protected where workers reasonably believe that the relevant failure falls within the remit of that person and that the information disclosed, and any allegation contained in it, are substantially true.

15.4.3.2 There are over 60 Regulators on the list of prescribed persons. These include the Health and Safety Executive, HM Revenue & Customs and the Scottish Environment Protection Agency. A full list of prescribed persons can be found at: www.gov.uk/whistleblowing/overview

15.4.4 Disclosure to a legal advisor

Disclosures are protected when they are made in the course of obtaining legal advice. The purpose of this is to allow workers to be able to discuss matters freely with their solicitor. This was the only category of disclosure where there was no requirement for workers to be acting in good faith for disclosures made before 25 June 2013. Note that the disclosure must be made in the course of obtaining legal advice. A worker who discloses information to a solicitor, for example at a social event, will not be making a protected disclosure and could therefore be disciplined as a result. It should be noted that a solicitor who discloses information obtained in the course of providing legal advice ('privileged' information) is not protected. See paragraph 15.3.3.3 above for further information.

15.4.5 Disclosure by public employees

Workers of Government agencies who make disclosures to UK or Scottish Government ministers will be protected if the other requirements are met.

15.4.6 Other disclosures

15.4.6.1 In certain circumstances, workers will be protected where disclosures are made to persons other than those referred to above. Two different sets of rules govern such disclosures depending on whether the relevant failures are classed as 'general' or 'extremely serious'. PIDA does not stipulate to whom disclosures may be made in these circumstances; however, the identity of the person to whom the disclosure is made is taken into account in determining whether it was reasonable to make such a disclosure.

15.4.6.2 Examples of other persons to whom such disclosures may be made might include a professional body such as The Law Society of Scotland or a Member of Parliament or the Scottish Parliament.

Who should disclosures be made to?

15.4.6.3 In exceptional cases a disclosure to the media may be deemed reasonable; however, where a reasonable alternative exists, a disclosure to the media will be unlikely to receive protection unless there is an exceptionally high level of public interest in the disclosure being made public.

15.4.7 General failures

15.4.7.1 In a number of situations workers are permitted to make disclosures concerning general failures to persons other than those referred to above. In order to be protected when making such a disclosure workers must:

a. have a reasonable belief that they will be subjected to a detriment by their employer if a disclosure is made to their employer or to a prescribed person (see paragraph 15.4.3 for further information about prescribed persons); or
b. have a reasonable belief that it is likely that evidence relating to a relevant failure will be concealed or destroyed if they make a disclosure to their employer and that no prescribed person has responsibility for such a relevant failure; or
c. have previously made a disclosure of substantially the same information to their employer or a prescribed person.

15.4.7.2 In addition to the above requirements, it must be reasonable, in all the circumstances of the case, for a disclosure to be made and the worker must:

a. make the disclosure in the public interest; and
b. reasonably believe that the information disclosed, and any allegation contained in it, are substantially true; and
c. not make the disclosure for the purposes of personal gain.

15.4.7.3 Whilst workers are not protected where disclosures are made for the purposes of personal gain, this does not mean that they cannot actually gain from disclosures. So long as their purpose in making the disclosure was not solely personal gain then it is unlikely to matter if they do in fact make a gain. It has been held that a disclosure concerning an employer's falsification of figures of a commission scheme was made in the public interest as the employee believed it affected other employees' interests. In practice workers who make disclosures, for example, by selling their story to newspapers may find it difficult to convince an Employment Tribunal that their motivation was not financial gain, should they do so before their claims are decided upon. It is presently unclear if workers are protected where their purpose in making a disclosure is both to ensure justice is done and to personally gain from it.

15.4.7.4 PIDA specifically provides that any reward for information which is available under legislation is not to be taken into account in determining whether a disclosure is made for personal gain. So, for example, workers who receive a reward from HM Revenue and Customs (HMRC) for providing them with information about illegal activity will not be deemed to have done so for personal gain. This is the case even if the reward is their motivation for making the disclosure to HMRC.

15.4.7.5 In determining whether it was reasonable in all the circumstances for workers to make a disclosure to other persons the following factors are taken into account:

a. the identity of the person to whom the disclosure is made;
b. the seriousness of the relevant failure;
c. whether the relevant failure is continuing or is likely to occur in the future;
d. whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person;
e. where workers have previously made a disclosure of substantially the same information:

    1. to their employer or a 'prescribed person' i.e. a body listed in accordance with PIDA: any action which the employer or prescribed person has taken or might reasonably be expected to have taken as a result of the previous disclosure; or
    2. to their employer: whether the worker complied with any of the employer's whistleblowing procedures.

15.4.7.6 In relation to (e), a subsequent disclosure of information relating to any act or failure to act by employers or prescribed persons as a result of the previous disclosure may be regarded as a disclosure of substantially the same information. An example of this would be a worker who discloses a serious breach of health and safety regulations to the Health and Safety Executive (HSE). Where the HSE takes no action and the worker informs a member of the Government of their failure to act this will count as a disclosure of substantially the same information.

15.4.8 Exceptionally serious failures

15.4.8.1 Where disclosures relate to exceptionally serious failures, less stringent rules apply. In these circumstances workers are protected if it is reasonable in all the circumstances to make the disclosure and all of the following conditions are satisfied:

a. the disclosure is made in the public interest; and
b. the worker reasonably believes that the information disclosed, and any allegation contained in it, is substantially true; and
c. he or she does not make the disclosure for purposes of personal gain; and
d. the relevant failure is of an exceptionally serious nature; and
e. in all of the circumstances, it is reasonable for him or her to have made the disclosure.

15.4.8.2 In determining whether the disclosure was reasonable in all the circumstances, in these cases, tribunals must have specific regard to the identity of the person to whom the disclosure was made. An example is a worker who discloses information to the media relating to an exceptionally serious fraud committed by his or her employer. The worker will only be protected if disclosure to the media is reasonable in all the circumstances. If it is decided that it was unreasonable to disclose the information to the media, as it should have been made to the police, the worker is not protected.

It should be noted that, apart from this specific requirement, a tribunal has complete discretion to consider any other circumstances which may be relevant to assessing whether or not it was 'reasonable' for the disclosure to have been made.

15.5 Confidentiality agreements

It is not possible for employees and workers to contract out of the provisions in PIDA. Any agreement which seeks to prevent workers from making a protected disclosure is therefore unenforceable. This includes confidentiality clauses in a worker's contract and settlement agreements (which were known as compromise agreements until recently).

If an employee raises a claim in respect of any alleged detriment or unfair dismissal in breach of PIDA it is important to note that no settlement agreement can be used to preclude the employee from restating the disclosure in respect of which their alleged detriment or unfair dismissal was made.

15.6 Disclosures and employment tribunal cases

15.6.1 Employment Tribunals are entitled to pass information about whistleblowing to the relevant Regulator. The consent of the employee must be obtained.

15.6.2 The rules only relate to claims which involve an alleged breach of PIDA, i.e. that the claimant was dismissed or suffered a detriment as a result of making a protected disclosure. If the claimant ticks the consent box on the ET1 (the Employment Tribunal claim form) the tribunal has the discretion to send a copy of the ET1 form, or extract from it, directly to the relevant Regulator. The relevant Regulator will be identified by the tribunal and will be one of the 'prescribed persons' referred to in 15.4.3 Disclosure to a prescribed person.

15.6.3 The tribunal will write to both the parties to inform them whether it made such a referral and, if so, to which Regulator.

15.6.4 If the Claimant prefers, for example for reasons of confidentiality, not to give consent he or she may choose to approach the Regulator directly.

15.7 Remedies

15.7.1 Complaint to an Employment Tribunal

15.7.1.1 Workers who suffer a detriment as a result of making a protected disclosure are entitled to make a complaint to an Employment Tribunal. Where employees suffer a detriment and are subsequently dismissed a complaint may be made in respect of both acts. When a protected disclosure has been made, co-workers and agents of the employer can incur personal liability if they subject the whistleblower to detriment on the ground that they made a protected disclosure. The employer can also be found to be vicariously liable in relation to such claims.

15.7.1.2 Employees are not required to have the minimum continuous service normally required to make a complaint of unfair dismissal. See 16.2 Early conciliation for more information on the minimum qualifying period required for unfair dismissal complaints. The complaint must be lodged within 3 months of the date of dismissal or detriment complained of. Having wages 'docked' for example, is an act of 'detriment' separate and distinct from dismissal. Where a detriment consists of a series of acts or failures to act the complaint must be lodged within 3 months of the last act or failure. In exceptional cases, a complaint may be accepted late where it was not reasonably practicable for it to be made within the 3 month timescale. Importantly the 3 months does not start from the date that the employee becomes aware of the detriment. See 16.2.2 What is early conciliation for further information on time limits for raising unfair dismissal claims.

15.7.1.3 The onus rests with employers to show that the reason for dismissal or detriment is not due to a protected disclosure being made. This may be because the treatment of the worker/employee was for other reasons entirely, notwithstanding a protected disclosure having been made, or because any alleged disclosure is not 'protected'. If the tribunal finds that the reason for dismissal or detriment is not due to a protected disclosure then a complaint under the PIDA will be unsuccessful. If the dismissal is found not to be by reason of a protected disclosure having been made, it may still be found to be unfair according to the principles applicable to a claim of 'ordinary' unfair dismissal (subject to the employee having the required qualifying period of service needed for an ordinary unfair dismissal claim).

15.7.2 Award of compensation

Where a complaint succeeds, a tribunal may award an amount of compensation which it considers just and equitable in all the circumstances. As previously mentioned there is no limit to the amount of awards and compensation levels are typically high. In deciding on the level of compensation to award a tribunal will have regard to the nature of the infringement and any loss suffered.

Compensation in respect of a detriment is awarded for loss suffered but also includes an award for injury to feelings. Compensation in respect of unfair dismissal is restricted to financial loss suffered as a result of the dismissal and does not include loss for injury to feelings. In either case, a complaint brought under PIDA, being unlimited, can involve awards greater than awards for unfair dismissal in typical circumstances and therefore represent greater financial risk.

15.7.3 Interim relief

Employees who make a complaint of unfair dismissal related to the making of a disclosure may also apply to a tribunal for interim relief. This must be made within 7 days of termination of employment. See 16.5.3 Requests for orders for more information on interim relief.

Chapter 16

Employment tribunals

16.0 Employment tribunals

16.1 Introduction

16.1.1 Overview

16.1.1.1 Employment Tribunals (or Industrial Tribunals as they used to be known) are independent judicial bodies that determine disputes between employers and employees over employment rights. These employment rights are generally created through legislation and can be enforced by bringing the claim to an Employment Tribunal.

16.1.1.2 The Employment Tribunals service has a website which contains rules of procedure and other useful information. This website can be accessed at www.justice.gov.uk/ courts-tribunals/employment-tribunal.

16.1.1.3 The vast majority of employment claims are raised in the Employment Tribunal, although breach of employment contract claims can be pursued in court. If Employment Tribunal judgments are appealed, these appeals can sometimes reach the upper courts. Nevertheless, the vast majority of claims begin and end in the Employment Tribunal. Employment Tribunals were set up so that employers and employees could represent themselves rather than engaging lawyers. Although parties are still allowed today to represent themselves, this is less common than it once was. Employment law has become infinitely more complicated as have the rules of procedure. If an employer is served with an Employment Tribunal claim it is prudent to seek legal advice at the earliest opportunity.

16.1.1.4 Employment Tribunals are less formal than courts. A Tribunal Judge will ordinarily hear cases sitting alone, however in complicated discrimination/whistleblowing claims a Tribunal may consist of a legally qualified Employment Judge and a member from each side of the employment relationship (the 'lay members'). One member will have an employer background and the other an employee background.

16.1.2 Overriding objective

16.1.3 Employment Tribunals have an overriding objective to deal with all cases fairly and justly which means that they must ensure, so far as practicable that:

- the parties are on an equal footing;
- expense is minimised;
- formality is avoided and flexibility is sought
- the complexity of cases will be reflected in the way they are handled; and
- delay is avoided.

16.1.4 Tribunals must seek to give effect to the overriding objective when managing cases and exercising any power given to it, or when interpreting its rules of procedure. The Tribunal must also encourage the use of ACAS, mediation or other alternative means of resolving the dispute by agreement.

16.2 Early conciliation

16.2.1 The Early Conciliation requirement

16.2.1.1 In order to raise a claim at the Employment Tribunal, any prospective claimant must first go through a process of Early Conciliation with ACAS and obtain a reference number to confirm that they have done so.

16.2.2 What is early conciliation

The four step procedure is as follows:

16.2.2.1 **Step 1**
Before lodging a claim, a prospective Claimant (Employee) must send ACAS an early conciliation form with the parties' names, addresses and contact numbers. ACAS will then try to contact the Claimant to obtain further information in relation to the claim.

Step 2
ACAS must then send a copy of the information to a conciliation officer.

Step 3
The officer must try to promote a settlement within a 'prescribed period' of 6 weeks.

Step 4
If a settlement is not reached, because settlement is not possible in the conciliation officer's view or the prescribed period expires, the officer must issue a certificate to that effect. If at step 1, ACAS was unable to contact the Claimant, a certificate will also be issued. A Claimant may not submit a claim without this certificate.

16.2.2.2 ACAS will continue to be involved in settlement discussions going forward, if necessary.

16.2.3 Changes to time limits

16.2.3.1 Amendments will be made to allow limitation periods to be extended to allow for conciliation. Contacting ACAS for early conciliation will "stop the clock" on the Tribunal time limit. The period which is ignored is the period starting the day after the Claimant contacts ACAS and ending with the day they receive a certificate from ACAS marking the end of the early conciliation process. The clock starts again on the following day.

16.2.3.2 Where the Claimant contacts ACAS with less than one month of the time limit still to go, they will nevertheless have a whole month from the day they receive (or are deemed to have received) the certificate from ACAS, in which to bring the claim. For more information on Early Conciliation and the process involved, visit ACAS' website, www.ACAS.org.uk.

16.2.4 Financial penalties

16.2.4.1 An Employment Tribunal has the power to impose a financial penalty on any employer who loses at Tribunal. The penalty is payable to the Secretary of State.

16.2.4.2 It has been suggested that genuine mistakes by an employer will not be penalised; however, a losing employer may be ordered to pay a financial penalty where the employer's breach has "one or more aggravating features" and even if a financial award has not been made.

16.2.4.3 In the government's guidance document titled "Employment Tribunal Powers", it was suggested that Tribunals would impose penalties where "the employer had deliberately breached the law or were motivated by malice in behaving as the did". The guidance also suggested that relevant factors could include the circumstances of the case, the size of the employer, the duration of the breach of the employment right and the employee and employer's behaviour.

16.2.4.4 The minimum penalty is £100 and the maximum is £5,000 for breaches before 6 April 2019 or £20,000 for breaches on or after that date. If a financial award has been made, the financial penalty must be 50% of the amount of the award (subject to the minimum and maximum caps). That penalty will be reduced by 50% if paid within 21 days. Tribunals are required to take account of the employer's ability to pay.

