A BASIC GUIDE TO EMPLOYMENT LAW

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Introduction

The law has given employees – and in many cases other workers who might not count as employees – rights and entitlements in relation to how they are disciplined and dismissed, how their grievances are handled, wages, absence from work and sickness, holidays, work breaks and working hours, time off for family emergencies, maternity and paternity leave, the right to apply for flexible working, redundancy and retirement. All workers have the right not to be discriminated against in relation to their sex, race, age, disabilities, sexual orientation or religion and beliefs.

Staff who feel they have been denied their rights have redress by taking their employers to an Employment Tribunal. The chances of this happening have increased three-fold for employers in the past decade or so. During 2007-08 the number of claims to Tribunals went up 42 per cent over the previous year.

In unfair dismissal cases employers can be ordered to pay compensation of up to £76,700. In discrimination cases compensation awards are theoretically unlimited, and six-figure payouts are not uncommon.

What follows is a basic guide to the main areas of employment law. Much of it is an abridged version of the guidance in the Lawrite HR Employment Law Manual, which extends to some 350 pages of useful advice and guidance.

Changes to the law

The law concerning employment and regulating what happens in the workplace is one of the fastest changing areas of law. The past decade has seen the coming into force of the Disability Discrimination Act 1995, and existing law consolidated in the Employment Rights Act 1996.

Workers' rights have been extended beyond recognition with the unfair dismissal jurisdiction of the Employment Tribunals extended to everyone who has been continuously employed by the same employer for more than 12 months.

The past decade has seen the implementation of:

1998 National Minimum Wage.

1998 Human Rights Act.

1998 Working Time Regulations.

1999 Tribunal compensation quadrupled and qualification halved.

1999 Time off for dependant's emergencies.

2000 Equality for part time workers.

2002 Paternity, adoption and parental leave.

2002 Protection for fixed terms employees.

2003 Exemption for small employers from DDA removed.

2003 Discrimination on religious beliefs outlawed.

2003 Discrimination on grounds of sexual orientation outlawed.

2004 Trade Union Recognition.

2004 Statutory Disciplinary & Grievance procedures compulsory (repealed 2009).

2005 Flexible working rights.

2006 New TUPE rules.

2007 Maternity leave up to 52 weeks and SMP 39 weeks.

2006 Age Discrimination and the right to apply to work beyond 65.

2007/09 Holiday entitlement increased by 20 per cent.

What is employment?

For there to be an employment there must be a contract of service. The nature of a contract of service is that the employer controls how, when and where the work is done. Usually the work is done on the employer's premises using the employer's tools and materials.

It is a relationship "of service" as opposed to someone agreeing to provide services as in a self-employed contractor role. The employer must exercise sufficient control over the employee and how he works. Lawyers still refer to the concept of "master and servant" when distinguishing a contract of employment from other contractual relationships.

There must be a mutuality of obligations between employer and employee. This is the case where the employee is obliged to work and the employer is obliged to provide him with work and to pay him for it.

It is essential to a relationship of employment that the obligation is a personal one, and the employee is personally obliged to do the work himself, as opposed to getting someone else to do it.

The contract of employment

A contract of employment can arise when one party agrees with another that he or she will personally undertake work for the other, which they will be paid to do by the other. It can be made verbally, or in writing, by exchange of letters, by a formal written agreement or it can be implied by the actions of the parties. It can contain express terms and implied terms. The essential characteristics of 'employment' must be present. Even if there is nothing in writing there will be a contract where someone is employed by someone else.

Employers do not have to make written contracts but the law is that employers must normally give employees a written statement of the main terms and conditions of employment ***within two months*** of their starting work. It has to include, among other things, details of pay, hours, holidays, notice period and, disciplinary and grievance procedures.

Workers v Self-employed

People who personally do work for other people can broadly be categorised as one of the above. If someone is not an employee they will either be genuinely "self employed" which means they run a business or profession offering their services to different clients or customers or they will be a worker. A "worker" is defined to include employees and others who "personally undertake to do work for another under a contract, whether written, oral, implied, or express, but not where the work is part of a profession or business undertaking carried on by the worker". Many rights like the Working Time Regulations and entitlement to the National Minimum Wage apply to all workers but the right to be protected from unfair dismissal and be paid redundancy pay only apply to employees.

Employment Agencies

At the present time agencies are regulated by the Employment Agencies Act 1973. This gives the Secretary of State the power to apply to an Employment Tribunal for an order prohibiting an individual company or partnership from running an employment agency for up to 10 years on the grounds of unsuitability, misconduct or other grounds.

The Act also makes it illegal to charge a fee for finding a job for someone except in certain cases such as au pairs, models and some jobs in the entertainment industry.

Regulations provide that: agencies have a duty of confidentiality; written statements of terms and conditions and information about the hirer's business must be given to workers; workers can take direct employment from the hirer; payment of the worker cannot be conditional upon the agency being paid by their client.

Regulations make a distinction between on one hand an 'employment agency' that introduces workers to an employer and on the other hand an 'employment business' which employs a worker who is seconded to another business who hires their services.

The broad effect of the Regulations is as follows:

1. An agency or business cannot contract with a worker to provide work finding services that it cannot charge for on the condition that the worker uses other services it can charge for or hires or purchases goods.

2. An agency or business cannot subject to, or threaten, a worker with detriment because the worker has terminated any contract with them or has taken up employment with someone else; neither can they require the worker to tell them the identity of any future employer of the worker.

