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EMPLOYMENT LAW UPDATE

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1. Why is Employment Law important?

- Everything you do in relation to staff is done on the company's behalf.
- A well-managed workforce is generally a happier and more productive one, and easier to deal with.
- Mistakes in handling legal matters in employment are potentially very expensive, in money, morale and maybe in career terms.
- Knowing the law is only one skill which will help in this, good interpersonal and communication skills are also vital - but it helps to know where you, and your workforce, stand.
- Managing the workforce is sometimes about having to make tough decisions, and it is good to have some principles upon which to base those decisions.

So…. What is the basis of the Employment Relationship?

The basis of all employment is the employment contract. The contract is vitally important because it sets out the terms on which a person is employed and is the whole foundation of the relationship.

2. Application and Interview

Can often be rushed, but it is a crucial time both for gathering information and for setting the tone of the relationship. Let's consider the consequences of getting it wrong!

If the new recruit **stays** for any length of time:

(i) unsuitable employee fails to do a good job, needs supervision and adversely affects morale of the team
(ii) good staff may go
(iii) ultimately may be legal consequences either in terms of expensive legal advice and/or a compromise agreement, or at worst, a tribunal case
(iv) always compromising may give you a reputation as soft target'
(v) if case goes to tribunal, there is damage in terms of money and reputation in high profile business.

If s/he **goes**…

(i) expense of recruiting afresh
(ii) wasted time and effort in training for the post again.

REMEMBER - the interview is crucial and should be prepared in advance. Mistakes with recruitment are expensive in simple financial terms and also in terms of time and staff morale.

2.1 The six stages of recruitment

1) Define the need
2) Attract the candidate
3) Screen the applications
4) Prepare the interview/selection test
5) Conduct the interview/test
6) Make the decision

2.2 Thinking logically about recruitment

2.2.1 Defining the need

Ensure that you use a resignation as an opportunity to **THINK**.

- Do I need another eg administrator at all?
- Would the budget be better spent somewhere else, or could the money be saved?
- Assuming I do need another person in that role, do I need to reconsider the duties and responsibilities – should the role be extended/compressed? Do I need someone with different qualifications/experience?
- Could I redraw the role by giving away or adding on some of the responsibilities? Eg a younger member of staff who needs 'bringing on'/ current member of staff struggling with their role who is willing and able, but could do with a break from a task they find onerous.

2.2.2 Attracting the candidate

Who Do I Want?

Before starting the recruitment process, it is essential that you are totally clear about the candidate you want to recruit.

Defining the Job

You must **start** by having an up-to-date job description/profile. Jobs evolve and change and the documentation doesn't! You will want to review the job description in case it has become outdated and you may want to make changes following the 'defining the need' stage above.

The Job Description covers:

- Purpose of job/why role exists.
- Where it fits into organisation structure.
- Title of person it reports to.
- Number of people reporting to, and their titles.

- What authority the job holder has eg size of budget controlled, what authority to commit the company in terms of purchase orders, discretion in making decisions.

2.2.3 Drafting the Role Profile/Person Specification

The Role Profile or Person Specification describes your 'ideal' person for the role and is based around experience, qualifications, contacts etc. It must be as objective as possible, as you may be called upon to explain it to an Employment Tribunal!

The profile should indicate certain qualifications, aptitudes or qualities which are **essential** for the job, and others which are **desirable.** You would probably not interview anyone who clearly did not have any of the essentials, but may be prepared to be more flexible on desirables, especially if they can be achieved through training reasonably quickly and effectively.

Ensure that any qualities you expect of a candidate are justified on the basis of the job.

A Note on Internal Candidates

- Can be overlooked, but can be a good source of candidates, both personally and via friends, business contacts etc.
- Ensure the coverage is complete – don't overlook anyone in a multi-site organisation.
- Try to follow any policy on internal recruitment if you can, but it is not legally required. All internal candidates **with** the desired skill/knowledge match must be interviewed – not everyone that applies.
- Be especially careful to provide feedback to internal candidates.

2.2.4 Screening the candidates

This is a critical stage, because it is going to result in a short-list from which you hope to get your successful candidate. When you screen, you must ensure that you:

- Are consistent in your selection of candidates.
- Are objective in your assessment of their qualities.
- Stick to relevant criteria – gut feelings will not do.

2.2.5 The interview

Your objective is to select the best person for the job, ensuring as far as you can that this person is capable of doing the job, has the right characteristics and personality to be successful as a worker and as a member of the team or/and working for this company and to ensure

that they know enough about the organization to make a decision about the job.