Financial penalties can be made against an employer, who has been ordered by an employment tribunal to pay an award to a worker, or who has agreed to pay the worker a sum by settlement agreement following conciliation, but who has failed to do so within the requisite time limit. A warning notice will be provided to the employer to provide them with at least 28 days to settle the outstanding sum prior to the financial penalty being imposed. Failure to settle in that period will result in a penalty of 50% of the unpaid amount. This will be subject to a minimum of £100 and maximum of £5,000 for breaches before 6 April 2019 or £20,000 for breaches on or after that date.

16.2.5 Claimants

Once an employee has completed ACAS Early Conciliation and holds a Certificate, they may then proceed to tribunal and only then.

The employee or "Claimant", as the Tribunal refers to employees who raise a claim, must present details of his or her claim in writing on the prescribed ET1 form. The Claimant must ensure that all the relevant sections of the form are completed otherwise the claim may not be accepted.

16.2.6 Lodging a claim

The ET1 form can be lodged with the tribunal either online or by personal delivery. If delivering an ET1 form, the central office addresses are:

Employment Tribunal Central Office (England & Wales)
PO Box 10218, Leicester LE1 8EG or:

Employment Tribunals Central Office (Scotland)
PO Box 27105, Glasgow G2 9JR

ET1 forms can be hand delivered to certain Tribunal offices but should not be posted to any of those offices.

16.2.7 Tribunal fees

During the period of 29 July 2013 to 26 July 2017 a claimant seeking to raise a claim at an employment tribunal had to pay a lodging fee followed by a hearing fee, subject to the availability of remission for those on low incomes. A claim would be rejected or dismissed if the requisite fee was not paid by the claimant.

The impact of the fee regime was dramatic, with a significant fall in the number of claims lodged at the employment tribunal. A challenge to the lawfulness of fee regime by Unison resulted in a Supreme Court decision which declared that the fee regime was unlawful and prevented access to justice. As a consequence of the decision fees were abolished, with effect from 26th July 2017.

The Ministry of Justice has indicated that since the scrapping of the fees, there has been a 90 per cent increase in claims. It has confirmed that it is considering the reintroduction of employment tribunal fees, albeit at a significantly lower level than previously. A consultation was launched in January 2024 and closes in March 2024 on this topic.

16.2.8 Time limits

It is important that the strict time limits for bringing claims are followed, otherwise the claim may be struck out as time barred at a preliminary hearing. Time limits for bringing claims vary depending on the nature of the claim. Although the tribunal has the discretion to allow late claims this discretion will only be exercised in certain limited circumstances. The various time limits in relation to claims include:

Unfair dismissal
Such claims must be presented within three months of the date on which the dismissal or resignation takes effect. If the claim is late it may still be allowed to proceed where it was "not reasonably practicable" to lodge the claim in time and the claim was lodged within a reasonable period afterwards.

Redundancy payment
These claims must be submitted to the tribunal within six months of the 'relevant date'. The relevant date is usually the date on which employment ended. If the claim is late it may still be allowed in if the tribunal decides that it is just and equitable to do so, taking into account the reason for the delay and any other relevant circumstances.

N.B this only applies to claims for a redundancy payment. Claims for unfair dismissal involving a redundancy process must be brought in accordance with the timescales set out above

Discrimination claims

Claims must be submitted to the tribunal within three months of the date of the act of discrimination or if a series of acts is complained of, then the date of the last act in the series. This time limit may be extended where it is 'just and equitable' to do so.

Deduction of wages

The claim must be presented within three months of the date of payment of wages from which the deduction has been made or if a series of deductions has been made, from the date of the last deduction. This may be extended where it was not reasonably practicable for the employee to present the complaint within that time. The Government introduced a two-year cap on the period over which a worker can claim a series of unlawful deductions from wages where the deductions relate to any fee, bonus, commission, holiday pay or other emolument referable to a worker's employment.

16.2.9 Informing other parties

A copy of the claim will be sent to each party against whom the claim has been raised, recording in writing the date on which it was sent. The parties will also be informed of the case number and the address to which any further communications should be sent. The parties will be informed in writing of how to make a response and the time limit that applies. The services of an ACAS conciliation officer will still be available and usually a copy of the claim will be sent to ACAS.

16.2.10 Withdrawing a claim

A Claimant may withdraw all or part of the claim at any time. This may be done orally at a hearing or in writing. If an employee leaves it very late in the day to withdraw the claim, for example a day before the hearing, it is open to the employer to make an application for expenses. However, expenses (in Scotland and "costs" in England) are the exception rather than the rule.

16.3 Responding to a claim

16.3.1 Respondents

A party against whom an Employment Tribunal Claim is raised (usually the Claimant's employer but it can also be other companies or individuals depending on the type of claim) is known as a Respondent. A Respondent has 28 days from the date the ET1 form is sent to the parties by the Tribunal to lodge its defence. This defence or "response" must be submitted on a form ET3. The last date for the Respondent to lodge the ET3 is always specified in the Tribunal's covering letter. If the covering letter is missing, ask the Tribunal as soon as possible to confirm in writing the last day for lodging the ET3. Respondents should take great care to diarise that date so that the deadline is not missed.

16.3.2 Failure to lodge a response

16.3.2.1 If the Tribunals office does not receive the response within that time limit and the Respondent has not applied for an extension of the time limit, the Respondent will be in default. A late response will be rejected unless an application for an extension of the time limit has already been submitted or is included with the late response.

16.3.2.2 Once a response has been rejected, an Employment Judge will look at the available information and decide whether a decision in respect of the claim can be made. The Employment Judge can ask the parties, including the Respondent for further information before determining whether or not a decision can be made. If a decision can be made, a judgement will be issued to that effect. Otherwise, a hearing before a Judge sitting alone will be fixed.

16.3.2.3 Previously, where a response was lodged out of time, a default judgement was issued automatically and the Respondent was barred from taking part in any hearing which took place. This meant the Respondent could not make any representations, bring any witnesses or question any of the Claimant's witnesses. The Employment Judge now has discretion to allow the Respondent to participate in any hearing.

16.3.2.4 Default judgments and a strict debarring of the Respondent have been removed by the new Tribunal rules. Under the new rules, the Employment Judge has discretion to allow the Respondent to participate in any hearing.

16.3.3 Extension of time

16.3.3.1 The Respondent may apply for an extension of the 28-day time limit. This can be done before or after the original 28-day time limit expires. If you know you can't comply with the time limit, it is always preferable to submit an application for an extension of time before the time limit expires. The response should be lodged as soon as possible; don't wait for the Tribunal to make a decision in relation to the application. If the application is submitted after expiry of the time limit it must be accompanied by the response (or an explanation of why it is not attached). The application must explain why the extension is sought.

16.3.3.2 A Tribunal will have to consider the overriding objective of dealing with cases fairly and justly, having regard to the length is still likely to consider whether it is just and equitable to do so, having regard to the length of delay, the balance of prejudice to the claimant and the merits of the defence. All these factors must be considered when the Tribunal exercises its discretion and therefore an application for an extension should address each in as much detail as possible.

16.3.3.3 The application should specify the length of the extension that is being sought. A copy of the application should be sent to the Claimant or his or her representative, who should be notified that any objections should be sent to the Tribunal asap. They will have seven days to object.

16.4 Sift stage

16.4.1 Review by Employment Judge

16.4.1.1 The aim of the sift stage is to quickly identify weak cases which should not proceed.

16.4.1.2 Under the Tribunal rules, once a response has been accepted, the case will be passed to an Employment Judge who will consider the claim and response and decide from the papers whether all or part of the claim or response should be struck out because it has no reasonable prospects of success or whether all or part of the claim should be struck out because it does not contain complaints the Tribunal has jurisdiction to deal with.

16.4.1.3 If the Employment Judge decides that the claim should proceed, he/she will determine what case management directions are required to get the case ready for the final hearing.

16.4.2 Strike out

If the Employment Judge decides that all or part of the claim or response should be struck out, the parties will be informed in writing of the decision, the reasons for it and when the strike out will take place. Unless the relevant party writes to the Tribunal setting out the reasons why their claim or response should not be struck out before that date, the strike out will take effect. If the party submits their written reasons within the deadline, those reasons will be considered by the Employment Judge who will either allow the claim or response to proceed, or fix a hearing to determine whether to do so. The other party may attend the hearing, but they are not required to do so.

16.4.3 Sift hearing

The Tribunal rules do not set out how a sift hearing will be conducted or what evidence the parties will be permitted or expected to bring. However, it is likely that they will be similar to pre-hearing reviews under the old rules and that evidence will only be required from the Claimant or Respondent and evidence from third parties will be rare.

16.4.4 Case Management Orders

16.4.4.1 When a Case Management Order can be made

At any time in the proceedings, the Tribunal can decide, on its own initiative or on application by either of the parties, to make a case management order. There is no list of the case management orders which a Tribunal can make. As such the Tribunal can make any order that it sees fit but it must always keep in mind the overriding objective of dealing with cases fairly and justly and also the obligation to encourage alternative methods of resolving the dispute, wherever appropriate.

16.4.5 How to apply for a Case Management Order

16.4.5.1 An application for a case management order can be made at a hearing or sent in writing to the Tribunal. Where the application is in writing, a copy should be sent to the other side and they should be notified that any objections should be sent to the Tribunal as soon as possible.

16.4.5.2 While not specifically set out in the Tribunal rules, it is advisable to set out the reasons for making the application and how it will assist the parties or Tribunal, especially in relation to the overriding objective.

16.4.5.3 There are specific rules in relation to certain case management orders. For example, the Tribunal can order anyone in Great Britain to disclose documents or information to a party and can also require anyone in Great Britain to attend a hearing to give evidence or to produce documents or information. Other case management orders which may be sought by a party to a claim include:

- A request to amend the claim or response form;
- Adding, substituting or removing a party to the claim;
- Striking out a claim or response which is, for example, scandalous, vexatious or has no reasonable prospects of success or where a Tribunal order has not been complied with.

16.4.6 Amending a claim or response

16.4.6.1 In deciding whether to allow a claim or response to be amended, the Tribunal will take a number of factors into account such as why the amendment is sought, whether the information could have been included in the original claim or response form and the extent to which allowing the amendment would prejudice either of the parties. For example, a party that seeks to amend its case the day before or on the morning of a hearing is likely to have that application refused if the result of the amendment would be to require the hearing to be adjourned to let the other party respond to the amendment. The more significant the amendment and the later in the case it comes, the less likely it is to be accepted.

16.4.6.2 Employers should ensure that, as far as possible, all relevant information is included in the original ET3 form so that it is not necessary to make any later requests to amend the defence. Any other necessary case management orders should be requested as early as possible in the process.

16.4.7 Failure to comply with an Order

Orders, if received, must be complied with timeously. Failure to comply with an order of the Tribunal can result in the claim or response being struck out. Where a response is struck out, the Employment Judge can issue a decision or fix a hearing. If a hearing is fixed, the Employment Judge will determine to what extent the Respondent may participate.

16.5 Preliminary hearings and related issues

16.5.1 Preliminary hearings

16.5.1.1 There is no distinction between CMDs and PHRs under the Tribunal rules. Preliminary hearings can be scheduled for either case management discussion or to deal with substantive issues prior to the full hearing, though there is no distinguishing between the two within the rules. At a preliminary hearing on case management, the Tribunal can make case management orders on matters such as production of documents and witness statements, ordering a party to pay a deposit and exploring the possibility of settlement or alternative dispute resolution. A preliminary hearing on substantive issues will concern a substantive matter relating to the claim itself, such as striking out a claim or response or determining questions such as employee or disability status. At such preliminary hearings representations are made by parties for determination by an Employment Judge.

16.5.1.2 There can be more than one preliminary hearing in a claim. The Employment Judge can fix a preliminary hearing following the sift stage or at any time thereafter or on application by either party. The notice fixing the preliminary hearing must specify the preliminary issues which are to be decided at the hearing. As previously, a preliminary hearing will be conducted by an Employment Judge only and will be held in private unless a preliminary issue is to be determined or consideration is being given to strike out.

16.5.1.3 In terms of the rules, all hearings can be conducted by telephone, including preliminary hearings as long as the parties, and any members of the public in attendance, can hear what the Tribunal hears and see any witnesses as seen by the Tribunal.

16.5.1.4 If a hearing is to be conducted by telephone, the parties should ensure that any documentation to be referred to or relied upon should be sent to the Tribunal in advance and in good time.

16.5.2 Fixing the full hearing

16.5.2.1 The general practice in Scotland is not to set dates for a full hearing of evidence without giving parties the opportunity to indicate unsuitable dates. This does not happen in every case. With straightforward cases on issues such as unpaid wages, deductions from wages, holiday pay or notice pay, a hearing date will usually be set upon receipt of the claim itself (called 'fast tracking'). More often nowadays, a date is being fixed for the hearing of an unfair dismissal claim upon receipt of the claim itself although this does not always happen. If a date is not fixed on receipt of the claim form, or the claim is one of discrimination, parties in Scottish cases are given an opportunity to indicate unavailable dates.

16.5.2.2 Typically the tribunal will issue a letter indicating that the full hearing will take place in the course of one of 3 specified months. A form is attached to the letter which is referred to as the date listing form. On the date listing form, parties are required to indicate unsuitable dates due to witness availability and also availability of representatives. Parties are also requested to specify on the form the witnesses that are to be led, the relevance of their evidence and the likely duration of the evidence of each witness. The information on this form allows administration staff to estimate the likely length of hearing and to fix the hearing.

16.5.2.3 Sometimes hearing dates were fixed during a CMD and may now be fixed at a preliminary hearing. When dates are to be fixed during a preliminary hearing the Tribunal will give parties advance notification of that fact so that they can establish availability of witnesses and unsuitable dates in time for the preliminary hearing.

16.5.3 Requests for orders

16.5.3.1 As outlined at section 16.6, parties are allowed to request that the tribunal issue orders. If, for example, a witness has indicated that he or she is not prepared to come to the hearing to give evidence voluntarily, then an order may be obtained compelling that person to attend. In addition, if a party thinks that another party to the claim may have relevant documents which have not been disclosed, upon application, the tribunal can issue an order for the disclosure of specified documents. This can be very useful for an employer in establishing whether or not a former employee who has raised a claim has found a new job. In unfair dismissal claims, employees have a duty to take all reasonable steps to find alternative employment. If they do not take such steps, then compensation may be reduced even if the case is won. More often than not documents demonstrating the employee's efforts to find work are not offered up voluntarily but instead orders are issued to the employee or his or her representative for the documents to be produced.

16.5.3.2 If an employer is of the view that the employee's case is vague and lacking in detail to the extent that the employer is having difficulty responding to the claim, the employer is entitled to seek an order from the tribunal compelling the employee to provide greater factual or legal details of the case. This is often referred to as an order for further and better particulars. However, such orders should seldom be required as a consequence of the new sift stage (see 16.4.1 Review by Employment Judge).

16.5.3.3 Another method of requiring parties to provide further information is by seeking written answers to questions which is not necessarily restricted to clarifying the points raised on the ET1 or ET3.

16.5.4 Deposit orders

The Employment Judge or Tribunal has the power to order a party to pay a deposit of up to £1,000 per individual head of claim, as a condition of being allowed to proceed if it appears that there may be little prospect of any particular allegation or argument in a claim or response succeeding. Such an order can be made at a preliminary hearing. The Tribunal must have regard to the party's ability to pay the deposit in fixing the amount of the deposit order. If the deposit is not paid by the specified date, the specific allegation or argument will be struck out. If the specific allegation or argument is not upheld by the Tribunal then the deposit is paid to the other party. Otherwise, it is refunded.