3. They cannot supply workers to replace workers who are on official strike.

4. An agency which supplies a worker to a third party cannot pay the worker's wages or make arrangement to pay them (except in certain cases).

5. They cannot charge an employer a fee when a temp decides to take a permanent job with the employer UNLESS the contract gives the employer the option to extend the time the temp is hired instead of paying the fee. The transfer fee also cannot be charged if a quarantine period has elapsed. The length of the quarantine depends on how long the worker worked for the employer as a temp and how long has elapsed since the worker last worked as a temp and their taking up the permanent job.

The issue of whether a worker supplied by an employment agency is employed by the agency or the agency's client or whether they are not an employee at all, has been the subject of court rulings.

The inference of the most recent decision is that the starting point is to look at the relationship between the Agency's client and the worker and look to see if an employment can be implied, and the longer that the worker goes to work for the same client in a way that is controlled daily by the client the more likely it is that there is an employment. This is clearly bad news for businesses that want to use contract labour so that they are flexible and do not have the responsibility and cost of employment.

In the short term workers supplied by agencies are less likely to be considered an employee but after a year when employee protection from unfair dismissal kicks in the chances are now much greater that the client will be liable if it terminates the worker's job unfairly.

Flexible working

Employees who qualify by having 26 weeks continuous employment with their employer have a right to apply to vary their contract of employment to allow flexible working. Their employer must consider that application and may only refuse it where the employer considers that specified grounds apply.

The right only applies to the parent, adopter, guardian or foster parent, or person married to or the partner of, a person in that position, of a child under 17, (or under 18 in the case of a disabled child). This includes a same sex partner.

A qualifying employee may apply to his employer for a change in his or her contract of employment so long as the change relates to the hours he or she is required to work or the times when he or she is required to work or where he or she is required to work (as between

his or her home and his or her employer's place of business). Only one application may be made in 12 months and it must be in writing.

After application is made the employer has 28 days to agree it, meet with the employee to discuss it.

An employer may only refuse an application if he considers that one or more of the following grounds apply:

- the burden of additional costs,
- detrimental effect on ability to meet customer demand,
- inability to re-organise work among existing staff,
- inability to recruit additional staff,
- detrimental impact on quality,
- detrimental impact on performance,
- insufficiency of work during the periods the employee proposes to work,
- planned structural changes.

An employee whose application is refused may appeal to his employer. If the employer has failed to deal with the application or the employee considers that the employer has decided the application on incorrect facts then the employee can complain to an Employment Tribunal who may order the employer to reconsider the application or award compensation up to eight weeks' pay (limited to the same statutory amount as a week's pay for redundancy and unfair dismissal compensation).

Part time workers

A part time worker is someone who is "paid wholly or in part by reference to the time he (or she) works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker."

The Regulations go on to specify that employees or workers employed under different types of contract including: a contract that is neither for a fixed term nor a contract of apprenticeship; a contract for a fixed term that is not a contract of apprenticeship; a contract of apprenticeship; workers who are neither employees nor employed under a contract for a fixed term; workers who are not employees but are employed under a contract for a fixed term; and any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract as included in the meaning of 'part time worker'.

Under the Regulations, a part time worker has the right not to be treated by his or her employer less favourably than the employer treats a comparable full time worker as regards the terms of his or her contract; or by being subjected to any other detriment by any act, or deliberate failure to act, of his or her employer.

The right only applies if the treatment is on the grounds that the worker is a part time worker, and the treatment is not justified on objective grounds.

Part time workers can request a statement from their employer explaining the reason for specified treatment that they believe is contrary to the Regulations and have the right to make a complaint to an Employment Tribunal.

In so far as rates of pay and benefits are concerned the pro rata principle applies as between a full time worker and a part timer.

Fixed Term Employees

Fixed term employees are those on contracts that last for a specified period of time or will end when a specified task has been completed or a specified event does or does not happen.

Fixed-term employees should not be treated less favourably than comparable permanent employees on the grounds they are fixed-term employees, unless this is objectively justified.

Either each of the fixed-term employee's terms and conditions of employment should not be less favourable than the equivalent treatment given to their comparator or the fixed-term employee's overall package of conditions should not be less favourable. In both instances any less favourable treatment would need to be justified on objective grounds.

There is no limit on the duration of the first fixed-term contract, although if a contract of four years or more is renewed, it will be treated from then as permanent unless the use of a fixed-term contract is objectively justified.

A fixed-term employee can compare their treatment to the treatment of a comparable permanent employee. A comparable permanent employee is someone who works for the same employer in the same establishment, doing the same or broadly similar work, and the comparator's skills and qualifications must be taken into account where they are relevant to the job.

Wages

The law defines wages to include any fee, bonus, commission, holiday pay or other emolument of employment; it also includes Statutory Sick Pay; Statutory Maternity Pay; a guarantee payment; any sum payable for reinstatement or re-engagement; and non-contractual bonus payments.

An employer may not make deductions from an employee's wages or receive any payment from an employee UNLESS the deduction is required or permitted by law OR the employee has given his prior written consent to the deduction.

However certain deductions are permitted including the recovery of overpaid wages or expenses and certain statutory deductions.

Also a written agreement – in the contract of employment for example – may authorise other deductions to be made.

Cash shortages

Special rules apply in relation to staff employed to carry out retail transactions with the general public. Deductions in relation to cash or stock deficiencies may only be made to the extent that they do not exceed 10% of the gross amount of the wage payment to the employee from whom they are deducted and if they are made within 12 months of the discovery of the shortage.