Aptitude Tests

You may seek to include particular tests which are relevant to the job eg telephone interview, psychometric test, presentation etc. These may be included at the same time as the interview or in a separate session.

Structuring the interview

It is a good idea to have a clear structure and to prepare a basic set of questions which are the same for each candidate, with variations for their particular career history/experience. You may have more than one interview, with different objectives.

You should have a clear beginning, middle and end of the interview, and this could be, for example:

- Warm up/familiarisation;
- Questions about knowledge and experience of individual candidate;
- Questions seeking to determine whether candidate has characteristics / behaviours necessary;
- Information about job and company;
- General questions.

2.2.6 Some Legal Points

- Interview notes are disclosable to the unsuccessful candidate under the Data Protection Act – don't write anything down which you would not want shouted across a crowded room (ie made public)!
- Keep careful notes of any particular points raised at interview – especially if you have made a promise to eg honour a holiday, allow some flexibility in working from home etc
- Don't make promises you cannot keep
- Sing from the same 'hymn sheet' as the formal documentation.
- Raise any peculiarities of the job at the interview eg particularly busy times of year, flexibility in hours, foreign travel – whether or not you think it might be obvious – there may be some reason why the candidate cannot do it.
- Where relevant, get copies of qualifications and make it conditional that you get them before the offer is finalised.
- References – be aware of company policy on references.
- Be aware that the offer of a job constitutes a contract.
- Be aware that employment contracts need to be signed in order to ensure that they are binding – make sure that, where your offer is accepted, the prospective employee signs and returns his or her contract.

- The Equality Act of 2010 has limited pre employment enquiries in relation to health. It is now unlawful for employers to ask health-related questions of applicants before job offer, unless the questions are specifically related to an intrinsic function of the work.

2.2.7 Questions at Interview – Discrimination Issues …

- It is dangerous, though not discriminatory per se, to ask a woman the number and ages of her children during a selection interview.
- The EAT in a 1980s case said that what mattered here was the intent and purpose of the questions, which were purely in order to put the candidate at her ease. There may be good reason for such questions, and if they are to be asked, they should be asked equally to male candidates.
- Questions about disability should be justified in that they should be intrinsically relevant to the needs of the job.

What if an applicant discloses a disability at the interview?

- Ensure that good and careful notes are taken at interview (note here the significance of the Data Protection Act – notes of interview will be disclosable to the applicant).
- Investigate any disclosures of medical problems given sensitively, but properly with a view to the reasonable adjustment requirement.
- Think creatively about ways in which a good, but disabled candidate can be accommodated.

If you are not giving a disabled candidate a job, be prepared to justify to an objective person why they did not get the job – if you cannot do this convincingly, you will not convince a tribunal.

Positive Action in Recruitment and Promotion

On 6 April 2011, section 159 of the Equality Act 2010 (EA 2010) will come into force and will enable employers "*to apply voluntary positive action in recruitment and promotion processes when faced with two or more candidates of equal merit, to address under-representation in the workforce*". This measure is being implemented as part of the government's agenda to tackle inequality, as demonstrated in *The Equality Strategy - Building a Fairer Britain*. It should be noted that neither quotas nor positive discrimination will be allowed. Furthermore, the decision as to whether to invoke this provision rests solely with the employer, who cannot be obliged to make use of it. Automatic selection of under represented groups or quotas is not required or permitted.

Positive action

Positive action is an exception to the general rule that discrimination, whereby

one employee is treated less favourably than another based on a "*protected characteristic*", is prohibited. Currently under section 158 EA 2010 employers can offer *training* to, or *encourage job applications* from groups which have previously been disadvantaged or under-represented in the workplace. Section 159 EA will now extend this positive action to selection of a candidate for *employment* or *promotion* permitting employers to take under-representation of particular groups into account when selecting between two equally qualified candidates.

Statutory requirements

In order to benefit from this new provision in the context of recruitment or promotion, the employer has five hurdles to pass. They must show that:

1. The successful candidate is from a protected group;
2. They "*reasonably think*" that the protected group is at a disadvantage or is under-represented;
3. The successful applicant is "*as qualified*" as other candidates;
4. They do not have a policy of treating people who share the protected characteristic more favourably in connection with recruitment and promotion than people who do not share it and;
5. The positive action is proportionate.