16.6 Interim relief hearing

16.6.1 Applying for interim relief

If an employee believes that he or she has been unfairly dismissed on certain specified grounds which make the dismissal automatically unfair (see 12.3.3 Automatically unfair reasons for dismissal for further information), that employee can make an application to a Tribunal for what is known as interim relief. A Tribunal hearing will take place and if the Tribunal makes an order for interim relief, that will have the effect of converting the dismissal into a suspension on full pay until there can be a full Tribunal hearing to determine the matter. Employees must not delay in making an application for interim relief. They have 7 days from the date of dismissal to make the application.

16.6.2 Grounds for interim relief

The specified grounds which can give rise to an application for interim relief are as follows:

- dismissal for whistleblowing;
- dismissal for seeking to exercise the right to be accompanied or to accompany someone else to a disciplinary or grievance hearing;
- dismissal of a health and safety representative or a member of a safety committee for a reason connected with that role;
- dismissal of a workers' representative in connection with the Working Time Regulations;
- dismissal of an employee who is a trustee of an occupational pension scheme for a reason connected with that role.

16.7 The full hearing

16.7.1 Introduction

The full hearing is where the tribunal hears the factual and legal aspects of the case and decides whether or not the claimant is successful. Tribunals in Scotland prefer to deal with compensation or remedies at the same hearing even though it has not yet been established who has won and who has lost. On occasion, the merits of a particular claim will be dealt with at one hearing and if the claim succeeds, compensation and remedy will be dealt with at a later hearing as is generally the case in England. This is becoming more common in Scotland. Where it appears to parties and the tribunal in the course of a hearing that there is unlikely to be enough time to deal with the substance of the claim and compensation or remedy, then parties may agree with the Tribunal that the issue of compensation and remedy be deferred to another day.

16.7.2 Documents for the hearing

It is the responsibility of individual parties to ensure that they bring to the Tribunal hearing all relevant documents which they intend to rely on. An inventory should be drafted and each page should have a sequential number. It is helpful for Tribunals if documents are listed in chronological order. Parties are required to bring six copies of all relevant documents if a full Tribunal is dealing with the case. In some cases the Tribunal will order or instruct that parties agree one single joint bundle of documents. Tribunals will often instruct one of the parties to be responsible for the collation and production of the agreed bundle. Due to the differing resources of parties, this is usually the Respondent. Even if the Tribunal does not order production of a joint bundle of documents, the parties may agree a joint bundle voluntarily to assist the Tribunal.

16.7.3 Witnesses

16.7.3.1 Each party is responsible for ensuring that their own witnesses are in attendance at the tribunal to give evidence. Witnesses can attend voluntarily or parties can obtain a witness order compelling attendance. It is the responsibility of the parties to ensure that their witnesses are at the tribunal at the requisite time for them to give evidence. This will involve parties estimating the likely duration of witness evidence.

16.7.3.2 Parties are allowed to bring along or call any witness who has relevant evidence to give. There is no obligation on either party to disclose the identity of witnesses to the other side. Although the identity of witnesses is disclosed to the tribunal on the date listing form, the tribunal does not pass this information on. Parties are allowed to call witnesses not disclosed on the date listing form, although where only one witness has been disclosed in the listing form and six witnesses attend to give evidence, it is likely that the time set aside for the hearing will be insufficient for the case to be completed. A party who brings along a significantly greater number of witnesses than originally disclosed runs the risk of the other side making an application for expenses if a hearing has to be adjourned or continued because of the number of witnesses.

16.7.3.3 Witnesses sit in separate waiting rooms during the tribunal hearing to avoid the possibility of conflict or confrontation. Unlike in England, in Scotland witnesses are not allowed to sit through the evidence of other witnesses before giving evidence themselves. The Employment Judge may exclude any witnesses from the hearing until they have given evidence if it is in the interests of justice to do so.

16.7.4 Giving evidence

16.7.4.1 In Scotland, parties generally give their evidence orally and under oath or affirmation, though the use of witness statements is becoming more common. Evidence is given by response to questions asked. After a witness gives his or her evidence (this is referred to as evidence in chief), he or she will be cross-examined by the other party or the representative of the other party.

16.7.4.2 In England, parties' evidence is given by way of a written witness statement. The statements are prepared and exchanged in advance of the hearing. Where there is a written statement, that will be taken as the witness' evidence in chief unless the Tribunal orders otherwise. The witness is then cross examined by the asking of questions. It was reasonably common in English Employment Tribunal Hearings for Witness Statements simply to be taken as read but this is now the rule rather than the exception. Witnesses in the English Employment Tribunal must also take the oath or affirm.

16.7.4.3 The Employment Judge or lay members can ask questions of witnesses at any time although they tend to wait until cross-examination has been completed before asking their own questions.

16.7.4.4 Once cross-examination has been completed a party can ask a limited amount of additional questions of its witness only to deal with issues which arose during cross- examination or to reclarify matters. This is known as re-examination. No new issues can be raised in re-examination.

16.7.5 The onus of proof – who goes first?

In unfair dismissal cases where the employer admits that a dismissal took place, the burden of proof is on the employer to prove a valid reason for dismissal. Once the reason has been established the burden in relation to the reasonableness of the dismissal is neutral. In such cases, the employer's evidence comes first. In most other cases, it is for the employee to lead his or her evidence first. This includes constructive dismissal and discrimination cases.

16.7.6 Timetabling

A Tribunal can impose a limit on the amount of time to be spent in giving evidence, cross-examining witnesses and making submissions. The Tribunal can also stop a party from continuing past their allotted time.

16.7.7 Summing up

16.7.7.1 After both parties' evidence is completed they are given the opportunity to make a closing statement summing up the factual and legal basis of their case or defence.

16.7.7.2 Summing up statements are referred to as submissions. During submissions, the parties must set out the facts that they maintain have been proved during evidence. A party should then go on to explain the legal consequences of these facts being proved. Parties can refer to employment acts or regulations, previous court and Employment Appeal Tribunal judgments in support of their case. These are referred to as authorities. Tribunals will not be influenced by other tribunal judgments or decisions. The most common type of authority is a judgment that has been handed down by the Employment Appeal Tribunal or a superior court such as the Court of Appeal, Court of Session or the Supreme Court.

16.7.8 Electronic communications

A full hearing may be conducted in whole or in part by use of electronic communications including by telephone and by what is referred to as the CVP (Cloud Video Platform). The Tribunal must consider it just and equitable to do so. In addition, the parties and members of the public attending the hearing must be able to hear what the Tribunal hears and see any witness as seen by the Tribunal. An example of where this might be used would be a witness who lives abroad and is unable to travel for the full hearing, or where the cost would be prohibitively high. (However note that if a witness is to give evidence from abroad, the consent of that country must be sought via the Employment Tribunal.) That witness could give evidence over the telephone with the telephone placed on speaker phone in the Tribunal room for all parties to hear. Alternatively, arrangements can be made in some Tribunal offices for witnesses to give their evidence by video link to the Tribunal room.

In light of the Coronavirus, the Employment Tribunals increasingly relied on the increased use of and reliance on remote electronic CVP hearings as a means to ensure Tribunal hearings did not halt in the face of Government imposed social distancing and travel restrictions.

Now that restrictions have been lifted, the Employment Tribunals have published guidance for the continued use of the CVP platform in appropriate cases.

As per the guidance, the Tribunal must still seek the views of the parties in relation to any proposal to conduct the hearing (or part of the hearing) remotely. Parties are encouraged to raise any concerns that they have in relation to the potential for the hearing to take place remotely. If for instance, one of the parties considers that it is not just and equitable to hold the hearing(s) remotely, they must make this clear to the Tribunal.

16.7.9 Failure to attend

If either party fails to attend the hearing or to instruct a representative to attend on their behalf, the Tribunal can dismiss the claim or proceed with the hearing in the party's absence. Before a decision is made as to whether to dismiss the claim or proceed, the clerk of the Tribunals office will try to contact the non-attending party and any information that is available will be considered by the Employment Judge.

16.7.10 The judgment

In Scotland it is very uncommon for a judgment to be handed down orally at the conclusion of the hearing. This may happen in straightforward cases that last a day or less. The usual practice is for the tribunal to retire to consider the evidence and reach a decision. The judgment will then be set out in writing and will be sent out to parties at a later date. It may take four to six weeks, or possibly longer, for a full written judgment to be issued following a tribunal hearing of two or three days' duration. If an oral judgment is given a very brief written judgment will then be issued at a later date unless one of the parties asks for full written reasons at the time the oral judgment is given or within 14 days of the issue of the written judgment.

16.8 Costs and expenses

16.8.1 When expenses may be awarded

16.8.1.1 The general rule in litigation that the losing party has to pay the legal expenses of the successful party does not apply for the most part in Employment Tribunal claims. Costs are the exception rather than the rule in the Employment Tribunal. "Costs" (known as "expenses" in Scotland) are fees, charges, disbursements or expenses that have been incurred in relation to attendance at a Tribunal.

16.8.1.2 Employers have to pay their own legal costs unless it is clear that the Claimant's claim was so hopeless that it had no reasonable prospect of success. In addition, expenses may be awarded against a claimant if he or she has behaved vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the claim. Awards of expenses are very much the exception, not the rule. Even if at the end of a hearing it is clear that the claimant's case was very weak, that will not usually be sufficient to lead to an award of expenses against that claimant. On the other hand, if after evidence has been heard a tribunal decides that a central fact in the Claimant's case was untrue and that the Claimant had been less than truthful in giving evidence, then it is highly likely in those circumstances that the tribunal will conclude that Claimant has behaved vexatiously or otherwise unreasonably and expenses will usually be awarded. The situation would be similar if a Respondent had behaved vexatiously, abusively, disruptively, or otherwise unreasonably in conducting proceedings.

16.8.1.3 It does not always follow that an award of expenses will be made if a tribunal is of the view that behaviour has been vexatious, abusive or otherwise unreasonable, or a claim is misconceived. The tribunal has a wide discretion to award expenses or not.

16.8.1.4 Tribunals usually take into consideration the financial circumstances of a Claimant if it has decided to award expenses. The maximum amount of expenses is £20,000 although there is the possibility of a higher figure if the Employment Judge orders a detailed assessment to be done in a county court (in England) or taxed in the Sheriff court (in Scotland). If a tribunal is considering making an award of expenses against a Claimant, it will ask the employer to provide some form of detailed evidence of the legal costs incurred.

16.8.2 Timing of request for expenses

An employer can make a request for expenses at the conclusion of the hearing. It may however be more prudent to wait until the full written judgment has been issued. An employer has a period of 28 days from the date on which a written judgment is issued to write to the tribunal requesting that an award of expenses be made against the claimant. A tribunal may decide the issue of expenses on the basis of parties' written arguments or alternatively a hearing on expenses may be fixed.

16.8.3 Expenses and unrepresented employers

If an employer runs its own defence without the assistance of a paid representative, then there will be limited scope to recoup expenses from the claimant, even if the tribunal decides that the claimant's case was misconceived or that he or she behaved vexatiously or abusively. In these circumstances, the tribunal can make an award for preparation time costs.

16.8.4 Breach of Orders

16.8.4.1 A costs order can also be made where a party has breached a Tribunal Order or where a hearing has been postponed or adjourned at the request of a party.

16.8.4.2 A costs order can also be made where a Claimant wishes to be reinstated or reengaged and the Respondent fails to bring appropriate evidence as to the availability of the Claimant's old job or other suitable vacancies.

16.9 Appeals and reconsiderations

16.9.1 Reconsiderations

16.9.1.1 Under the old rules, certain judgments and decisions could be reviewed by the Employment Judge or tribunal on the application of a party or on the tribunal's own initiative on one of the following grounds: -

- a decision was wrongly made as a result of an administrative error;
- a party did not receive notice of the proceedings leading to the decision;
- a decision was made in the absence of a party;
- new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or
- the interests of justice require such a review.

16.9.1.2 Under the rules, a Tribunal will, either on its own initiative or on the application of a party, reconsider any judgment where it is "necessary in the interests of justice" to do so.

16.9.1.3 Reconsiderations can be on the request of either party. A party must make an application for reconsideration in writing within 14 days of the date on which the Tribunal sent the judgment to the parties and must set out why reconsideration of the original judgment is necessary. It is only possible for this time limit to be extended under the Tribunal's general power to amend time limits. Previously, a Tribunal would only extend the time limit for a review application if it considered that it would be just and equitable to extend time. The over-riding objective will be relevant in a Tribunal's decision whether or not to accept a late application.

16.9.1.4 An Employment Judge shall consider any application for reconsideration and if there is no reasonable prospect of the original judgment being varied or revoked, the application will be refused and the parties will be informed. If the application is not refused at this stage, the Tribunal will write to both the parties asking for their response to the application and seeking their views as to whether a hearing is necessary. A hearing will be held unless the Employment Judge considers it is not necessary in the interests of justice. If no hearing is held, the parties will have a reasonable opportunity to make further written representations.

16.9.1.5 The Tribunal may vary, revoke or confirm its earlier judgment as a result of the reconsideration.

16.9.2 Appeal

16.9.2.1 An appeal is a separate and distinct remedy from the right of reconsideration. Reconsiderations tend to be appropriate when there is an obvious and manifest error which has led to a clearly wrong or unjust decision. An appeal is only appropriate if a tribunal has reached a decision or judgment having wrongly applied the law. Parties cannot appeal a tribunal judgment simply because they are unhappy with the outcome or because the Tribunal preferred one side's evidence to the other. An appellant must be able to point to a clear error in law before the Employment Appeal Tribunal ('EAT') will entertain an appeal.

16.9.2.2 Although appeals on the facts are generally speaking prohibited, if a tribunal's conclusion in respect of a fact or set of facts flies in the face of reason to the extent that it can be labelled 'perverse' then the EAT may entertain an appeal. There is a very high bar indeed for factual perversity appeals. An employer has to be in a position to argue that no tribunal properly directing itself could possibly have come to the same conclusion.

16.9.3 Time limits for appeal

Parties have 42 days from the date on which the tribunal sends out written reasons for its decision or judgment, or if no written reasons were given, the date the record of the judgment was sent. If an appeal is successful the EAT may do one of the following:

- overturn the decision or judgment altogether;
- send the case back to be reheard by the same tribunal; or
- send the case back to be heard by a new tribunal.

16.10 Restricted reporting orders and private hearings

16.10.1 When a hearing may be held in private

16.10.1.1 The Employment Tribunal is generally speaking a public forum and it is common for journalists, particularly freelance journalists, to sit through hearings and report on them.

16.10.1.2 Under the rules, it is possible to obtain a restricted reporting order in a much wider range of circumstances than just national security, sexual offences or disability. A Tribunal may at any time throughout the claim, either on its own initiative or following an application, "make orders with a view to preventing or restricting the public disclosure of any aspect of those proceedings" where it is necessary in the interests of justice or to protect an individual's human rights. A Tribunal will have to give full weight to the principle of open justice and freedom of expression.