Itemised Pay Statements

Employees must receive a written itemised pay statement at or before the time that payment of wages or salary is made to the employee. It must contain the gross amount of wages or salary; the amounts of any variable or fixed deductions from that gross amount and the purpose for which they are made; the net amount payable; where the net amount is paid in different ways, the amount and method of payment of each part payment.

However, a standing statement of fixed deductions may be given to the employee, and if so the statement given with each payment need only give the aggregate amount of fixed deductions.

The National Minimum Wage

All workers aged over the compulsory school leaving age (16 years old) must be paid the National Minimum Wage.

Complex rules govern how the NMW is calculated, particularly for piece workers who are paid according to what they produce rather than by the hour.

Equal Pay

The Equal Pay Act 1970 provides that an equality clause is implied in to the contracts of men and women employed in Great Britain. The effect of the equality clause is that where any term of the woman's contract is, or becomes, less favourable to her than a term of a similar kind in the contract under which a man is employed, that term of the woman's contract is modified so as to make it not less favourable; where the woman's contract does not include a beneficial term that forms part of the man's contract, the woman's contract is treated as including the missing term.

It operates in three situations:

1. Where a woman is employed on like work with a man in the same employment;

2. Where a woman is employed on work rated as equivalent with that of a man in the same employment;

3. Where a woman is employed on work that is of equal value to that of a man in the same employment.

Although the Act applies to and refers to a woman's contract compared with a man's, it applies equally to a man's contract compared with a woman's too.

The effect is that a woman should not be paid less than a man in the same job. However the law is quite complex and employers can draw distinctions between the work that men and women do that justify lower pay. Applications under the Act are far from straightforward. A woman (or man) has to have six month's continuous employment to bring an Equal Pay Act application to a Tribunal.

Sunday working and shop-workers

Shop workers in England and Wales have protection against having to work on Sundays by being able to opt out of doing so without fear of dismissal or detriment as a result. This does not apply if they are specifically employed only to work on Sundays.

Large shops (i.e. over 280 square metres) are not allowed to open on Easter Sunday or Christmas Day if it is a Sunday. Under the new Christmas Day Trading Act 2004 opening of large shops on any Christmas Day will be prohibited.

Working Time Regulations

The Working Time Regulations 1998 implement the European Working Time Directive in the UK and came into force on Oct 1, 1998.

The legislation imposes a statutory right to a maximum working week of 48 hours for many workers, averaged out over 17 weeks. The Regulations limit the hours of night workers and make certain health checks compulsory. Young workers too are controlled. Rest periods and breaks at work are regulated too.

Workers who want to opt out of the 48 hours a week limit can make an agreement to do so with their employers but cannot be forced to do so or treated detrimentally for so doing.

The Regulations also gave all workers the right to a minimum of four weeks paid annual leave. With effect from October 1st 2007, the basic entitlement increased to 4.8 weeks and it was increased again to 5.6 weeks – capped at 28 days a year – from 1st April 2009.

Dismissal

Unless an employee is contracted to work for only a specific fixed period or his contract provides for circumstances that automatically end it, his employment can usually only be terminated by either him or his employer giving a period of notice. If the employer ends the contract this is a dismissal. However a dismissal will also occur if an employer simply fails to renew a contract for a fixed period when that period comes to an end.

There can also be a constructive dismissal if an employee resigns in circumstances where he is entitled to treat the contract as brought to an end by a fundamental breach of contract on the part of the employer. A common example of this kind of dismissal is where the trust and confidence between employer and employee is destroyed. Abusive or discriminatory behaviour by an employer towards an employee, a serious unilateral variation of contractual terms by the employer or conduct intended to provoke the employee's resignation may well cause a constructive dismissal.

Unfair dismissal

Generally an employee who has completed more than one continuous year's employment is protected from unfair dismissal.

In order for a dismissal to be fair the reason for the dismissal must be one of these potentially fair reasons:

• Reasons related to the capability or qualifications of the employee.

• Reasons related to the conduct of the employee.

• Redundancy.

• Where his continued employment would involve him or the employer contravening a duty or restriction imposed by law.

• Retirement over the age of 65.

• Some other substantial reason.

In all cases the employer's decision to dismiss must satisfy a test of fairness. If the employer has not followed a fair procedure in making the decision to dismiss an employee the dismissal will usually be ruled to be unfair.

A Tribunal will look at all the circumstances of a dismissal in order to decide whether the decision to dismiss was a reasonable response to the circumstances and the facts known to the employer at the time.

If the claimant is found to be unfairly dismissed the Tribunal will award compensation made up of two components. The basic award is calculated in the same way as a statutory redundancy payment multiplying a week's pay by the number of years worked adjusted according to the claimant's age. Over and above the basic award the Tribunal may award compensation to meet the claimant's financial losses caused by the dismissal. The maximum award of compensation is fixed by law at £66,200 (2009/10), making the current total maximum including the basic award £76,700. This figure is index linked and increased annually every February 1st.

As well as awarding compensation a Tribunal may also order the employer to give the employee his job back or re-engage him in a similar job. The number of such orders made is very small.

Tribunals have the power to adjust awards. An employer who fails to comply with a reinstatement or re-engagement order may be ordered to pay additional compensation. An

employee who is found to have contributed to his dismissal may have his compensation reduced.

Tribunals also have powers to order one party or the other to pay the other's costs.

Automatic unfair dismissal

A dismissal will be automatically unfair if the reason or main reason for dismissal is one of those reasons that the law says will be automatically unfair (and in most cases the employee requires no qualifying period of employment to make a Tribunal claim).