Candidates of equal merit

When the implementation of this proposal was first suggested, it was one of the more controversial aspects of the EA 2010. In part this was due to the ambiguous nature of the wording of the provision, which will only apply if employee A is "*as qualified*" as employee B (i.e. of equal merit). There has been much debate over how the issue of equal merit can be objectively determined and as yet there is little useful guidance on this point, save that it should be broadly interpreted and not relate only to qualifications in the academic sense.

According to the EHRC's draft Employment Code of Practice, an assessment "*will usually involve an employer preparing an objective set of criteria that relate to the job or post and then conducting an objective assessment or evaluation of each candidate against that set of criteria and against each other*". The provision does not go so far as to allow the employer to prefer a less qualified employee over one that is *clearly* better qualified. Whether an employer can prefer a *slightly* better qualified employee remains to be seen. The government is anxious to emphasise that the principle of "*selection on merit*" remains fundamental.

Government Equalities Office guidance

The Government Equalities Office has shed some light on the situation and published non-statutory guidance on section 159. This addresses the equal merit point by stating that various factors may be taken into consideration aside from just academic qualifications, including professional experience,

performance and the applicant's overall capability. In terms of the element of reasonable belief of under-representation or disadvantage, it explains that this would not require statistical evidence of any such under-representation or disadvantage. Furthermore, positive recruitment or promotion is not limited to the final stages of decision-making but can equally apply in the earlier phases, such as during any period of short listing. Finally, it points out that the temptation to set a low capability threshold when comparing the applicants' abilities in order to create a greater pool of candidates must be avoided.

What does this mean for employers?

Unfortunately, the general lack of clarity surrounding, in particular, the requirement for equal merit means that employers are likely to avoid using the provision rather than risk potential litigation by rejected candidates who claim to be better qualified. Whilst the issue of "*reasonable belief*" in the context of under-representation has some scope for subjectivity, employers are left to hazard a guess at whether two candidates would be deemed "*equally qualified*" by a tribunal. That question would ultimately be one for the Tribunals to decide. An employer may believe that two candidates are of "*equal merit*" but a Tribunal may decide, based on its own analysis of the evidence, that they are not. This leaves an employer who takes positive action under section 159 exposed to the risk of litigation. Therefore, unless and until there is concrete statutory guidance, there seems to be little incentive for employers to concern themselves with interpreting section 159, given its voluntary nature and the potential risk of a claim by an unsuccessful candidate if the employer does take positive action under section 159.

3. Employment Status

3.1 Employee, Worker or Self-employed?

Why is this distinction important?

Many legal rights and obligations depend on status, in particular:

- Statutory employment rights
- Tax liability
- Health and safety obligations
- Vicarious liability for torts and other wrongs of the worker

Categories of Employment

Employee

- does work personally, has mutuality of obligation, is 'at employer's disposal'
- often enjoys significant 'perks' over and above minimum rights
- enjoys all available statutory rights subject to length of service, in particular:
  - all family friendly rights
  - unfair dismissal protection

        - redundancy payment
    - tax is paid at source
    - employer is vicariously liable for all wrongs

Worker

- does work personally, has no job security
- typically agency workers and direct casuals
- enjoys some statutory rights, in particular:
    - health and safety protection
    - protection from unlawful discrimination
    - working time regulation
    - minimum wage
- tax is paid at source
- employer is vicariously liable for all wrongs

Self Employed

- 'in business on their own account'
    - client or employer?
    - Levels of control
    - Mutuality?
    - More than one client?
    - Intermittent work rather than continuous?
    - Provision of tools and equipment?
    - Possibility of substitution?
- where it is genuine, is paid gross of tax
- should be insured for any wrongs committed
- only protection from statute is:
    - health and safety, except for risks of their 'calling'
    - unlawful discrimination protection

3.2 Issues around employment status and recent cases

3.2.1 Long term agency workers

Where agency workers become a 'part of the furniture' at the end-user's premises, there is always a danger that s/he will be seen as an employee ie a contract of employment will be implied. There have been a number of cases over the years where a long-term agency worker, especially where the length of the assignment has been years, has been held to be an employee and has been entitled to employment protection. Tribunals have indicated that:

- continuous service of more than one year
- use of the agency limited to a conduit for money
- reasonable expectation of future continuity by the employee

indicated that implication of a service contract was likely.

Backlash by the courts.. 'leave the creation of social policy to Parliament'

James v Greenwich Council 2008 Court of Appeal

This case concerned a woman working for the council through an employment agency from September 2001 until she went sick in August 2004 (she switched agencies to get a higher rate of pay in 2003). On her return she was told that the agency had sent someone else and she claimed unfair dismissal. Her claim was rejected on the basis of lack of mutuality – it was also interesting that she did not inform the council when she went off sick.