16.10.2 Types of Orders

16.10.2.1 The types of order a Tribunal can make to protect privacy and anonymity include:

- That a hearing that would otherwise be held in public, be conducted, wholly or partly in private.
- That the identities of specified parties, witnesses or other persons who are referred to in the proceedings should not be made public, either during the course of any hearing, its listing, or in any documentation entered on the Register or otherwise forming part of the public record.
- Preventing witnesses at a public hearing being publicly identifiable.
- A restricted reporting order (where there are issues of sexual misconduct or disability).
- An order having similar effect to a restricted reporting order.

16.10.2.2 Where a restricted reporting order is issued it must specify whose identity is protected, the duration of the order; the Tribunal has the power to decide the duration of the reporting order.

16.10.2.3 The Tribunal can make an order without a hearing, and before the parties have had the opportunity to make representations. It will then be for a party who objects, or any other person with a legitimate interest, to apply for the order to be revoked or discharged.

16.10.2.4 The protection of human rights and the principle of open justice and the right to freedom of expression now forms part of the test.

16.10.2.5 It is not sufficient for an employer to be worried about adverse publicity; the principle of open justice and freedom of expression still limit such orders to only the most exceptional of claims.

Chapter 17

The Coronavirus (Covid-19) Pandemic

17.0 The Coronavirus (Covid-19) Pandemic

17.1 Introduction

17.1.1 The coronavirus (Covid-19) disease, characterised as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), caused significant disruption to the everyday lives of people worldwide.

17.1.2 Whilst the effect of any ongoing disruption has significantly decreased, this section outlines the ongoing practical considerations from an employment law and workforce perspective.

17.2 Coronavirus Job Retention Scheme (CJRS)

The CJRS allowed for employers to furlough employees and apply for a grant to cover a portion of their usual monthly wage costs and was open to claims for any type of employment contract.

Employers must keep full records of any claim

under the CJRS for 6 years, including:

- the amount claimed and claim period for each employee
- the claim reference number for your records
- your calculations in case HMRC need more information about your claim
- for employees you flexibly furloughed, usual hours worked

including any calculations that were required

17.3 Online Claim Portal

17.3.1 14 October 2021 was the last date to make a claim for the CJRS.

However, it is still possible to access the online claim portal to

- view a previous claim
- delete a claim (within 72 hours of making the claim)

This requires a Government Gateway user ID and password that is issued when a registration is made for PAYE online.

17.4 Ongoing Covid-19 Considerations

Whilst the vast majority of day to day restrictions have been lifted, the long lasting effects of Covid are becoming more entrenched into everyday life. There are a number of areas of employment law where this is particularly the case:

17.4.1 Hybrid working

Prior to the COVID-19 pandemic, a smaller percentage of the UK workforce regularly worked from home. Since restrictions lifted many employers have retained some degree of home working and adopted a hybrid approach.

There have been a number of benefits of hybrid working identified, both for employees and organisations, including a better work–life balance, greater ability to focus with fewer distractions, saved commuting time and costs as well as savings on office space, higher levels of employee job satisfaction and reduced absence rates.

Where an organisation operates a hybrid working approach, there are a number of factors to consider:

- There should be an agreed overall position on hybrid working and this should be captured in a policy
- Ensuring training arrangements and compliance requirements are made and met
- Development of communication streams to ensure feedback and support is adequate
- Wellbeing protections
- Ensuring adequate insurances are in place and advising employees to consider their mortgage conditions

17.4.2 Disability discrimination: long-COVID

An employment tribunal has held for the first time that an employee with long-COVID was disabled under the Equality Act 2010. Whilst this is clearly a significant decision which employers should be aware of, it does not automatically mean that any employee suffering with long-COVID will be similarly protected.

Whether or not an employee with long-COVID will be considered disabled turns on the specific facts of the case and the usual test for disability status applies. See 6.4.9.1 Definition of a Disabled Person.

Where an employee is suffering from long-COVID employers should be mindful of the potential for long-COVID to be classed as a disability and consider what practical steps they can take to best support their employees, including regular communication, seeking medical input and training manager to provide support.

17.4.3 Whistleblowing

As well as claims for disability discrimination and unfair dismissal for a failure to follow COVID safety measures, another line of case law which has emerged from the pandemic is in relation to whistleblowing disclosures. The employment tribunal has recently ruled that the dismissal of an employee was automatically unfair because she had made protected disclosures (whistleblowing) relating to her employer's lax and inadequate implementation of their own COVID-19 protocols. Upon raising her concerns regarding the lack of social distancing and mask wearing, the employee was told to be 'realistic and not paranoid'. She was dismissed for what her employer claimed was her rude and confrontational manner with co-workers and managers. The Tribunal considered that the true reason for the dismissal was the fact that she had made the disclosures and not as a result of the way in which she made them.

For more information on whistleblowing see Chapter 15.

Ongoing Covid-19 Considerations

Chapter 18

Brexit employment changes

18.0 Brexit employment changes

18.1 Introduction

Following the expiry of the Brexit transition period on the 31 December 2020, the UK has now formally left the EU by virtue of the EU-UK Withdrawal Agreement that was negotiated and agreed between the UK and EU.

This section details significant changes in accordance with the UK's new relationship with the EU, particularly in respect of key employment changes, and changes in relation to GDPR.

18.2 Brexit – employment implications

See 1.4.6 Right to work in the UK

18.2.1 In terms of significant employment implications and developments as a result of Brexit, there are various matters that need to be considered. These include the change to free movement of people, right to work checks, immigration, and the potential for changes to both UK employment legislation, and EU-derived domestic employment legislation.

18.2.2 Free movement of people

18.2.2.1 Following the expiry of the Brexit transition period at 11pm on 31 December 2020, free movement of people came to an end. All EU nationals newly arriving in the UK from 1 January 2021 will be subject to the new 'single' post-Brexit immigration system (see 18.2.4 Points based immigration system). Accordingly, EEA citizens no longer have the automatic right to move to the UK to work and settle (and vice versa). The free movement rights of Irish citizens are unaffected, meaning Irish citizens are free to enter and remain in the UK without restriction.

18.2.2.2 For EEA nationals residing in the UK at 11pm on 31 December 2020, the EU Settlement Scheme was introduced to allow EEA nationals and their family members retain their existing rights. Broadly, those who have resided in the UK for a continuous period of five years (subject to exceptions) which commenced prior to the end of the transition period will be granted indefinite leave to remain (also known as settled status). Those who have resided in the UK for less than five years by that date will be granted limited leave to remain (also known as pre-settled status) allowing them to accrue the relevant qualifying period to be granted settled status in the UK.

18.2.3 Right to work checks

18.2.3.1 Since 1 July 2021, employers have no longer been able to rely on an EEA passport or national identity card as proof of an individual's right to work. Right to work checks should be carried out by employers to satisfy themselves that an individual is lawfully permitted to work in the UK. See 1.4.6 Right to work in the UK for further information on right to work checks.

There is no requirement to carry out a retrospective check on EEA citizens who commenced employment up to and including 30 June 2021. Employers will retain a statutory excuse against a liability for a civil penalty if the initial checks were carried out in line with the relevant guidance that applied at that time. However, where an employer has reasonable cause to believe an EU citizen has no right to work then they should be conducting additional checks to ensure the individual in question does in fact have the right to work in the UK.

18.2.4 Points based immigration system

18.2.4.1 Under the new points based immigration system, anyone looking to come to the UK for the purposes of work must meet a set of specific requirements. This includes EEA citizens arriving in the UK after the end of the Brexit transition period. If they meet the requirements, they will score points, with visas then awarded to those who have scored high enough.

18.2.4.2 The Skilled Worker route (which replaced the Tier 2 (General) System post Brexit) has undergone a major shake-up since its introduction in December 2020. New Skilled Workers now need to demonstrate:

- they have a job offer from a Home Office licensed sponsor (i.e. the employer holds a skilled worker sponsor license);
- they speak English at the required level;
- the job offer is at the required skill level of RQF3 or above (equivalent to Highers);
- hey'll be paid at least £38,700 per annum, or the 'going rate' for the job offer, whichever is higher.

These changes represent a significant increase to the minimum general salary threshold for sponsorship under the Skilled Worker route, with the previous minimum rate being £26,200 per annum. In addition to the minimum general salary threshold increasing to £38,700, the 'going rate', which is the salary attributed to a particular role, have also been adjusted and are now based on the median Annual Survey of Hours and Earnings (ASHE) data (previously set at the 25th percentile).

18.2.4.3 It will be possible to pay less than £38,700 in certain circumstances where the applicant can trade points on specific characteristics against their salary. In such circumstances, the minimum general salary threshold will be reduced to £30,960 (or £34,830 in some cases). An applicant will need to be paid the higher of: :

Brexit – employment implications

- £30,960 per annum (or £34,830 in limited cases); and
- 70-90% of the going rate for the role

The percentage reduction on the 'going rate' will depend on the reason for claiming tradeable points.

Complex transitional provisions have been introduced for those Skilled Workers who had valid permission in the UK under the Skilled Worker route prior to 4 April 2024. Individuals will benefit from a lower general salary threshold if:

- the application for an extension of stay as a skilled worker is made before 4 April 2030; ;
- the applicant was granted permission as a Skilled Worker under the rules in place before 4 April 2024
- the applicant has had continuous permission as a skilled worker since then

In such instances, the applicant must be paid the higher of:

- £29,000 per annum; and
- The going rate for the role

The going rates for these applications have been updated in line with the current 25th percentile ASHE salary data. Those covered by the transitional provisions can also continue to rely on tradable points and will need to be paid the higher of:

- £23,200 per annum (or £26,100 in some cases); and
- 70-90% of the going rate.

As a result of the changes, some occupations are no longer eligible
As a result of the changes, some occupations are no longer eligible for sponsorship. Where this is the case, applicants will only be eligible to extend their permission to stay under transitional provisions where they are applying to continue to work for the same sponsor.

The shortage occupation list, which included a number of engineering occupation codes, has been replaced by a new Immigration Salary List. None of the engineering roles which appeared on the Shortage Occupation List appear on the new Immigration Salary List. This means that those roles are no longer eligible to rely on a salary reduction as a shortage occupation under one of the 'tradable' points options.

By way of an example, under the rules in place from 4 April 2024 a civil engineer applying to the skilled worker route (and not covered by the transitional provisions) would need to be paid a minimum of £45,500 per annum for a 37.5 hour week. The 'new entrant' rate which applies in certain circumstances (e.g. to applicants 26 and under, or those switching from the graduate route) is £31,850 per annum.

18.2.5 Intra-company transfers

18.2.5.1 If an employer wants to transfer a worker from a part of their business overseas to work for in the UK, they will need to consider whether the position is eligible for sponsorship under the skilled worker route, or consider using the Senior or Specialist Worker route. The Senior or Specialist Worker route was introduced on 11 April 2022 and replaces the Tier 2 (Intra-Company Transfer route). Employers will need to first apply to become a Global Business Mobility licenced sponsor under the Senior or Specialist Worker category. Applicants will normally need to be existing workers who will undertake roles that meet the skills and salary thresholds. The need to be an existing employee of the overseas company can be waived where the applicant is a high earner.

18.2.5.2 Workers transferring to the UK under the Senior or Specialist worker route will need to:

- be sponsored as a Senior or Specialist worker by a Home Office Global Business Mobility : Senior or Specialist worker licensed sponsor;
- have 12 months' experience working for a business overseas linked by ownership to the UK business they will work for (unless earning £73,900 a year or more, there is no minimum time requirement);
- be undertaking a job on the list of eligible occupations; be paid at least £48.500 or the 'going rate' for the job, whichever is higher.

18.2.5.3 Permission for workers transferred to the UK on the Senior or Specialist worker route is temporary. Workers can be assigned to the UK multiple times, but they cannot stay in the UK for more than five years in any six-year period.

18.2.5.4 Workers paid over £73,900 do not need to have worked overseas for 12 months and can stay for up to nine years in any ten-year period.

18.2.5.5 Other routes, include the Innovator Founder route (designed to attract entrepreneurial talent and business ideas to the UK), which requires an endorsement, and the scale-up route (entry to work for fast-growing UK business, which requires sponsorship). .

18.2.6 Global Talent Route

The Global Talent route is open to EU citizens on an equal basis to non- EU citizens. What this means is that those considered the most highly skilled, who can achieve the required level of points and who are endorsed by a recognised UK body, will be free to enter the UK without a job offer. For those considering recruiting highly skilled engineering employees, the Royal Academy of Engineering is considered as an approved endorsing body.

18.2.7 The Graduate Route & High Potential Individual Route

- These are both unsponsored routes. The Graduate route opened on 1 July 2021 to international students who have completed a UK degree or other relevant qualification during their current period of permission as a student. Successful applicants will be able to remain in the UK for a period of two years (3 years for PhD graduates), with permission to work (except working as a professional sportsperson or coach).
- The High Potential Individual route opened in May 2022 for overseas graduates from one of the world's top 50 universities who have graduated in the past five years. In order to be eligible, the applicant's university has to be included in list of the top 50 global universities in at least two international ranking systems designated by the Home Office. Successful applicants will receive a two year (3 years for PhD graduates) visa permitting them to work in the UK, again with the exception of working as a professional sportsperson or coach.

18.2.8 Other Routes

In addition to the potential routes mentioned above, there are a number of other visas available but limited to specific sectors such as sport and healthcare.

18.2.9 Becoming a Licensed Sponsor

18.2.9.1 If employers anticipate recruiting talent from overseas in the future (with the exception of Irish citizens), you will need to apply to become a licensed sponsor – if you have not already done so. If you already had a sponsor licence at the time the new immigration system was introduced, your Tier 2/Tier 2 ICT licence would automatically have become a Skilled Worker/ Global Business Mobility Senior or Specialist worker licence. Your licence will continue to have the same expiry date as when initially issued.

18.2.9.2 It should be noted that you do not need a sponsor license to recruit EEA citizens that have either "settled" or "pre-settled" status (see below), or non-EU citizens with indefinite leave to remain in the UK, or anyone who has unrestricted permission to work in the UK. In the event you do not have a licence yet, and anticipate that you are going to need one, various points need to be considered:

The application process usually takes 8 weeks from receipt of application; the eligibility status of your business (those with unspent criminal convictions for immigration offences and certain other crimes will not be able to obtain a license); the type of sponsor licence you want to apply for; the person(s) responsible for managing sponsorship within your business (there will be various roles needed for managing your sponsor licence and complying with your sponsor duties and obligations – which can be carried out by the same person if desired).

18.2.9.3 There will also be a fee that needs to be paid which may be subject to change.

18.2.10 Frontier Workers

18.2.10.1 For those EEA citizens who are not resident in the UK, there may be the option of applying for a Frontier Worker Permit which lets an individual come to the UK to work while living elsewhere. To be eligible all of the following apply:

- from the EU, Switzerland, Norway, Iceland or Liechtenstein
- not primarily resident in the UK
- have worked in the UK by 11pm on 31 December 2020
- have kept working in the UK at least once every 12 months since they started working in the UK.

18.2.10.2 In addition, the permit will only be available to those who either:

- have been in the UK for less than 180 days in the last twelve-month period, or
- have returned to their country of residence at least once in the last six-month period, or twice in the last twelve-month period.

18.2.10.3 Frontier workers will need a permit to enter the UK to work from 1 July 2021; until that time they can enter the UK with their passport or national ID card. There is no fee for the permit which, once issued, will be valid for up to 5 years.