The reasons are:

1. Dismissal for a union related reason.
2. Dismissal for asserting a statutory right (e.g. objection to illegal deduction from wages or insisting on any of his statutory rights under the Employment Rights Act 1996).
3. Dismissal for a health and safety related reason (e.g. refusing to operate dangerous machinery).
4. Dismissal for a maternity related reason (e.g. sacked when she tells employer she is pregnant).
5. Dismissal in connection with function as a pension scheme trustee.
6. Dismissal in connection with function as an employee representative or a special negotiating body or European Works Council.
7. Dismissal in connection with refusal of Sunday work by a shop worker.
8. Dismissal in connection with Working Time (e.g. someone who asks to be allowed to take annual leave or breaks or refuses to opt out of the 48 hour week).
9. Dismissal in connection with assertion of right to the National Minimum Wage.
10. Dismissal in connection with making a protected disclosure (whistle blowing).
11. Dismissal in connection with Trade Union Recognition or bargaining arrangements.
12. Dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing.
13. Dismissal in connection with taking part in protected industrial action (official strikes for example).
14. Dismissal because of taking time off for dependants or maternity, paternity, adoption or parental leave.
15. Dismissal because of action related to part time worker's rights.
16. Dismissal in connection with someone's rights as a fixed term employee.
17. Selection for dismissal by way of redundancy because of an automatically unfair reason.
18. Dismissal in connection with tax credits or a claim for the same.
19. Dismissal in connection with being absent for or selected for jury service.

In all the cases above the normal one year continuous employment qualifying period does not apply.

In the following cases the qualifying period still applies but the dismissal will be automatically unfair:

1. Dismissal because of a spent conviction.
2. Dismissal in connection with a TUPE transfer (unless justified for economic, technical or organisational reasons for a change in the workforce).

3. Dismissal because of an application for flexible working.

Wrongful dismissal

This is an entirely different concept to unfair dismissal. Every employee is entitled to reasonable notice of the termination of their employment unless employed on a fixed term contract. This is a common law concept independent of the statutory rights not to be unfairly dismissed. Most contracts of employment specify the notice either party must give the other. In the absence of such agreement the Employment Rights Act 1996 provides that where an employee has been employed for more than a month, the employer must give him at least the statutory minimum period of notice which is one week. After two completed years of continuous employment, the notice entitlement rises to one week for every completed year of employment up to a maximum of 12 weeks notice.

An employee only has to give his employer a week's notice, after a month of employment, irrespective of how long he is employed.

An employee dismissed without notice may be able to sue his former employer for wrongful dismissal and claim damages equivalent to what he has lost as a result.

However an employer may dismiss without notice where the employee is guilty of gross misconduct.

What exactly constitutes 'gross misconduct' is not defined but it clearly requires something so serious "… such as to show the servant to have disregarded the essential conditions of the contract of service...". Generally the concept is well illustrated by these examples: severe abuse, assault on a manager, theft, accessing pornography at work on the internet; drunkenness at work; damage to property.

The right to be accompanied

Workers have a statutory right to be accompanied by a fellow worker or trade union official where they are required or invited by their employer to attend certain disciplinary or grievance hearings and when they make a reasonable request to be so accompanied. This right is additional to any contractual rights. The statutory right to be accompanied applies to all workers, not just employees working under a contract of employment.

The statutory right applies where a worker is required or invited to attend a disciplinary or grievance hearing, and reasonably requests to be accompanied at the hearing.

The statutory right to be accompanied applies specifically to hearings that could result in the administration of a formal warning to a worker by his employer (i.e., a warning, whether about conduct or capability, that will be placed on the worker's record); the taking of some other action in respect of a worker by his employer (e.g., suspension without pay, demotion or dismissal); or the confirmation of a warning issued or some other action taken.

A worker has a statutory right to be accompanied at a disciplinary or grievance hearing by a single companion who is either a fellow worker, i.e., another of the employer's workers; or a full-time official employed by a trade union; or a lay trade union official, so long as they have been reasonably certified in writing by their union as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings. Such certification may take the form of a card or letter.

A worker who has been requested to accompany a colleague employed by the same employer and has agreed to do so is entitled to take a reasonable amount of paid time off to fulfil this responsibility. The time off should not only cover the hearing but should also allow a reasonable amount of time off for the accompanying person to familiarise themselves with the case and confer with the worker before and after the hearing.

The law states that an employer must permit the companion to address the hearing in order to put the worker's case, sum up that case, and respond on the worker's behalf to any view expressed at the hearing. The worker and companion must be allowed to confer during the

hearing. However the companion is not allowed to answer questions on the worker's behalf. If the worker indicates that he does not want the companion to address the hearing the employer is not obliged to permit him to do so. Furthermore the companion must not use the powers conferred upon him in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

It is now clear that a union representative can effectively act as an advocate on the worker's behalf at a disciplinary hearing in much the same way as an advocate in a court hearing.

Redundancy

A redundancy occurs only when an employee is dismissed and the reason for his dismissal is that his job is no longer available at the place where he works (because the factory that employs him was closed, for example) or where his employer no longer requires the same number of employees to do what he does (because of a fall in demand for the product he makes, or changes in technology, for example).

In summary an employee's job is redundant if the business that employs him closes down or closes down at the location where he works, or if he becomes surplus to the requirements of the business.