The Court of Appeal confirmed that a tribunal will only be able to imply a contract of employment between the agency worker and the 'end-user' where it is necessary to do so to give business reality to the situation. Where agency relationships genuinely and accurately represent the relationship between the parties, they will be upheld. What the court makes clear is that an employment contract should not be implied simply because the worker has been engaged with one client for a significant period of time.

Checklist for end users

- Check all terms of contract between agency and workers and contract between agency and end user – all ts and cs should be consistent with a tri-partite relationship, not employment – in particular:
  - workers should be paid, taxed, appraised and controlled and disciplined by the agency as far as possible;
  - agency should be required to provide a substitute worker to cover for holidays, illness etc;
  - appropriate warranties/indemnities should be sought from agency regarding employment status,
- Assignments should be completed in accordance with written contract and should not change over time.
- Integration of agency worker into workforce should be minimised – where possible do not give them supervisory jobs, train them or include them in organisation charts.
- Try not to have long term assignments.
- Do not enter into artificial arrangements made with the express intention of avoiding employment consequences eg engaging former employees as self employed.
- In appropriate circumstances, consider direct employment.

It is also interesting that in ***Cairns v Visteon 2007***, the tribunal considered that it was 'difficult to envisage' that an agency worker who was clearly an employee of the agency would be able to argue that he was an employee of the end user ie that there were parallel contracts of employment.

Please note there is new legislation on its way in 2011 to give more rights to Agency Workers.

. Key points in the new legislation are:

- Agency workers will have the right to equal treatment in terms of basic employment terms and conditions when compared to a directly recruited comparator who is employed by the hirer. Basic conditions for these purposes are those in relation to pay, duration of working time, length of night work, rest periods and breaks and annual leave. This right is triggered once the agency worker has undertaken the same role with the hirer for a period of 12 weeks.
- From the start of their assignment an agency worker has the right to be told of any relevant vacancies in the hirer during their assignment, in order to be given the same opportunity as a comparable worker to find permanent employment with the hirer.
- From the start of a worker's assignment an agency worker has the right to be treated no less favourably than a comparable worker in the hirer's establishment in relation to "collective facilities and amenities". This includes canteen or other similar facilities, child-care facilities and the provision of transport services.
- hirers will have to allow a pregnant agency worker reasonable paid time off during her working hours to attend ante-natal appointments.
- hirers will be under a duty to make adjustments to protect agency workers from identified risks if they are pregnant, have recently given birth or are breastfeeding.

If you are a hirer of agency workers you may wish to carry out an "agency worker audit". Do you have any agency workers currently or likely to be engaged for more than 12 weeks? If you do you should consider what equal treatment will involve, including:

•What roles do you use temporary agency workers for?

•Do you have comparable directly hired roles?

•What are the basic working and employment conditions of those comparators?

•Do these differ from the current conditions of your agency workers? If so, how?

From this businesses will need to consider whether the use of agency workers on a long term basis is the right approach and whether alternatives to agency workers might be more appropriate.

3.2.2 Self- Employment

This is all about 'being in business on your own account' and working for 'clients' rather than an employer. It depends upon a range of factors including taking risk of loss, working for more than one person, provision of tools and equipment, levels of control, substitution etc.

The 'Contractor'

Many organisations have staff, often specialising in highly technical areas of work/IT, who commence working for the organisation on the basis of being self-employed contractors. As far as the tax authorities are concerned, these people may eventually be categorised as employees if they cannot satisfy them that they are 'in business'. The basic question is whether the person who pays them is their employer or their client.

Ministry of Defence HQ Defence Dental Service v Kettle 2007

Ms Kettle was an experienced dental and orthodontic specialist taken on by MOD, set up as invitation to tender and contract for provision of services. Subsequently she claimed unfair dismissal. She paid her own tax and insurance, received no pension or sick pay and had to provide her own insurance against negligence. She argued that the real nature of the relationship was one of employment. In her favour were the following:

- *she was part of the MOD system;*
- *subject to direction about where she should work;*
- *working absolutely regular sessions three days per week, and in practice there was mutuality of obligation;*
- *provided with a list of patients*
- *provided with all equipment, including uniform;*
- *the advertisement mentioned 'salary', job share arrangements and the fact that the MOD was an equal opps employer;*
- *although the contract provided for a substitute to be provided by her, in practice the MOD always arranged holiday cover.*

The appeal tribunal agreed with the first decision that in effect she was an employee. What had actually been agreed and was done in practice was that she provided her work personally and, once her clinic times had been agreed, there were mutually binding obligations.