18.2.11 Posted workers

Under the EU free movement of people provisions, workers posted into an EU member state should enjoy equality with employees of the host state in terms of certain specified employment rights, including working time rights, minimum rates of pay, health and safety, equality and maternity related rights. However, the Brexit withdrawal agreement did not cover any new arrangements for posted workers. As a result, EU countries may now impose different registration and work permit rules to posted workers than to locally-employed individuals.

18.2.12 Legislative changes

18.2.12.1 As part of the EU-UK Withdrawal Agreement, the UK has agreed not to lower the level of employment law rights in the UK to a level that would be below those rights that existed on 31 December 2020 (but only where this would affect trade or investment).

18.2.12.2 This focus on "affecting trade or investment" is part of the 'level playing field' concept that was said to dominate large parts of the negotiations that led to the EU-UK Withdrawal Agreement. If the UK was to diverge from EU employment laws, and is perceived to gain an unfair advantage in respect of trade or investment, it will be open to the EU to take measures to "rebalance" the playing field. Such measures would include the imposition of tariffs – subject to an arbitration process.

18.2.12.3 Employers should accordingly be aware of the potential for changes to employment laws in the UK, particularly with regards to potential changes to matters such as (among other things); the Transfer of Undertaking (Protection of Employment) Regulations 2006 (known as "TUPE"); the Working Time Regulations 1998; and protection of agency workers' rights.

18.3 Brexit – GDPR implications

18.3.1 On 28 June 2021, the EU approved adequacy decisions for the EU GDPR and the Law Enforcement Directive (LED). This means data can continue to flow as it did before, in the majority of circumstances.

Both decisions are expected to last until 27 June 2025.

18.3.2 Those employers that do not send or receive data to or from the EEA, and who already comply with the GDPR, will likely not need to make any significant changes in order to ensure continued compliance.

18.3.3 For those employers that do receive data from the EEA, current BEIS guidance notes that alternative safeguards should be implemented to ensure compliance in future (such as the use of Standard Contractual Clauses (SCCs)). Such safeguards should be implemented by April 2021 (if not already done so) in case the bridge period does not get extended any further. For further information on GDPR and data protection see 9.0 Data protection.

Chapter 19

Pension benefits

19.0 Pension benefits

19.1 Introduction

19.1.1 The provision by employers of pension benefits can be a significant and highly valued part of an employee's remuneration package. It is also becoming a very high profile subject and one which can have far reaching consequences including in relation to corporate transactions. The vast amount of legislation and regulatory requirements applying to pension schemes and arrangements makes it a very complicated area.

19.1.2 This chapter can only summarise some aspects of pension provision including the most popular types of schemes and arrangements, the benefits they can provide, how they can be established and run and taxation issues. A brief explanation of the benefits that the State provides is also included as is an outline of certain employment law aspects of pension provision.

19.1.3 Employers must consult members if certain changes are being made to a scheme or arrangement as well as providing certain information to members at various times during their membership. This chapter sets out a summary of these requirements.

19.1.4 Trustees of schemes must have an internal dispute resolution procedure for resolving formal complaints made. A brief outline of the requirements is covered under this chapter.

19.1.5 Anti-discrimination legislation is far reaching and pension provision is not exempt. A summary of anti-discrimination legislation and its impact in the pensions context is also provided.

19.1.6 Given this is a very complicated area, professional advice should be sought as appropriate in relation to specific issues that arise.

19.2 Types of pension benefits

19.2.1 There are various types of pension arrangements but the pension benefits they provide can generally be classified as defined benefit, defined contribution or a hybrid of each. Scheme design frequently incorporates a mix of these benefit types. Below are some examples of defined benefit and defined contribution arrangements. This is not an exhaustive list.

19.2.2 Since 6 April 1988 an employee cannot be forced to be an active member of his or her employer's pension scheme (see 19.3 Auto Enrolment) although the introduction of auto- enrolment in October 2012 may require the employee to be enrolled if they meet the criteria and they can then elect to opt-out again if they choose.

19.2.3 Defined benefit schemes

19.2.3.1 Defined benefit schemes come in various forms but historically the most common is the traditional final salary scheme. Under a final salary scheme the pension entitlement is determined by the number of years and months the employee has been a member of the scheme multiplied by the member's 'final pensionable salary' at or near retirement multiplied by a factor, the most common being one-sixtieth or one-eightieth. Therefore an employee who accrues forty years' pensionable service would become entitled to a pension of one-half of his 'final pensionable salary' in a one-eightieth scheme, and two-thirds of 'final pensionable salary' in a one-sixtieth scheme at or near retirement.

19.2.3.2 A career average revalued earnings (CARE) scheme is an increasingly popular variant of the traditional final salary scheme and generally less costly to fund than the traditional final salary scheme. Unlike a 'final salary' scheme, a CARE scheme generally calculates the accrued pension each year (based on pensionable pay in that year) and then revalues this from the year of accrual to retirement age using an appropriate index and may be subject to a cap. The pension will be the sum of all the revalued yearly amounts.

The indexes commonly used are the Retail Prices Index and Consumer Price Index.

19.2.3.3 Under a defined benefit scheme members are generally required to contribute a fixed percentage of their pensionable salary to the scheme. However, in some schemes members are not required to contribute. Such non-contributory schemes for members are becoming less common.

19.2.3.4 The employers under defined benefit schemes generally pay the balance of any contributions required to fund the benefits over and above what members pay. The rate of contributions an employer will be required to pay will be based on actuarial advice. A schedule will be produced to show the rates and due dates of contributions by employers and members and additional contributions due by employers if there is a recovery plan in place for the scheme. If a scheme is in surplus and the scheme's governing provisions allow, an employer may be able to reduce or stop its contributions for a certain period. This is commonly known as a contribution holiday and will be subject also to legislative provisions. In addition, in certain circumstances and subject to conditions prescribed by law, an employer may be permitted to take a refund from surplus. This is now fairly rare and more often the scheme will be underfunded. An actuarial valuation might show that the scheme assets are insufficient to fulfil pension obligations and then additional contributions may be required under a recovery plan agreed by the trustees and the employer (a copy of which must be sent to the Pensions Regulator) to try to eliminate the funding shortfall. If an employer leaves a multi-employer scheme with a funding shortfall, there will be a debt triggered on the departing employer which will need to be dealt with.

19.2.4 Defined contribution schemes and arrangements

19.2.4.1 Defined contribution schemes and arrangements are also commonly known as money purchase schemes and these terms are interchangeable.

19.2.4.2 Unlike a defined benefit scheme the benefits to be provided for a member in a defined contribution scheme are dependent on a number of factors including:

- the amount of contributions paid into the scheme by the employer and the member;
- the investment return on those contributions;
- any expenses deducted; and
- the conditions that apply at the time the members' fund is converted into providing retirement income.

19.2.4.3 In a defined contribution scheme or arrangement the member is usually given a choice of investment options (although the scheme provider or the Trustees may select what options are to be provided).

19.2.5 Personal pension schemes and retirement annuity contracts

19.2.5.1 Personal pension schemes have been available since July 1988. They were introduced to encourage employees not in their employer's occupational pension scheme and those who did not have access to such a scheme to save for retirement. An employee may therefore take out his or her own personal pension scheme. It is now possible for an employee to be in both his employer's occupational pension scheme and a personal pension scheme simultaneously. In fact an employee can be in any number of personal pension schemes as he chooses provided the annual and lifetime limit and allowances are adhered to.

19.2.5.2 Personal pension schemes are not generally Trust based but are instead provided under a contract, usually through an insurance company or some other financial institution.

19.2.5.3 As a personal pension scheme is taken out by an employee there is no requirement for an employer to make any contributions to it. However, some employers voluntarily choose to make contributions to a personal pension scheme. As personal pension schemes do not relate to individual employment, changing jobs will not prevent an employee continuing to make contributions.

19.2.6 Group personal pension schemes

A group personal pension (GPP) is a collection of personal pension contracts, often provided by an insurance company or some other financial institution. Employers who make these available to their employees would normally contribute to them. GPPs are often promoted on the basis that compared to group occupational pension schemes they offer employers a saving in administrative time and cost.

19.2.7 Stakeholder pension schemes

19.2.7.1 Under the provisions of the Welfare Reform and Pensions Act 1999 the Government introduced stakeholder pension schemes from 6 April 2001 to encourage more private pension provision.

19.2.7.2 With effect on and from 1 October 2012 provisions in the Pensions Act 2008 came into force which repealed the stakeholder pension requirements. The result of this is that:

- the previous requirement on employers employing at least 5 employees to designate and facilitate access to a stakeholder pension scheme has been abolished;
- transitional provisions mean that an employer must continue deducting contributions from the salary of an existing employee who contributes to a stakeholder pension scheme after 1 October 2012. Any such contributions must be passed to the stakeholder pension scheme;
- If an existing member of the stakeholder pension scheme asks his employer to stop deducting contributions, the employer must comply with that request as soon as possible.

19.2.7.3 The repeal of the stakeholder requirements has not been aligned to the staging dates for auto enrolment. The result of this is that an employer will no longer be obliged to provide access to a pension scheme until it becomes subject to the auto enrolment requirement for its eligible jobholders. An existing Stakeholder scheme may be amended so that it can be used for the purposes of satisfying auto- enrolment requirements.

19.3 Auto Enrolment

19.3.1 As part of the Government's strategy to encourage people to save for retirement Auto-Enrolment has been introduced from October 2012. Starting with the largest employers, the scheme requires employers to automatically enrol eligible workers and make minimum contributions into a scheme which meets certain criteria. The framework is set out in the Pensions Act 2008 and was recently amended by the Pensions Act 2011.

19.3.2 Each employer has an individual staging date (from 2012 to full introduction in 2017) based on the number of employees on PAYE. After reaching this staging date, employers will be required to automatically enrol certain eligible employees into a workplace pension scheme that meets certain minimum criteria, and to pay minimum contributions to such a scheme. The Government has established a scheme called the National Employment Savings Trust ('NEST') which can be used to comply with the new duties if an employer does not have an existing workplace pension scheme. It is established by law and governed by rules which set out how NEST operates. NEST has certain limits on contributions, transfers and may have lower charges than other providers. The starting date for auto-enrolment was 1 October 2012, with the new employer duties being phased in over a period of more than five years, with large and medium-sized employers having to comply first.

19.3.3 An employer must auto-enrol qualifying jobholders at the start of their employment (although it may postpone auto-enrolment for a period of up to three months). Jobholders are described by the legislation as those workers aged 16-74 with "Qualifying Earnings" (earnings between £6,240 and £50,270 for the tax year 2022/23. Only those Jobholders aged 22-state pension age and who earn above the Auto-Enrolment "Earnings Trigger" must be automatically-enrolled but other jobholders may still be entitled to join the Auto-Enrolment pension scheme and receive employer pension contributions. Those workers below the Qualifying Earnings threshold may elect to join a nominated pension but there is no obligation to make employer contributions in respect of them. The "Earnings Trigger" is currently £10,000.

19.3.4 Once the scheme is fully implemented, employers will be required to contribute a minimum of 3% of Qualifying Earnings. Employers can contribute more than this if they so choose. The total minimum contribution for eligible employees will be 8% of Qualifying Earnings (made up of 3% employer contributions and the remaining 5% through employee contributions).

19.3.5 To help employers and employees adjust to the costs associated with the new regime, mandatory contributions have been phased in over a period of time reaching the combined level of 8% by 6 April 2019. Currently minimum employer contributions are 3% for employers and 5% for employees.

Importantly, the employer is obliged to ensure it meets the total minimum contribution through either a combination of employer minimum contributions and employee contributions, or by making the satisfying total minimum contribution itself, e.g. making an 8% contribution from 6 April 2019 onwards. If an employer makes contributions over and above the minimum employer contribution percentage (3% from 6 April 2019), an employee making contributions could conceivably seek to reduce their contribution so that only the total minimum contribution is being made. In order to prevent this, employers should ensure that contracts of employment have express provisions for levels of pension contribution.

19.3.6 Employers do not have to use NEST to discharge their obligations. Employers are free to choose an alternative type of scheme or arrangement to meet their obligations provided it meets the minimum standards required by the legislation. Those may be existing or newly established arrangements, including defined benefit schemes, defined contribution schemes, personal pension schemes, group personal pension schemes or stakeholder pension schemes. However, any scheme that an employer chooses must meet qualifying conditions. Existing schemes may therefore have to be changed to ensure that they are compatible and that the employer fulfils its duties.

Auto Enrolment

19.3.7 The Government has established NEST which can be used by employers to auto- enrol their workers and make the necessary contributions. Some important facts about NEST are as follows:

- it is a Trust based occupational pension scheme which will be regulated by the Pensions Regulator;
- it is run by a non-profit trustee corporation which has wide ranging powers to run and manage the scheme in the interests of the members;
- transfers in or out of the scheme are not permitted except in very limited circumstances;
- there are limits on the charges that can be applied which currently include an annual management charge of 0.3% of the value of your members fund and a 1.8% charge on contributions;
- a limited choice of investment funds will be provided; and
- the scheme must provide certain minimum information to members.

The NEST Corporation was established as a non-departmental body specifically to assist in the establishment and operation of the scheme and relevant information can be found on its website, nestpensions.org.uk.

19.3.8 Eligible employees will require to be automatically enrolled in the appropriate scheme either on commencing employment or on satisfying the auto-enrolment criteria, however, employees will be able to opt out. There are time limits for opting- out and specific forms and notice requirements apply. Employers must be careful that they are not seen to induce opt-outs and the forms should be provided directly from the trustees or managers of the pension scheme and opting-out should not be discussed during recruitment. Even if an eligible employee opts-out, an employer will currently be required to automatically re-enrol eligible employees every three years. This duty is discretionary where the employee:

- has in the last 12 months decided to leave a qualifying scheme;
- benefits from certain tax projection; or
- has in the last 12 months received a winding-up lump sum.

The regime therefore involves onerous obligations for employers – with employees requiring to be enrolled by the employer, whether the employee wishes to be enrolled or not, and then having to be 're-enrolled' again after three years despite having themselves opted out. Some employees may also be entitled to opt-in which must be processed by the employer. Some employers may choose to contractually enrol all workers to avoid the additional administrative burden associated with the assessment of staff for auto-enrolment.

Employers are required to provide information to employees regarding their pension rights within 6 weeks of them becoming eligible jobholders, or where a worker without qualifying earnings elects to opt into a scheme, or have been re-enrolled having previously opted out. Employers will not be required to provide enrolment information to employees who are jobholders and members of a qualifying scheme at the enrolment date.

19.3.9 An employer must give relevant information about the jobholder to the trustees or managers of the occupational pension scheme or personal pension scheme within six weeks of the date of them acquiring the right to opt into a qualifying scheme, or where a worker without qualifying earnings elects to opts into a scheme.

19.3.10 The Pensions Regulator will monitor employers' compliance with the requirements for auto enrolment and payment of contributions and will be assisted in this by the Department for Work and Pensions and HM Revenue & Customs. Employers will have to register with the Pensions Regulator and provide certain information to show compliance within certain time limits. Any employer who 'wilfully' fails to comply with certain duties (automatic enrolment, automatic re-enrolment and the right to opt in) will be guilty of an offence and on conviction:

- on indictment liable to imprisonment for a term not exceeding two years or to a fine (generally unlimited) or both; or
- in the case of a summary conviction to a fine not exceeding the statutory maximum, which is currently £10,000.