TUPE

The Transfer of Undertaking (Protection of Employment) Regulations 1981 (TUPE), apply when there is a transfer of a trade or business undertaking or part of an undertaking, to a new owner. Employees who are employed by the undertaking at the time of the transfer automatically become the employees of the new owner, effectively as if their contract of employment was made originally with the new employer. If either the old or new employers dismiss an employee because of the transfer of undertakings, the dismissal may be considered unfair.

Trade Union Recognition

A Trade Union may make a request for recognition to an employer who employs 21 or more workers. The employer can respond within 10 working days but if he fails to do so this will have the same effect as refusal to recognise the Union, and the Union can make a formal application for compulsory recognition to a Government body called the Central Arbitration Committee.

The Union must have 10% membership in the bargaining unit it wants to represent and must show that the majority of workers would be likely to favour recognition. The procedure for dealing with an application is complex.

Consultation with Employees

The Government had to implement the EU Directive on National Information and Consultation between 23 March 2005 and 23 March 2008, beginning with employers of 150 or more in 2005 and extending it to 100 or more in 2007 and finally to 50 or more in 2008. Employers who have less than 50 employees will not be covered by the new requirements.

This Directive requires that employees shall have the opportunity to be informed and consulted on management decisions affecting their future, such as decisions relating to changes in work organisation or contractual relations, including redundancies and transfers of the undertaking.

The Government has pledged to bring to an end the situation where employees sometimes only found out about their redundancy or the takeover of the business where they work by watching the news on TV or by text message from their employers.

Basically, where an employer already has in place arrangements for employees to be given information about the business that employs them, it will need 40% of the workforce to agree to change them. Otherwise, if 10% of the workforce wants them to do so, employers must appoint information and consultation representatives from their workforce.

In order to bring the Directive into UK law The Information and Consultation of Employees Regulations 2004 came into force on 6 April 2005, with full implementation by 6 April 2008.

Consultation about health and safety

All employers are obliged to consult with employees about health and safety.

Safety Representatives are appointed by a trade union where the employer recognises the union. They will have been employed by the employer for two years or have two years' experience in similar employment. They represent their fellow employees in consultations about health and safety arrangements. The employer must consult with them and provide them with assistance to perform their functions.

Non-union employees must be consulted directly or may elect employee representatives to consult with the employer on their behalf.

Industrial action

Official industrial action called by a Trade Union in accordance with a properly conducted ballot will be 'protected'. An employee who takes part in industrial action (e.g. an overtime ban or a strike) that is 'protected' and is then dismissed will not only have a claim of unfair dismissal but will be found to have been automatically unfairly dismissed. The protection extends to the first 8 weeks of industrial action if during that time the employer takes such procedural steps as are reasonable for the purposes of resolving the dispute. If he does not then the remainder of the action is protected too.

Employment Tribunals

Employment Tribunals (which were originally known as Industrial Tribunals) are a system of courts that have authority to deal with a number of different types of claims and disputes on matters arising between an employer and his workforce. They can award up to £66,200 (2009/10) compensation for unfair dismissal and in some cases, including all discrimination claims, there is no limit on how much compensation they can award.

Health and safety

The common law has established that an employer has a general duty to take reasonable care to avoid injury, disease or death occurring to their employees at work.

In particular employers must:-

a) provide a safe place of work with safe means of access and egress;

b) provide and maintain safe appliances and equipment and plant for doing the work;

c) provide and maintain a safe system of work;

d) provide competent people to undertake the work.

If an employer fails in his common law duty the injured employee has a civil law right of action to sue his employer for compensation as long as he can show that there has been negligence.

However employers also face a raft of statutory duties imposed by Parliament.

The **Health and Safety at Work Act 1974** provides that every employer has a duty to ensure the health and safety and well being of all his employees. His statutory duty (under **Section 2(2)** of the **1974 Act**) is to provide:-

Safe plant and systems;

Safe methods of handling, storage and transport of articles of goods;

Provide employees with information, instruction and training;

Ensure the place of work is safe with means of access and egress;

Provide a safe working environment.

The effect of the 1974 Act and the **Management of Health and Safety at Work Regulations 1999** and other regulations is that:

All employers of more than **five** people must prepare (and as appropriate revise) a written policy statement setting out their general health and safety policy, and the organisation and arrangements for carrying out this policy. The employer MUST also bring the statement and revisions of it to the attention of employees.

Every employer must carry out a suitable and sufficient assessment of risks to health and safety of his employees (and persons not in his employ but who would otherwise be at risk). Employers of more than five people *must* record the significant findings of his risk assessments and any group of his employees identified as being especially at risk.

Every employer must make and give effect to arrangements for effective planning, organisation, control, monitoring and review of preventative and protective measures, which if there is more than five employees, must be recorded in writing.

There must be written procedures for *serious and imminent danger* and dangerous areas setting out emergency procedures.

Employees must be provided with comprehensive and relevant information on risks to their health.

An employer has an absolute duty to take into account human capabilities of his employees when entrusting them with tasks.

There is a duty to ensure that there is adequate health and safety training when employees are recruited and repeated in the future when risks to them are increased by new responsibilities, new work or equipment, new techniques or new systems.

All employees to be given information about Health and Safety as prescribed in the Act, and for posters to be put up in places of work. An alternative to display of a poster is to hand each individual employee an approved leaflet.

The poster must be displayed in a readable condition at a place that is reasonably accessible to employees at work and positioned so that it is easily seen and read. An employer must clearly and indelibly insert in the appropriate space on the poster the name and address of the enforcing authority for the premises and the address of the employment medical advisory service for the area where the premises are situated.