Whereas

Parade Park Hotel v Commissioners for HMRC 2007

M and K were painters who had worked for a firm which was half way through a job for the hotel when it closed down. The hotel asked them to stay on to complete the job, which took 2 months. Subsequently one of the men was asked if he would like to do general maintenance work, he initially gave a price for each job and then they agreed a daily rate. There was a list of tasks to be done which the hotel added to; he decided when to turn up and what jobs to do. He started doing 5 days per week, then less, then work dried up and he got work elsewhere, work was always intermittent. Hotel knew he had a drink problem, but he was good when he turned up, so they did not consider they had any obligation to offer him work and did not necessarily expect him to turn

up. He used his own tools and rectified mistakes at his own expense. He was treated as self-employed from the start and both parties believed that he was. HMRC disagreed.

Held
He was self-employed. There was an absence of mutuality of obligation which would mean no employment. In addition, there was no detailed control over the way he did his work and the provision of his own tools also pointed to employment. Long service, as was the case here, would not mean that you were not an independent contractor, if other factors pointed away from it. He was required to do his work personally, and was certainly regarded as the 'regular maintenance man', but this was not enough to make him an employee.

The tax risk is borne entirely by the employer in this case.

Demibourne v IR 2006

Special Commissioners decided that IR were entitled to assess employers for the full PAYE/NI contributions which should have been paid in respect of a man wrongly categorised as 'self-employed'. The IR refused to give credit for the fact that he had paid tax on his earnings.

New regulations were introduced from 6 April 2008 which amend The Income Tax (Pay As You Earn) Regulations 2003 to extend the limited circumstances where HMRC may make a direction to **transfer** an employer's PAYE liability to the employee who received the relevant payments from which tax has been under deducted. This is good news for the employer as it means that liability will be transferred if a contractor is later found to be an employee after all.

Broadly, the new power to make a direction will apply where an employer has failed to deduct or account for tax in relation to a payment subject to PAYE as defined in Regulation 4 of the PAYE Regulations, while tax on that payment has been included in the employee's self assessment.

3.2.3 Part-Time Workers

The cumulative effect of the Part Time Workers Regulations and the general law on sex discrimination is that the position of part-timers **must** now be equalised with full timers.

The Regulations outlaw any treatment of part-timers which is **less favourable** than that afforded to full-timers – includes any form of detriment. The most common areas of difficulty for part-timers include the provision of private healthcare, overtime, company cars and bank holidays and the fact that they are often the first to go in redundancy situations.

The employer can defend the claim on the basis that, either the treatment was unconnected to the part-time status, or it was justified – a court will be looking for a valid objective business reason. Claims must be made within 3 months and compensation is unlimited, and includes claims for pension loss.

3.2.4 Fixed Term Work

Regulations designed to protect people on fixed term contracts apply to employees, not workers (agency temps are excluded too). The overall principle is that employers should not treat fixed term employees less favourably than comparable permanent employees, unless the treatment is for some reason other than the fact that the employee is fixed term and it can be justified on objective grounds.

Also, where a fixed term employee has been employed continuously on successive fixed term contracts beyond 4 years up to the present date s/he should be made permanent, unless failure to do this can be objectively justified.

3.2.5 Vicarious Liability

Employers are responsible for the negligence of their employees which takes place 'in the course' of their employment. A case in 2005, **Viasystems v Thermal Transfer** has established that, where a fitter's mate was employed by a sub-sub-contractor on a site, but working under fitters who were employed both by his employer and by the sub-contractor, there was dual liability for his negligence, which caused a flood and each employer had to pay 50%. The correct question was – who was entitled to exercise control over the relevant act or operation of the fitter's mate? There was no need to look for a transfer of employment, both sets of fitters had a right to exercise control over the mate and they could have prevented the negligent act. Both parties were held equally responsible. The same tends to happen where personal injury has been caused by a person working for you, whether s/he is self-employed or employed by others, if s/he was under your control, you may well be liable.

4. The Contract of Employment

The relationship is a contractual one, but there is no need for the contract to be in writing to be recognised by the law. In practice, it is possible for the contract to be wholly oral or partly or mainly in writing.

- Law says that employees **must** be given a written standard statement of terms and conditions of their employment within 2 months of starting work (or a contract of employment covering mandatory terms).
- Applies to all employees.
- If not provided, employer may be liable for additional award of 2-4 weeks pay if employee takes successful action in employment tribunal.