19.3.11 The Pensions Regulator will also be responsible for taking action against employers who contravene their duties. They will have power to:

- issue a compliance notice to an employer directing them to take steps to correct the failure;
- issue notices requiring employers to provide information and pay unpaid contributions; and
- impose penalties, including fixed or escalating penalties.

The fixed penalty notice is currently £400 and escalating penalty notices will be dependent on the size of the employer (currently ranging from £50 per day for one to four workers, to £10,000 per day for 500 or more workers).

19.3.12 Various employment protection rights are included for workers to support operation of the new regime. This is a complex area and employers should take specialist advice to ensure compliance.

19.4 Setting up a scheme

19.4.1 As mentioned, most occupational pension schemes are set up and operated through a Trust. A Trust is essentially a tripartite relationship where an employer sets up an arrangement with Trustees who hold property under that arrangement for the benefit of its beneficiaries. The Trustees hold and invest that Trust property for and on behalf of the beneficiaries who will be pensioners, members with a preserved benefit (often known as deferred members) and active members, along with their dependants.

19.4.2 A Trust-based occupational pension scheme, whether it be defined benefit or defined contribution, will normally be set up by a declaration of Trust or other Trust Deed. A declaration or deed usually sets out the framework of the Trust including making provision for amendment and the powers and duties of the Trustees. Provision is also generally made for adoption of the rules of the scheme, which set out the detailed benefit structure under the scheme and include eligibility conditions and contribution levels. These documents may be subsequently amended in accordance with the original trust deed and rules.

19.4.3 The role of a Trustee is very onerous. There are various types of Trustee including Employer Trustees (those selected by the employer), Member Nominated Trustees (those nominated and selected by the members of the scheme) and Corporate Trustees. Legislation requires one-third of a scheme's trustee board to be Member Nominated Trustees (or, in the case of a Corporate Trustee, one third of its trustee directors must be Member Nominated Directors). There are some people who cannot become Trustees. Those who are automatically disqualified from being Trustees include:

- any person who is convicted of an offence of dishonesty or deception;
- an undischarged bankrupt, or
- a person who has been disqualified from being a company director.

19.4.4 All Trustees (whether Member Nominated Trustees and Directors or those selected by an employer) have exactly the same functions, responsibilities duties and powers. The general functions have been summarised as follows:

- to act in accordance with the Trust Deed and rules of the scheme and within the framework of the law;
- to act prudently, conscientiously and with utmost good faith;
- to act in the best interests of all classes of beneficiary;
- to take advice on technical matters and any other matters which are not understood;
- to invest the funds of the scheme.

The Trustees are liable for ensuring that the scheme is administered in accordance with the Trust Deed and rules and legislation. If the relevant legislation is not adhered to, financial penalties or prosecution could result, and these could be imposed on the Trustees themselves.

19.4.5 The Pensions Acts of 1995, 2004, 2008 and 2011 place a number of responsibilities on Trustees. In general, these include:

- the appointment of certain professional advisers for certain schemes is compulsory e.g. the appointment of an actuary and auditor;
- the preparation and maintenance of a statement of investment principles;
- compliance with scheme funding legislation under the Pensions Act 2004;
- reporting breaches and the general obligation to notify the Pensions Regulator of certain events. Whilst advisors are appointed to assist the trustees, accountability remains with the trustees.

19.4.6 The Pensions Act 2004 also requires Trustees to have appropriate knowledge and understanding of the law relating to pensions and trusts, the principles relating to the funding of occupational pension schemes and the investment of the assets of the scheme.

As a result of this, all Trustees of a scheme may be required to undergo formal trusteeship training and perhaps tests following their appointment and throughout their term as Trustee to the scheme. All Trustees will be required to keep their knowledge and understanding up to date.

The Pensions Regulator provides useful information to new and existing trustees see www.thepensionsregulator.gov.uk/trustees/role-trustee.aspx

If an employee of an employer participating in the scheme becomes a Trustee they are given employment protection under law, including paid time off to perform Trustee duties and undergo relevant training.

19.4.7 The provisions contained in sections 17.4.4 to 17.4.6 are only a summary of some of the duties and responsibilities that apply to Trustees.

19.4.8 Certain pension schemes and arrangements are not set up under a Trust. Generally, these are established under contract via some form of agreement or arrangement. They will however, have rules setting out benefits etc. Personal pension schemes are an example of this. Such schemes and arrangements are generally administered and operated by scheme managers and not Trustees.

19.5 State pensions

19.5.1 Background

In addition to any private pension provision, the State also provides retirement pensions subject to certain conditions. Until 6 April 2016 state pensions consist of two components, these being the Basic State Pension and the other being the Additional State Pension (now known as the 'State Second Pension' or 'SP2' but previously known as SERPS). This has now been replaced by the single-tier state pension.

19.5.1.1 State Pension Age

The age at which state pensions become payable has changed over the years. It was previously 65 for men and 60 for women.

Currently State Pension Age is as follows:-

- Age 65 for men born before 6 December 1953;
- Age 60 for women born before 6 April 1950;
- On a sliding scale between age 60 and 65 for women born on or after 6 April 1950 but before 6 December 1953;
- On a sliding scale between 65 and 66 for any person born on or after 6 December 1953 but before 6 October 1954;

The Pensions Act 2007 set out details that State Pension Age would increase to age 68 by 2046 and it was increased to age 66 for those born after 6 April 1960. This was further amended by the Pensions Act 2011 and the Pensions Bill 2013 which brings forward the timetable so that it will be age 67 by 2028. The SPA will now increase as follows:

- For individuals born between 6 October 1954 and 5 April 1960, State Pension Age is 66
- For individuals born between 6 April 1960 and 5 March 1961, State Pension Age is an age between 66 and 67.
- For individuals born between 6 March 1961 and 5 April 1977, State Pension Age is 67

19.5.1.2 Single-tier state pension

The Basic State Pension and SP2 were replaced by a single tier state pension from 6 April 2016. The key elements of the single-tier state pension are:

19.5.1.3 Flat-rate payment

The single-tier pension will provide a flat-rate payment set above the basic level of means-tested support (no less than £185.15 a week in 2022/2023, increasing to £203.85 per week) and will be uprated by the higher of growth in prices (measured by the Consumer Prices Index (CPI)), average earnings or 2.5%.

19.5.1.4 Eligibility for full rate requires 35 qualifying years of NICs

An individual will need to have built up 35 or more qualifying years of NICs, or have obtained credits to that effect, to receive the full amount. Currently, individuals can receive a full category A basic state pension after paying NICs for 30 years of their working life.

An individual with fewer than 35 qualifying years will receive a pro-rated amount (1/35th of the full rate for each qualifying year of NICs) subject to them having a minimum number of qualifying years. The minimum number of qualifying years will be 10.

19.5.1.5 Individual pension

The single-tier pension will be based solely on an individual's own NICs record. Under the reforms it will not be possible to derive or inherit a single-tier pension from a spouse or civil partner.

Only those who reach their SPA on or after 6 April 2016 will be entitled to the single- tier flat-rate pension.

As part of this, the ability for occupational pension schemes to contract out of the Additional State Pension has ceased. An employee who is contracted out (via his or her employer's occupational pension scheme) paid a reduced rate of National Insurance Contributions, as will the employer. The employee will not be entitled to any additional State Pension for the period he or she was contracted-out. Instead the pension scheme will provide benefits as an alternative (or partial alternative) to the Additional State Pension.

From 6 April 2012 the Government abolished the ability to contract-out on a money purchase basis. Such schemes therefore contracted into the Additional State Pension and members then earned benefits under the State Second Pension.

19.5.2 Basic state pension

19.5.2.1 Basic State Pension is a flat rate pension paid by the State. An employee will be entitled to a Basic State Pension even if he or she is a member of the employer's pension scheme or has a personal pension scheme. The Basic State Pension is payable at State Pension Age and is based on the number of qualifying years an employee has gained through national insurance contributions ('NICs'), treated as having paid or have been credited with throughout working life. A qualifying year is a tax year in which the employee has sufficient income to pay NICs or during which they are treated as having paid or credited with NICs.

19.5.2.2 You need 30 qualifying years of national insurance contributions to qualify for the full Basic State Pension. If an employee does not have sufficient qualifying years they may still be entitled to a reduced Basic State Pension. For example, if an employee reaches State Pension Age on or after 6 April 2010 and does not qualify for the full Basic State Pension but does have some qualifying years they will be entitled to one thirtieth of the full amount for each qualifying year.

19.5.2.3 People who are over age 80 and who have little or no State Pension will qualify for a small pension. At the time of publication, the rates for 2023/2024 were not known.

19.5.3 The State Second Pension and alternatives

pre 6 April 2016

19.5.3.1 Prior to 6 April 2016, the second component of State pension provision was the 'State Second Pension'. This pension was paid in addition to the Basic State Pension provided the relevant conditions have been met. It was payable from State Pension Age.

19.5.3.2 During the period from 6 April 1978 to 5 April 2002 the Additional State Pension was provided through the State Earnings Related Pension Scheme (SERPS). The amount of SERPS depends on how much was earned and the amount of National Insurance Contributions paid (or that were treated as having been paid). It also depends on whether the employee was contracted-out of SERPS via a works pension scheme or a personal pension. If employees were contracted-out this reduced the amount of Additional State Pension available as the contributions were paid into the private arrangement and benefits will be paid from that instead. Further information on contracting-out is set out in section 19.5.3.4.

19.5.3.3 From 6 April 2002 the Government changed SERPS when it introduced the State Second Pension. Any additional pension an employee earned through SERPS before 6 April 2002 is added to any amount payable under the State Second Pension. The State Second Pension is designed to provide low earners, carers and people with long-term illnesses or disabilities with a better additional State pension. The State Second Pension is calculated primarily according to an employee's length of service and salary but, since April 2012, the calculation also includes a flat-rate element. From 6 April 2016 S2P was abolished and replaced by the flat rate single-tier pension. The provisions are contained in the Pensions Act 2014. It was also possible for employees to contract-out of the State Second Pension but this was abolished when the new single-tier pension came into force.

19.5.3.4 Contracting out

For employees in a private pension scheme which meets certain conditions, it is possible to contract-out of the State Second Pension. In occupational pension schemes the employer will need to apply for a contracting-out certificate from HM Revenue & Customs. In the past it was only possible to contract-out via a defined benefit scheme however from 6 April 1988 to April 2012 it became possible to contract-out via money purchase schemes including personal pension schemes.

Since 6 April 2012 only defined benefit schemes could contract out.

Due to the introduction of the single tier pension to replace the basic state pension and S2P, the ability of defined benefit scheme to contract-out was abolished as of 6 April 2016. As a result employers of existing contracted-out schemes are subject to an increase in their NIC contributions. In order to compensate for this cost, the Government has legislated to provide affected employers with a limited power to amend their scheme rules to offset the increase.

19.6 Pensions taxation – registered pension schemes

19.6.1 The Finance Act 2004 brought into force a new pension tax regime from 6 April 2006 and replaced the previous tax regime. The new regime applies to all members of registered pension schemes. All schemes or arrangements which were granted exempt approved status by HM Revenue & Customs automatically became registered pension schemes with effect from 6 April 2006. This applies to personal pension schemes, retirement annuity contracts and occupational pension schemes. Any new scheme which wishes to become a registered pension scheme must complete the process of registration. Registered pension schemes are required to comply with a number of administration requirements including the provision of certain information to HM Revenue & Customs.

19.6.2 A registered pension scheme benefits from certain tax advantages. However, there are limits on both the pension savings that can be built up and the contributions that attract tax relief. The new regime is based on two allowances which are as follows:

19.6.3 Lifetime allowance

19.6.3.1 This is an allowance set by law which applies to the total value of pension benefits that a member receives from all schemes or arrangements they have. The lifetime allowance is frozen a £1,073,100 until April 2026. There are different ways in which benefits are valued depending on whether they are money purchase or defined benefit or whether they are in payment. This allowance is tested on various occasions such as when a person becomes entitled to a pension. Certain persons whose pension pots exceeded or were expected to exceed the Lifetime Allowance could protect these by electing to have their own personal allowances under the primary and enhanced protection provisions.

19.6.3.2 If the Lifetime Allowance is exceeded there will normally be a tax charge. This is called a Lifetime Allowance Charge. The rate is currently 25% if the benefits are taken as a pension or currently 55% if the benefits are taken as a cash sum. The Scheme administrator and the member are jointly and severally liable for the tax charge.

19.6.4 Annual Allowance

19.6.4.1 This is the maximum tax relievable allowance on annual input to a member's pension arrangements. From 6 April 2016 the Annual Allowance was reduced for those earning £150,000 or more at a rate of £1 for every £2 that their income exceeds £150,000, to a maximum deduction of £30,000. The Government may review the Annual Allowance limit from time to time. There are different ways in which the annual amounts are calculated which is dependent on the type of scheme of arrangement.

19.6.4.2 Following the reduction in the Annual Allowance to £50,000 in 2011/2012 the Government introduced a carry forward rule. This three year carry forward rule generally allows members to carry forward certain unused Annual Allowance from the previous three tax years.

19.6.4.3 An Annual Allowance charge normally applies if the Annual Allowance is exceeded. The member is liable for this tax charge. The charge is designed to recoup excess tax relief and so applies at 20%, 40% or 45% according to the rate at which tax relief is available on the member's contribution or accrual. However there is an exemption in the case of serious ill-health and death.

19.6.5 Benefits to be provided by a registered pension scheme

19.6.5.1 To avoid any penal tax charges payments under a pension scheme or arrangement must be authorised payments provided for under the Finance Act 2004. The Finance Act 2004 sets out a list of authorised payments relating to pension payments to members, lump sums payable to members, pensions that are payable on death and lump sums that are payable on death. These can vary depending on the type of scheme or arrangement providing them. Some important benefits schemes are likely to provide and qualify as authorised payments are as follows:

Pension benefits

These are generally only payable when a member reaches a particular age. However, scheme provisions may allow a member to take benefits earlier or later than this age subject to certain conditions being met. The pension payable may be reduced or increased depending on whether it is taken early or late. Pension benefits must be in the form of a Scheme Pension for a defined benefit arrangement. Under a money purchase arrangement (including any AVCs under a defined benefit scheme which are on a money purchase basis) pensions can be taken as a Scheme Pension, Lifetime Annuity or as a draw down pension. To qualify for any of these certain conditions have to be met.

Member's pensions must generally not commence before age 55 unless retirement is on ill-health grounds and the conditions under the Finance Act 2004 and the scheme provisions have been met.

Lump sum exchanges

A member can exchange part of his or her pension for a tax-free cash lump sum which is now known as a pension commencement lump sum subject to certain conditions. The maximum lump sum payable will be 25% of the fund value to be used to provide a pension. Since 2011/2012 a registered scheme may also pay a lump sum to a member over the age of 75 since the abolition of the requirement for members of money purchase schemes to purchase an annuity before the age of 75.

Death in service payments

A lump sum can be paid on the death of an employee whilst in the service of his or her employer before his or her benefits are in payment.

Payments to dependants

Certain pensions may be paid to eligible dependants on the death of a member. The recipients must generally fall into the definition of dependants under the Finance Act 2004. There are various forms of dependant pensions reflecting the type of arrangement from which they are to be paid.