An employer carrying on business in Great Britain (i.e. in England, Wales and Scotland) to insure with an authorised insurer against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment in Great Britain in that business.

Accidents must be reported.

An employer must so far as is reasonably practicable avoid the need for employees to undertake any manual handling operations involving a risk of injury.

An employer must provide such equipment and facilities as are adequate for enabling first aid to be rendered to his employees if they are either injured at work or become ill at work. He must also tell his employees what arrangements have been made for first aid including the location of equipment, facilities and personnel.

All employers have duties under the Control of Substances Hazardous to Health Regulations 2002.

There are many other specific regulations applying to workplaces and specific industries and hazards.

Whistleblowers

The Public Interest Disclosure Act 1998 protects workers (not just employees) from being victimised or dismissed for making disclosure (often in breach of contractual terms against breach of confidentiality) in certain circumstances. Only information about criminal activity, other illegality, danger to individual health and safety, environmental damage or concealment of information about these matters is protected.

The worker must act in good faith, believe reasonably that his disclosure is protected and that it is true. Disclosure to the employer, a legal adviser, a Minister of the Crown, a Regulator, or someone to whom the employer has a legal responsibility is protected provided that the employee believes that his employer will punish him, evidence will be destroyed or that other workers have made previous disclosure without effect. Other criteria apply.

Discrimination

It is unlawful to discriminate in employment on the grounds of race, sex or married status, sexual orientation, religion or beliefs, age and disability. Someone who is the victim of discrimination may apply to an Employment Tribunal and be awarded compensation for any damage or loss suffered including injury to feelings. The compensation awarded has no limit. As well as injury to feelings (which will usually attract compensation of between £4,000 and £8,000) all financial losses stemming from the discrimination may be recovered. Awards of several hundred thousand pounds are not uncommon.

Bullying and harassment

Harassment is a criminal offence under a number of provisions including the Public Order Act 1984 and the Protection from Harassment Act 1997.

It covers use of threatening abusive or insulting language or behaviour and putting someone in fear of violence. Pursuing a course of conduct that someone knows or ought to know is harassment of another person is a criminal offence.

Harassment, bullying or constantly tormenting someone who works in the same business may well amount to a criminal offence. It is also conduct that could infringe the laws that make discrimination unlawful where the victim is targeted because of their sex or race or disability or sexual orientation or religious beliefs. An employer can be held vicariously liable for the actions of an employee and can be liable personally if they fail to implement policies to prevent discrimination or harassment or bullying.

Compensation for discrimination claims can include damages for injury to feelings and awards can be very substantial.

Sex discrimination

Sex discrimination may be direct such as where a woman is treated less favourably than a man or vice versa or where a married person is treated less favourably than a single person. The test is whether the person would have received the same treatment but for his or her sex or marital status.

Sex discrimination may also be indirect. This would occur if a requirement or condition were imposed upon a woman or married person that also applies to a man or single person but has a detrimental effect on the woman or married person because she or he cannot comply with it.

Sex discrimination can also take place when a person is discriminated against because they have had or intend to have a gender transformation.

Race discrimination

The Race Relations Act 1976 applies the same principles of unlawfulness to discrimination and victimisation that relates to a person's colour, race, nationality, ethnic origins or national origins. The Commission for Racial Equality was established as a result of the 1976 Act, and its role is to work towards the elimination of discrimination, to promote equality of opportunity and to keep under review the working of the Act. The Commission has issued a code of practice on race relations that can be taken into account by Employment Tribunals.

Racial discrimination can take place directly, indirectly or by way of victimisation. When a Tribunal or court decides whether discrimination has taken place, the position of the alleged victim will be compared with someone of similar ability and qualifications in similar circumstances.

Direct discrimination is where on racial grounds a person is treated less favourably than other people would be.

Disability discrimination

The employment provisions of the Disability Discrimination Act 1995 ("DDA") apply to employment at an establishment in Great Britain. All employers now have to comply with the Act.

It is unlawful to directly discriminate against a person because of their disability by treating them less favourably than the employer would treat a person without that disability whose relevant circumstances (including ability) are the same as, or not materially different from, those of the disabled person. This discrimination cannot be justified.

It is unlawful to treat a disabled person less favourably for a reason related to his disability than the employer treats or would treat a person to whom the reason for the treatment does not apply AND the employer cannot show that the treatment is justified.

An employer has a duty to take such steps as are reasonable to prevent any arrangements made by him, or on his behalf, or any physical features of his premises from placing a disabled applicant or employee at a substantial disadvantage compared with those who are not disabled.

Failure to make adjustments is itself an act of discrimination.

Discrimination on grounds of sexual orientation, or religion or belief

It is illegal to discriminate on the grounds of a person's sexual orientation. This means that treating someone less favourably because of their sexuality will be unlawful whether it's a straight employer discriminating against a gay employee or the other way round or indeed a gay employer discriminating against other gays or a straight person discriminating against someone who is straight because of their sexuality.

Discrimination on the grounds of a person's religion or beliefs is also unlawful. There are genuine occupational requirements that are allowed as in sex or race discrimination.

Age discrimination

It is illegal for an employer to discriminate on the grounds of age in the areas of recruitment, promotion and training. The only compulsory retirement age is 65 but all staff have the right to apply to work beyond retirement. Employers must follow a statutory retirement procedure. However age discrimination can be objectively justified.

Human Rights

The Human Rights Act 1998 came into force on 2 October 2000. It means the UK Courts (and the Employment Tribunals and EAT) will have to interpret UK domestic law in accordance with the European Convention on Human Rights.