19.6.5.2 If a benefit payable under a scheme or arrangement does not meet the conditions for any authorised payment then it is an unauthorised payment and the member or recipient in the case of a death benefit will be subject to a tax charge known as an unauthorised payment charge. This charge is fixed at 40%. If the unauthorized amounts exceed a specific portion (currently 25%) a further 15% surcharge may be imposed.

The scheme administrator may also be subject to a scheme sanction charge in respect of most unauthorised payments. The tax charge is 40% of the chargeable payments but this can be reduced by up to 25% if the unauthorised payment has been subject to an unauthorised payment charge and this has been paid.

19.6.5.3 Any pensions paid by a scheme or arrangement are subject to income tax.

19.7 Pensions and employment contracts

19.7.1 Prior to 1 October 2012, unless they have contracted to do so, there was no legal obligation on employers to make any pension provision for their employees other than the requirement to designate and facilitate access to a stakeholder pension scheme. From 1 October 2012 the largest employers have been required to automatically enrol eligible workers into pension schemes or make contributions to private pension plans (unless the workers opt-out) and make contributions. For other employers staging dates were between October 2012 and April 2017 (see 19.3 Auto Enrolment).

19.7.2 Even before auto-enrolment, many employers chose to offer some form of pension provision to their employees. Very often an employee's contract of employment contains specific references to entitlement to pension benefits, but the extent of the obligations is rarely set out in full. It is important that great care is exercised when including any express pension provision in an employment contract. Care should also be taken to ensure that any contractual provisions also meet the requirements of auto-enrolment.

19.7.3 To the extent that the contract of employment expressly sets out details of pension provision it is to be remembered that any change to these terms will require variation of the contract. See 2.6 Varying terms and conditions of employment for further information. Given that in many cases a party or parties other than the employer and employee will be involved in the delivery of benefit provision, e.g. trustees, insurance companies, care should be taken to ensure any terms to be included are sufficiently precise.

19.7.4 Under the Employment Rights Act 1996 all employees who have one month's service are entitled to receive within two months of commencement of employment written particulars of their terms and conditions of employment. See 2.3 Statement of employment particulars for further details. This applies regardless of whether the employee has a written contract or not. Specifically in relation to pensions the written particulars should include the following:

- any terms and conditions relating to pensions and pension schemes;
- where there are no terms and conditions relating to pensions, specifically state that fact;
- if there are provisions in relation to pensions, reference can be made to the provisions of another document which is reasonably accessible.

Employees must be provided with information on the employee's status for Auto- Enrolment and in particular whether the employee is to be automatically enrolled and when, details of the scheme to be used for this purpose and the amount of deductions to be made from salary and where further information on the scheme and options can be found.

Pensions and employment contracts

19.8 Pensions and TUPE

19.8.1 10.15 Occupational pensions specifically sets out some details relating to how the Transfer of Undertakings (Protection of Employment) Regulations (the 'TUPE Regulations') apply to pensions. In summary, in the context of a relevant transfer under the TUPE Regulations, terms and conditions for future benefits are protected for employees whose contracts of employment transfer following certain business transfers.

19.8.2 Normally under the TUPE Regulations the employees transferred from one employer to another become employees of the new employer and their employment contracts automatically transfer to the new employer. In most respects this means that the terms and conditions of employment are the same after the transfer. However, an exception to this is under Regulation 10(1) which excludes certain rights under occupational pension schemes from transferring to the new employer. This exclusion does not apply to personal pension schemes which will include group personal pension schemes and most stakeholder schemes and so contractual rights under these do transfer under TUPE.

19.8.3 It is to be noted that Regulation 10(2) of the TUPE Regulations brings certain occupational pension rights within the scope of the TUPE Regulations and as a result these will transfer to the new employer. In certain circumstances contractual terms in relation to provision of benefits that are not 'old age, invalidity or survivor's benefits' transfer. In particular early retirement and provision of pension and lump sum benefits on redundancy may transfer if they are not purely retirement related. This is a very complex area and specific advice should be sought.

19.8.4 A further layer of protection was introduced under the Pensions Act 2004. This new protection is in addition to the protections mentioned above and which apply under the TUPE Regulations. Under sections 257 and 259 of the Pensions Act 2004 transferring employees who are entitled to benefits under an occupational pension scheme of the old employer, must be provided with certain pension benefits by the new employer. The new employer is free to decide what type of scheme it offers but if it offers a defined contribution scheme then under the new arrangements it must match contributions paid by employees to a maximum limit of 6% of gross basic salary or match the transferring employer's contributions (where it was under an obligation to make them).

19.8.5 If the new employer provides a defined benefit scheme it must generally provide:

- benefits which are at least at the level required to satisfy the contracting-out reference scheme test under the Pensions Act 1993 regardless of whether the scheme is contracted-out or not; or
- employee benefits the value of which equal or exceed 6% of pensionable pay per annum in addition to any member contributions.

Before any transfer, the seller must inform employee representatives of the anticipated pension measures to be offered by the buyers.

Pensions and TUPE

19.9 Consultation requirements for proposed changes to pension arrangements

19.9.1 Under the Pensions Act 2004 most employers are now required to consult active and prospective members on proposals to make certain changes to the affected members' pension arrangements. If the Pension Regulator takes action for failure to adhere to the statutory requirements it may impose civil penalties described below. This applies whether the employer or the Trustees propose the changes. The changes which give rise to the consultation requirement are set out in the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 and depend on whether the arrangement is an occupational pension scheme or a personal pension scheme. The regulations apply where the employer sponsors a pension arrangement and has 50 or more employees (whether or not in the pension scheme). There is no requirement to consult on changes made to comply with legislation but any additional listed changes require consultation. In this regard, consultation may be required for some but not all of the employees depending on how the changes affect different employees. The changes on which consultation is required include the following:

19.9.1.1 Occupational pension schemes

- an increase in the normal pension age;
- closing the scheme to new members (or to a category of new members);
- introducing member contributions or increasing them;
- stopping accrual under the scheme or for a particular category of members;
- removing an employer's liability to make contributions;
- reducing employer contributions for money purchase benefits;
- altering some or all benefits from a defined benefit basis to a defined contribution;
- changing the basis of future benefit accruals, in whole or part for a defined benefit scheme;
- changing the elements of pay that constitute pensionable earnings or changing the properties or limiting the amount of any element of pay that forms part of pensionable earnings for a defined benefit scheme;
- changing the rate of increase for pensions in payment, or the rate deferred pensions or other benefits are revalued, where the change would (or would likely to be) less generous to all members or for a particular category; and
- reducing the rate of future accrual for a defined benefit scheme.

19.9.1.2 Personal pension schemes

- reducing or stopping employer contributions towards the scheme or for a particular category; and
- increasing member contributions.

19.9.2 Consultation must take place before any decision (or series of decisions) to make those changes is made. If the proposal is made by the Trustees, they may not make the decision without first notifying each employer and being satisfied that the employer has undertaken the consultation.

19.9.3 The requirement to consult applies to certain employers with at least 50 employees. The test is based on the number of employees and not the number of members. Regulation 4 of the Information and Consultation of Employees Regulations 2004 sets out how the number of employees should be calculated. Certain employers are exempt from the consultation requirement i.e. employers in relation to public service schemes and an employer in relation to an occupational pension scheme with less than two members.

19.9.4 Certain written information must be given to all affected members and their representatives before the start of the consultation. The information to be provided is:

- details of the listed change and the possible effects it would or be likely to have on the scheme and its members (to be accompanied with relevant background information); and
- the timescale for implementation including closing date for responses.

Additionally, the information to be provided and the way it is presented must be in such a fashion which would allow representatives of affected members to consider, conduct a study of and give their views to the employer on the impact of the listed change on such members they represent.

19.9.5 An employer must consult about a listed change in accordance with any pre-existing consultation arrangements it has in force. An employer who has one or more of the following representatives must use these:

- representative of any trade union where recognised by the employer;
- information and consultation representatives established under the Information and Consultation of Employees Regulations 2004;
- representatives under one or more pre-existing agreements recognised by the Information and Consultation of Employees Regulations 2004; or
- affected members in terms of any negotiated agreement or pre-existing agreement under the Information and Consultation of Employees Regulations 2004.

Employers should provide full information and allow time for members to respond.

The Information and Consultation of Employees Regulations 2004 (ICE Regulations) have been amended so that employers are not required to consult about the same issues twice under both Regulations. See 8.10 Information and consultation for further information on the ICE Regulations.

19.9.6 If there are no pre-existing arrangements or agreements the employer must consult through representatives elected for the specific purpose. If the interests of affected members are not represented by representatives or no representative is elected the employer must consult directly with the affected members. The procedure for election of representatives is set out in the regulations.

19.9.7 The relevant employer and any person consulted are under a duty to work in the spirit of co-operation, taking into account the interests of both sides. The relevant employer must notify the persons to be consulted of any date set for the end of the consultation and/or for the submission of written comments. The consultation must continue for 'an appropriate period' and in any event must not be less than 60 days.

19.9.8 The relevant employer must consider the responses received and if the listed change was proposed by a 3rd party such as the Trustees or principal employer then it must report in writing to them confirming the responses received as soon as reasonably practicable. The third party must then satisfy itself that each consultation was carried out in compliance with the regulations. If no responses are received, the consultation is deemed complete at the end of the consultation period.

19.9.9 At the end of the consultation period the party proposing the listed change must consider the responses (if any) before making a decision as to whether or not to implement the proposed change.

19.9.10 A complaint can be made to the Pensions Regulator where there has been any failure to comply with the consultation requirements. The Pensions Regulator can, if it upholds the complaint, issue an improvement notice under the Pensions Act 2004, directing that steps must be taken to remedy the situation. The Pensions Regulator can also impose civil penalties (up to £5,000 for individuals and £50,000 for others) and has the power to waive or relax any of the requirements of the regulations but only where satisfied that it is necessary to do so in order to protect the interests of the members of the scheme.

19.9.11 Employees who are consultation representatives under the ICE Regulations are given certain enhanced employment rights and protections i.e. right to paid time off, protection from unfair dismissal etc.

19.9.12 No consultation is required where:

- the active and prospective members of the scheme to whom the listed change relates ('affected members') were notified of the proposal before 6 April 2006;
- in the case of occupational and personal pension schemes where as a result of a consultation on a proposal for cessation of employer contributions there is a further proposal to reduce employer contributions or (in the case of occupational schemes only) where as a result of a consultation to prevent future accrual, there is a further proposal to reduce the future accrual rate (instead of this ceasing altogether);
- changes are made for the purpose of complying with a statutory provision or a determination of the Pensions Regulator;
- the proposed changes have no lasting effect on eligibility or benefits (e.g. for administrative purposes); and
- the proposed changes are covered by the provisions of section 67 of the Pensions Act 1995.

Additionally, some employers fall outside the scope of the consultation regime. Exempted employers include those that participate in:

- public service pension schemes;
- small occupational scheme with fewer than 12 members, all of who are trustees of the scheme;
- schemes with fewer than two members;
- unfunded pension arrangements; and
- unregistered schemes outside the EU

19.10 Information requirements

19.10.1 The law imposes on Trustees and managers of pension schemes strict requirements regarding the provision of certain information to certain people including members or prospective members of pension schemes. The legislation is very prescriptive as to when the information is to be provided and what information is to be provided. Some information must be provided automatically, some on request and some information must be provided before or after a certain event (i.e. retirement). The information to be provided depends also on whether the scheme is a defined benefit or defined contribution scheme.

19.10.2 The legislation is too extensive to cover in great detail in this section. The principal legislation on disclosure of information concerning occupational pension schemes is the Occupational Pension Schemes (Disclosure of Information) Regulations 2013 ('the Disclosure Regulations').

19.10.3 Under the Disclosure Regulations and often specified in the scheme trust deed and rules, some basic information must automatically be given in writing to members and prospective members, spouses or civil partners of any member or prospective member, beneficiaries and independent trade unions recognised for the purposes of collective bargaining. The information should be provided automatically to a prospective member if it is practicable to do so and to members who have not already been given the information. Where the scheme is a qualifying scheme for auto-enrolment purposes, the basic scheme information must be provided within 1 month of the trustees/managers receiving the statutory information about the prospective member or member. In other cases, the trustees/managers must provide the information within 2 months of becoming a member. The position in relation to others varies and it may be that the information does not require to be provided automatically but only on request. If the information is to be provided on request it must be provided within two months of the request. If an applicant received requested information within the previous 12 months, the request for the same information can be refused.

19.10.4 The basic scheme information that must be provided includes:

- categories of employees who are eligible to join;
- conditions for eligibility and how those eligible are admitted;
- how the employers' and the members' normal contributions are calculated;
- what benefits are payable and how they are calculated (including the definition of pensionable earnings and the rate at which benefits accrue);
- when benefits are payable;
- whether survivors' benefits are payable and, if so, when and the conditions for paying them;
- a summary of what can be done with a member's accrued rights where the member leaves pensionable service before normal pension age, including whether accrued rights can be transferred out of the scheme, converted into an annuity and commuted to a lump sum.
- whether the scheme is registered with HMRC, details of the scheme's internal dispute resolution procedure, details for the Pensions Advisory Service, The Pensions Ombudsman and the Pensions Regulator.

If there are any material changes in the basic scheme information members, beneficiaries and recognised trade unions must be automatically advised in writing before or as soon as possible after the change is effective and in any event within three months of the change.

19.10.5 On request, a copy of the scheme's annual report and accounts must be provided, generally free of charge, within two months of the request. The Disclosure Regulations set out details of the information which must be included within the annual report and accounts.

19.10.6 Certain other documents must also be provided within 2 months of a request a by post, email or by making the document available on a website but a charge can be applied. These documents include:

- the statement of investment principles;
- the statement of funding principles;
- the actuarial valuation;
- the payment schedule or schedule of contributions; and
- any recovery plan.

19.10.7 The Trustees and managers must also disclose on request the contents of the Trust Deed or other document which established the scheme and the rules.

19.10.8 Persons with benefit entitlements must be given information in relation to their benefits in certain situations. For example, a benefit statement must be given automatically before, or within one month after, the initial benefit becomes payable (two months if the person is retiring before normal pension age). Members with money purchase benefits additionally have to be provided with certain information about their options and (where applicable) about annuities at least 4 months before retirement.

19.10.9 Members of salary related schemes are entitled to request certain information each year. On request, this information must be provided as soon as reasonably practicable, but no later than two months after the request. The information to be provided includes:

- the date pensionable service started;
- a summary of the method for calculating the member's own benefits and those of any survivors;
- the pensionable remuneration at a specific date;
- details of how any deductions from benefits are calculated;
- for active members, the amount of member's pension and any survivors' benefits payable from a specific date (this must be calculated without regard to possible increases in salary);
- the amount of any death in service benefits payable if the active member died in service and details of how they are calculated; and
- for deferred members, the date pensionable service ended and the amounts of the member's benefits and survivors' benefits payable from the date benefits are payable.

It is normal that annual benefit statements be issued automatically each year to avoid requests being made.

Within 7 months of the scheme year end, Trustees must produce an annual report containing audited accounts, latest actuarial valuation and statement and other information such as details of the trustees and the scheme advisors. This should be supplied freely within 2 months of a request by a member, prospective member, and beneficiary or recognized trade union. A summary funding statement should be sent to members after completion of an actuarial valuation.