The provisions of the Convention on Human Rights that are most likely to be of interest in the field of employment law are:

Article 9

Everyone has the right to freedom of thought, conscience and religion.

Article 10

Everyone has the right to freedom of expression including the right to hold opinions, receive and impart information and ideas without interference by public authorities.

Article 11

Everyone has the right to freedom of peaceful assembly and to freedom of association with others including the right to form and join trade unions for the protection of their interests.

Article 14

The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Human Rights Act regulates how the state and its laws are to affect the lives of its citizens. It does not directly create rights that are enforceable by one person against another. But because disputes between employers and their employees will involve recourse to the law and rulings by the courts about the extent to which one or the other is regulated by the law, and the interpretation of the law, human rights issues are relevant and will continue to arise in the decisions courts have to make which effect the relationship of employers and employees.

Absence from work

The fundamental concept of employment is that an employee works for their employer at the times and places agreed in their contract of employment.

An employee’s absence from work is often the basis for disputes between employers and their staff.

The Working Time Regulations and other industry specific regulation, like those that regulate driver’s hours, control the number of hours that an employee can work before having to have a break and also time off work. In addition every worker now has to have at least 5.6 weeks’ paid annual leave. How and when an employee takes his holiday will be regulated by his contract of employment. For example many employers have periods of annual shutdown when the workplace is closed and staff are obliged to take their holidays.

Apart from holidays the law also provides that employees have a right to take leave from work for different reasons. These are:

- maternity leave;
- paternity leave;
- parental leave;
- adoption leave;
- time off for family and dependents;
- time off for ante natal care in pregnancy;

• time off to deal with duties as a trade union official;

• time off to deal with duties as a trade union learning representative;

• time off to deal with duties as a member or candidate for membership of a European works council;

• time off to take part in trade union activities;

• time off for 16/17 year olds to study for certain educational qualifications;

• time off during notice of redundancy to seek new work;

• time off to perform duties as a pension fund trustee;

• time off to perform duties as a health and safety representative;

• time off to perform duties as an employee representative;

• time off to accompany another worker to a disciplinary or grievance hearing where the right to be accompanies applies;

• time off to perform certain 'public duties'- including service as a Justice of the Peace or a member of a local authority or statutory tribunal. Only such time of as is reasonable is allowed;

• time off while suspended; an employee may have to be suspended from work due to health and safety considerations during pregnancy for example, so will then have to be allowed time off work.

Although there is no law that specifies that an employee is allowed to have leave from work for jury service the effect is the same because subject to certain exclusions most employees are liable to serve as jurors and failure to do so is contempt of court. Dismissal for taking time off for jury service would be unfair dismissal.

Absence due to sickness

Apart from holidays or other statutory leave the most common reason for an employee being absent from work is time off because the employee is sick. An employee who takes time off claiming to be sick when they are not sick will be guilty of misconduct and subject to discipline and even dismissal.

Most employers have terms in their contracts or procedures that specify the way in which an employee must report sickness. The contract of employment should provide whether an employee would be paid when off sick. If it does not provide any period of paid sickness then the only obligation is to pay Statutory Sick Pay.

Long-term sickness may prevent an employee's capability to do their job and entitle their employer to terminate the employment. To avoid such a dismissal being unfair the employer should follow a fair procedure and obtain evidence about the employee's capability either from the employee's own doctors or by arranging an examination by an occupational health specialist. Only when there has been consultation with the employee and consideration of alternative employment can a decision that the employment is brought to an end be made. Where the sickness is likely to last for 12 months or more, or otherwise amounts to a disability as defined by the Disability Discrimination Act, then the employer must avoid discriminating against the employee, and consider all the reasonable adjustments that can be made to enable the employee to continue working or return to the workplace in the future.

Compassionate leave of absence

In the event of a member of an employee's family who lives with them, being taken suddenly ill, then leave to make arrangements to care for them may be taken under the right for time off to care for dependents. However this is not applicable to non-dependent members of the family or for non-emergencies. An employer who dismissed someone simply because they took time off to care for a relative taken ill or because of the death of a relative would be acting unfairly but equally there is no right to take leave on bereavement unless it falls within the right to take time off to care for dependents. There is no right to be paid for such leave

either. Undoubtedly taking time off to arrange a funeral and to attend it falls within the right to leave where the deceased is the employee's spouse, partner, child, parent or other family member who lives in their household.

Enforced absence due to arrest or a custodial sentence

If someone is arrested and held in custody or receives a custodial sentence they will obviously not be able to attend their work. An employer may find such an event entitles him to dismiss the employee either for gross misconduct or for some other substantial reason. Alternatively it will automatically bring the contract to an end because it is frustrated by the impossibility of the employee performing his part of the contract. This will almost certainly be the case if the employee is sent to prison for a substantial period.

Maternity leave

All pregnant employees are entitled to reasonable time off for antenatal care.

From the first day of employment there is an entitlement to 26 weeks' ordinary maternity leave and 26 weeks additional maternity leave.

If the employee has worked continuously for the same employer for 26 weeks by the 15th week before the child is due she is entitled to Statutory Maternity Pay if her average weekly earnings are at least equal to the lower earnings limit for National Insurance contributions for the first 39 weeks.

At the end of ordinary maternity leave an employee is entitled to return to the job in which she was employed before absence.

At the end of additional maternity leave an employee may return to the job in which she was employed before absence unless it is not reasonably practicable for the employer to permit her to return to that job, in which case she is entitled to return to another job which is suitable for and appropriate for her to return to in the circumstances.

Paternity leave

Employees must have or expect to have responsibility for the child's upbringing, be the biological father of the child or the mother's husband or partner, and have worked continuously for their employer for 26 weeks leading into the 15th week before the baby is due to qualify for paternity leave.

Eligible employees are entitled to choose to take either one week or two consecutive weeks' paternity leave. They can choose to start their leave after the date of the child's birth (whether this is earlier or later than expected), or from a chosen date.

Leave can start on any day of the week on or following the child's birth but must be completed within 56 days of the actual date of birth of the child, or if the child is born early, within the period from the actual date of birth up to 56 days after the expected week of birth.

Only one period of leave will be available to employees irrespective of whether more than one child is born as the result of the same pregnancy.

During their paternity leave, most employees are entitled to Statutory Paternity Pay from their employers.

Employees are required to inform their employers of their intention to take paternity leave by the fifteenth week before the baby is expected, unless this is not reasonably practicable. They will need to tell their employers the week the baby is due and whether they wish to take one or two weeks' leave, and when they want their leave to start.

Employees are entitled to the benefit of their normal terms and conditions of employment, apart from wages or salary, throughout their paternity leave. Most employees will be entitled to SPP for this period. Employees are entitled to return to the same job following paternity leave.

Parental leave

Working parents with one year's service with their employer are entitled to unpaid parental leave to care for a child up to five. The right applies to parents and to a person who has obtained formal parental responsibility. The entitlement is 13 weeks' parental leave for each child and the employee's rights to take the leave last until the child's fifth birthday. The employee will remain employed while on parental leave and at the end of parental leave an employee is guaranteed the right to return to the same job as before, or, if that is not practicable, a similar job which has the same or better status, terms and conditions as the old job; where the leave taken is for a period of 4 weeks or less, the employee will be entitled to go back to the same job.

Time off for family and dependants

All employees have the right to take a reasonable period of time off work to deal with an emergency involving a dependant, and not to be dismissed or victimised for doing so. The right enables employees to deal with an unexpected or sudden problem and make any necessary longer-term arrangements.

Children and young persons

The employment of children and young persons is covered by a number of pieces of legislation. In legal terms a 'child' is someone not over the compulsory school age of 16. A 'young person' is someone who has ceased to be a child but is under the age of 18. In law 'a minor' is a person under the age of 18 years.

No child may be employed whether paid or not:

- if he or she is under the age of 14 years;
- or for any other than light work;
- or before the close of school hours on any day on which he or she is supposed to attend school;
- before 7am or after 7pm on any day;
- or for more than two hours on any day on which he or she is supposed to attend school;
- or for more than two hours on any Sunday;
- For more than 12 hours in a week in which he or she is required to attend school;
- for more than 8 hours, or if under 15, 5 hours, on any other day apart from a Sunday on which he or she is not required to attend school;
- or for more than 35 hours (25 hours if under 15) in any week in which he is not required to attend school;
- for more than 4 hours in any day without a rest break of at least one hour;
- at any time in a year unless at that time he or she has had or could still have during a school holiday at least two consecutive weeks without employment.

However employers should also take note that local authorities are empowered under the Children and Young Persons Act 1969 to pass by-laws restricting the employment of children. This may enable a child aged 13 to be employed in specified categories of light work.

Before children and young persons start work, employers are obliged to:

assess the risks to their heath and safety taking special account of factors such as their inexperience and immaturity, and the extent of training provided;

ensure the young persons, including children, are protected from any risks to their health and safety as a consequence of the assessments;

provide relevant and comprehensible information to the parents of a child about the risk assessments and the control mechanisms the employer has put in place;

Young persons must not be employed for work beyond their physical or psychological capacity or involving harmful exposure to certain agents or radiation, or involving risk of accidents that it may reasonably be assumed cannot be recognised or avoided by young persons due to their insufficient attention to safety or lack of experience or training; or risks to health due to extreme cold or heat. This does not however apply to a young person over the school leaving age where the work is necessary for their training, they are supervised by a competent person, and the risks reduced to the lowest practicable level.

The **Working Time Regulations 1998** apply to young persons so that:

- a health and capability assessment is necessary before they can be required to do night work;
- minimum daily rest period of 12 hours;
- 2 days a week without work;
- minimum 30 minutes rest break after four and a half hours continuous work.

Young workers may not ordinarily work more than 8 hours a day or 40 hours per week, nor at night between 10pm to 6am or, where the worker is contracted to work after 10pm, 11pm to 7am.

They may work longer hours where this is necessary to maintain continuity of service or production, or to respond to a surge in demand for a service or product and where an adult is not available to perform the duties and the training needs of the young worker concerned are not adversely affected. They must be adequately supervised during night work hours, where that is necessary for their protection, and be allowed equivalent periods of compensatory rest.

Young workers may work at night between midnight and 4am, provided the above tests are met, in the following sectors: hospitals or similar establishments and those employed in connection with cultural, artistic, sporting or advertising activities. Young workers may also work between 10 or 11pm to midnight and between 4am to 6am or 7am in these sectors and also agriculture; retail trading, a hotel or catering business (including public houses, restaurants or bars), a bakery or postal or newspaper deliveries.

Stakeholder Pensions

Stakeholder Pension Schemes have been available since April 2001. Since 8th October 2001 almost all employers have been required to offer their employees access to a scheme.

Certain employers and employees are exempt from this obligation.