19.10.10 Members who have money purchase benefits must be given certain information automatically. This information must be provided within twelve months of the end of each scheme year. The information to be provided includes:

- the gross contributions credited to the member during the last scheme year including any minimum payments, incentive payments and age related payments credited, together with the date of birth used in determining the age related payment and the name and address of the person to contact if the date of birth is wrong where the scheme was at anytime before 6 April 2012 a contracted out scheme;
- value of the member's accrued rights at a specified date (and if different, their respective cash equivalents); and
- statutory money purchase illustrations which set out the benefits likely to be paid.

19.10.11 The above is a summary of the main types of information that must be disclosed. Relevant legislation specifies other information which must be disclosed at different times and advice should be sought in connection with meeting an employer's obligations fully.

19.10.12 Given the requirement to provide certain basic scheme information automatically in writing to certain persons under the Disclosure Regulations, employers, Trustees and managers of schemes generally produce a scheme booklet. The scheme booklet must contain all the information required by the Disclosure Regulations but they generally contain more than the minimum required. It is essential to ensure that the booklet is consistent with the scheme's Trust Deed and Rules or governing documents. However there is normally a provision in the booklet which states that if there are any differences the provisions of the Trust Deed and Rules take precedence. That approach is recommended although it may still be subject to challenge and so accuracy is preferred.

19.11 Data protection and pensions

19.11.1 In order to administer a scheme, collect contributions and pay benefits, it is necessary for the Trustees (or other parties who act on behalf of the Trustees) to hold and process personal data (as defined in the Data Protection Act 2018 (DPA) – see 9.0 Data protection) relating to its members. All this information is necessary and will generally be held for the duration of a person's membership of the scheme or for any longer period necessary to enable the scheme Trustees or administrators to answer questions relating to a person's benefits. As 'data controllers' under the DPA, employers, managers and Trustees should ensure personal data is kept secure in order to avoid breaching their obligations under that legislation. Data should only be disclosed in limited circumstances. For example the information may be disclosed to:

- an employer and other companies in the group in connection with the operation of the scheme;
- third parties (e.g. actuaries, insurers, plan administrators, banks) providing services in connection with the administration of the scheme;
- parties with whom the employer is negotiating a commercial agreement (e.g. a business sale or joint business venture) or to Trustees of other group pension schemes (and their advisers) where a reorganisation of pension schemes is being discussed; and
- government or regulatory authorities if the Trustees are obliged to do so.

Disclosure may be within or outside the UK but should not be transferred outside the EEA unless adequately protected.

19.11.2 Given the far reaching effect of the Disclosure Regulations and other legislation relating to disclosure, Trustees and managers should have procedures in place for dealing with any requests for information by individuals.

19.12 Dispute resolution in pensions

19.12.1 Most queries or problems under pension schemes stem from a misunderstanding of information and can be quickly and informally resolved without using formal procedures. However, in some cases the dispute cannot be resolved this way and a more formal complaint may be made. Under the Pensions Act 2007, occupational pension schemes and stakeholder pension schemes are required to have a formal internal dispute resolution procedure (IDRP) in place. This can be either a one or two stage process.

19.12.2 TPAS (The Pensions Advisory Service) is an independent voluntary service that provides free help and advice to members and other beneficiaries of occupational pension schemes and personal pension schemes. TPAS is available at any time to assist members and other beneficiaries in connection with queries, or difficulties encountered at any stage of the dispute procedure.

19.12.3 The Pensions Ombudsman may investigate and determine any complaint or dispute of fact, or law, in relation to any occupational pension scheme or personal pension scheme. However the Pensions Ombudsman normally insists the matter is first dealt with through the plan's own IDRP and raised with TPAS. Any complaints or disputes which cannot be resolved through the IDRP or by TPAS may be referred to the Pensions Ombudsman.

19.13 Anti-discrimination and pensions

19.13.1 European Union (EU) law has had a major impact on occupational pension schemes within the UK. Much of UK law has been brought onto the statute books to implement a plethora of equal treatment requirements that the EU has developed. These equal treatment provisions have an impact on UK pension schemes.

19.13.2 6.4.9.1 Definition of a Disabled Person explains that discrimination law in the UK prohibits acts of direct or indirect discrimination, harassment or victimisation by employers on grounds of sex, age, religion or belief, sexual orientation, transgender status or disability. These principles have application in the pensions context as well. The following summarises this extremely complicated area of law in the field of pensions:

19.13.3 Sex-based discrimination

19.13.3.1 EU law requires the application of the principle that men and women should receive equal pay for equal work. EU case law developed by the European Court of Justice has determined that pension benefits are 'pay' within the meaning of EU law and that the equal treatment principle applies to both access to and benefits from a pension scheme.

19.13.3.2 The Pensions Act 1995 and the Occupational Pension Schemes (Equal Treatment) Regulations 1995 and now the Equality Act 2010 and Regulations made within it incorporate the principles of EU case law into UK Statute. However, it is still important to refer to EU law and relevant EU case law because the UK legislation is principle based and so EU case law will provide further detail as to how things are to apply.

19.13.3.3 The general principles laid down by EU case law and as enshrined in legislation are that:

- Pension benefits for men and women must be equal in so far as they relate to service on or after 17 May 1990 (it may be earlier than this in certain cases). Benefits for service before 17 May 1990 do not need to be equalised.
- Survivor benefits must also be equalised and so must be on the same terms for men and women for service on and from 17 May 1990.
- Access to an employer's scheme must be equal for men and women. This means that the conditions for entry to the scheme must be the same. Thus if a condition under a scheme results in a greater number of females being excluded than males then this could amount to indirect discrimination unless it can be objectively justified.
- If there has been any discrimination regarding entry to a scheme then any claim can be calculated by reference to all periods of service for which the employee should have been a scheme member or if later from 8 April 1976. Any claim for unequal treatment must be referred to an employment tribunal during their employment or within six months of its termination.
- Normal pension ages for male and female members must be equal for benefits accrued in respect of service on and from 17 May 1990. In respect of benefits earned between 17 May 1990 and the date when scheme benefits are equalised (by a valid amendment to its Trust Deed and rules), benefits must be levelled up (increased to the level enjoyed by the advantaged sex).
- The requirements for non-discrimination apply to employers and Trustees and managers of pension schemes.
- The Equality Act 2010 imposes an equal treatment rule in so far as it relates to benefits on and from 17 May 1990. The equal treatment rule has the effect that (among other things) if any of the terms of the rule as to the treatment of members are or become less favourable to a member of one sex than they are to a member of the opposite sex, the term is modified so as not to be less favourable'.

19.13.3.4 A number of high-profile cases relate to elimination of sex-based discrimination (equalisation of pension age for males and females) and the measures taken to effect such changes, although the principles can be extended to other types of amendments. Typically, in these cases the parties sought to make changes by sending out letters or notices to members but did not comply with the strict requirements of the power of amendment governing this scheme. This vital step had often been overlooked. The cases underline that for any intended amendment to be valid, the formal requirements of the scheme's power of amendment should be strictly complied with. If the formal requirements have not been complied with then the proposed amendments, despite the fact that they have been announced, may not be valid.

19.13.3.5 The principle of equal treatment applies to all pension benefits irrespective of whether they arise from employer contributions or employee contributions.

19.13.3.6 If an employee's pension rights are transferred from one scheme to another, the receiving scheme is required to provide equalised benefits. It is therefore important that a receiving scheme ensures that before any transfer value is paid to it that the benefits under the transferring scheme have been equalised for benefits earned from 17 May 1990 until validly equalised.

19.13.3.7 The use of gender-based actuarial factors in defined benefits schemes are permitted and are not considered discriminatory. Such factors can be used for commutation and early and late retirements.

19.13.3.8 In a bridging pension, a formula is applied to calculate the pension payable from a scheme which when added with to State pension, will produce the same total retirement pension. Currently, between the ages of 60 and 65, an occupational pension scheme will pay less to females than it would to males as females start receiving State pension from age 60. The European Court of Justice has held that such pensions are not discriminatory. The Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010 provides that bridging pensions are a permitted exception to the equal treatment rule.

19.13.3.9 Although there remains uncertainty over the legal position, the Government's view is that schemes should equalise the effect of Guaranteed Minimum Pensions. It is expected that legislation will be enacted shortly to deal with this.

19.13.3.10 In March 2011, the ECJ ruled in Test Achats case that the Gender Directive requires insurance premiums and benefits to be gender-neutral. As a result of this, the derogation which allowed gender sensitive pricing became invalid from 21 December 2012. The effect on schemes is unclear but may potentially impact those depending on annuity purchases as premiums and annuity rates are equalized to the higher of the former cost levels.

HMRC has updated its guidance on drawdown pensions and letting providers to use the scheme rates for women as for men to determine drawdown pension from 21 December 2012. Further changes may be required as matters become clearer.

19.13.4 Discrimination on grounds of age

19.13.4.1 The Employment Equality (Age) Regulations 2006 (the 'Age Regulations') implement the age discrimination provisions of the EU framework employment directive. For general employment matters the Age Regulations came into force on 1 October 2006. Following objections from the pension industry, the pensions aspects of the Age Regulations were delayed until the Department for Work and Pensions made some changes to the regulations and these were finally brought into force on 1 December 2006. The pension provisions of the Age Regulations have been repealed and replaced by The Equality Act 2010 and supporting regulations. See 6.4.9.1 Definition of a Disabled Person for more information on the Equality Act.

19.13.4.2 It is unlawful for the Trustees (and employers) to discriminate (directly or indirectly) against or to harass a member or prospective member on the grounds of age, unless the practice falls within specific exemptions set out in the age regulations or can be 'objectively justified'. Rights accrued in respect of service before 1 December 2006 are not generally affected but the Regulations provide some other transitional protections to existing and prospective members.

19.13.4.3 From 1 December 2006 schemes are deemed to include a 'non-discrimination rule', which overrides any provisions within the scheme to the extent that those are unlawful and discriminatory. Trustees/managers of the scheme must refrain from doing any act which is unlawful (meaning that the disadvantaged age group in such circumstances will require to be treated on the same basis as the advantaged age group i.e. 'levelled up'). To avoid having to 'level up' action can be taken to amend the scheme's provisions to provide that the advantaged age group in such circumstances are treated on the same basis as the disadvantaged age group (i.e. a 'levelling down'). The Scheme will be required to provide for 'levelling up' until an effective amendment is made eliminating unlawful age discrimination.

19.13.4.4 The age discrimination provisions under The Equality Act 2010 include exemptions for a wide range of age related rules and practices that will typically exist in schemes. The government considers that these are justified at a national level and therefore, if a rule or practice is covered by an exemption, there is no need for the practice to be objectively justified. These exemptions generally include (although it is worth checking as not all schemes or cases will qualify under the exemption):

- a minimum or maximum age for admission to a scheme;
- the use of age criteria in actuarial calculations;
- basing some benefits on pensionable pay including having different accrual and contribution rates according to pay;
- a minimum age to become entitled to age related benefits;
- benefits being calculated by reference to the length of a member's pensionable service; and
- different employment and/or member contribution rates to money purchase schemes depending on the member's age where the aim is to provide benefits that are equal for members of different ages who are otherwise in a comparable position.
- for defined contribution schemes, differences in contributions based on length of service

19.13.4.5 Some uncertainty applies in relation to certain common practices applied by schemes. An example of this would be cessation of accrual of benefits at a particular age which is the scheme's normal pension age. There is no exemption relating to this and so this may have to be objectively justified if it is to be lawful. When checking for potential issues, consider contractual terms in employees' contracts, all scheme information and booklets and the practice of exercise of discretion.

19.13.4.6 One major issue which the DWP has consulted on is in relation to flexible retirement. This allows a member to draw all or part of their benefits whilst remaining in the service of their employer. This has raised questions as to whether they should be allowed to continue to earn further benefits under the scheme or not. Not offering continued membership may amount to discrimination. Following the results of the DWP consultation the DWP confirmed it had dropped plans to introduce exemptions for flexible retirement. This remains a complicated area now that the default retirement age has been removed and appropriate advice should be obtained before any decisions are taken.

19.13.5 Discrimination on grounds of sexual orientation

19.13.5.1 Direct or indirect discrimination on grounds of sexual orientation is unlawful. See 6.4.9.1 Definition of a Disabled Person for further information on discrimination on the basis of sexual orientation.

19.13.5.2 The Civil Partnership Act 2004 came into force on 5 December 2005 and introduced registered civil partnerships. This Act provides same sex couples with rights and responsibilities similar to those of married couples. As a result of the Act survivors' benefits must be extended to civil partners but only in respect of benefits referable to service on or after 5 December 2005 (the start date for contracted-out benefits is 6 April 1988).

19.13.5.3 The Marriage (Same Sex Couples) Act 2013 extended the right to marry to same sex couples In England and Wales with effect from March 2014. The equivalent Scottish legislation (the Marriage and Civil Partnership (Scotland) Act 2014) is expected to come into force by the end of 2014. From a pensions' perspective, same sex spouses have to be treated in the same way as civil partners. As a result, when the Scottish legislation comes into force, survivors' benefits must be extended to same sex spouse for benefits relating to service on or after 5 December 2005 (and for service from 6 April 1988 for contracted-out benefits).

19.13.6 Discrimination on grounds of disability

19.13.6.1 Under the disability provisions of The Equality Act 2010 it is unlawful for businesses to discriminate against disabled persons. See 6.4.9.1 Definition of a Disabled Person for further information.

19.13.6.2 These provisions apply to pensions and import a non-discrimination rule into scheme rules. It does not apply to rights earned and benefits payable in respect of service before 1 October 2004.

19.13.6.3 These provisions also apply to employers as well as Trustees or managers of a scheme. They must not discriminate against disabled persons in carrying out their functions and duties including admission to any scheme. Trustees and managers of occupational pension schemes have a duty to make reasonable adjustments to the rules of the scheme such as to avoid any discriminatory impact an individual may suffer.

19.13.7 Unlawful discrimination and fixed term workers

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations came into force on 1 October 2002. See 2.7 Fixed term contracts for further information. These Regulations prevent fixed term employees being treated less favourably than comparable workers on an indefinite contract. It also limits the use of successive fixed term contracts to a period of four years. It applies to access to and benefits from occupational pension schemes. Discrimination may be lawful if it can be objectively justified. Advice should be sought when contemplating treating employees on fixed term contracts differently from those on contract of indefinite employment.

19.13.8 Gender Recognition Act 2004

Under the Gender Recognition Act 2004 transsexuals who acquire a gender recognition certificate can marry in their acquired gender and be given birth certificates that recognise their acquired gender. The effect of this is that their benefits under a scheme should be calculated by reference to their acquired gender.

Chapter 20

Style guides

20.0 Style guide

20.1 Style guide web links

Style guide letters are available in the members' area of the ScotEng website. The letters are updated regularly to reflect changes in legislation. The wording should always be checked carefully and, if necessary, altered to reflect the particular circumstances you are dealing with. They have been provided for guidance purposes only.

If you have any questions about the use of the style letters, please contact Scottish Engineering.

20.1.1 Flexible working letters

20.1.2 Disciplinary letters

20.1.3 Grievance letters

20.1.4 Redundancy - *selection pool and stand alone selection letters*

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