- Mandatory terms include names of the parties, the date of commencement of employment, pay and benefits, hours of work etc.
- Contract is binding, whereas statement is only evidence of terms (as is unsigned contract).
- Sometimes, other documents may become part of the contract of employment eg offer and acceptance letters and staff handbooks.

All contractual documents taken together contain the express terms of the contract.

4.1 Probationary Period

The legal position

- Probationary periods have little legal significance in terms of statutory rights.
- Contractually, it is normally provided that during or at the end of the probationary period, the employee will be entitled to one week's notice only and the full contractual procedures will not apply to them. Once the probationary period has been successfully completed, full contractual protection applies.
- At the end of the probation the employer will have the option of:
    - 'passing' the employee as satisfactory
    - extending probation to deal with outstanding issues on performance ie setting objectives and a new time frame
    - dismissing the employee – this should never be one in a perfunctory manner, beware:
        - employees protected by unlawful discrimination provisions
        - employees who are otherwise in protected categories such as TU reps and health and safety reps

      as they do not require one year's service to challenge their dismissal.

Przybylska v Modus Telecom Ltd 2007

P was subject to a standard three month probation period, success to be determined by an objective performance assessment. Under the contract, the probationary period automatically came to an end unless extended. P was ultimately dismissed on 19th Jan, even tho' her probationary period had ended on 2nd Dec (she was actually on holiday on that day). She was successful in claiming that she was entitled to 3 months notice as her probation had automatically ended 2nd Dec, not having been extended by her employer.

It is important that you ensure that you have formally communicated with any employee before his/her probation runs out, to set a time for the probationary interview and state that probation is extended until that time. This covers you if the interview has to be delayed for practical reasons.

- Whatever the length of the formal probationary period, the employee does not obtain statutory rights to claim unfair dismissal until 1 year of continuous employment.
- Therefore it is suggested that an informal review should always be conducted at 8/9 months to check that the employee is still satisfactory in all respects.

4.2 Variation of the terms of the Contract

- The contract may become outdated, the job itself may change, the employee may be promoted or have his/her job title changed. Where the employee agrees to any change, this is binding.

- The employer may have allowed scope for variation eg 'and any other duties reasonably incidental to the post' or clause requiring the employee to be reasonably flexible in relation to his place of work. Where this is the case, the employee will usually have to agree to changes, unless the request is inherently unreasonable.

- Where the change involves a mutually agreed **term** of the contract, if there is no scope for variation in the contract, the employer will have to get the employee's consent to any change. If the employer imposes the change on an individual, it may well be a constructive dismissal if the employee leaves in disgust, or a claim for back pay.

- Where the change requested is just to the 'works rules' or conditions of employment eg a no-smoking rule, dress code etc, the employer can enforce this unilaterally with reasonable notice.

- Even where the change required is a fundamental one, it is sometimes possible for the employer to enforce it where it is part of a 'genuine economic reorganisation' – is shown to be necessary and applicable to the whole workforce or the whole of a department and for good business reasons, but this is a tricky path and it is always better to negotiate and gain consent.

Morgan v Network Europe Group Ltd

FACTS

Mr Morgan commenced employment as a storekeeper with Network Europe Group Ltd on 1 November 2005. He signed a statement of terms and conditions and confirmed receipt of the company handbook. Neither made any provision for payments during a lay-off.

In March 2008, Mr Morgan was issued with a new handbook that stated that, together with the contract of employment, it set out the main terms and conditions of employment. The new handbook included a provision providing for lay-off without pay, other than the statutory guarantee payment. The provision was not specifically brought to employees' attention.

Network Europe Group Ltd alleged that employees had also been issued with new contracts of employment, but no copy was produced. Mr Morgan brought a claim for unauthorised deductions from wages in respect of a period of lay-off between 27 February and 22 May 2009.

DECISION

The employment tribunal held that Mr Morgan was bound by the new handbook. Network Europe Group Ltd had the contractual right to lay him off without full pay and the unauthorised deductions claim failed. Mr Morgan appealed to the Employment Appeal Tribunal (EAT). The EAT overturned the decision of the employment tribunal.

The EAT held that there was no agreed variation of the contract of employment. Mr Morgan could not be deemed to have accepted the new lay-off term. The term was not drawn to his attention and it was not one that affected Mr Morgan until he was actually laid off in 2009, at which point he promptly raised a grievance. This was consistent only with him not accepting the lay-off variation.

It said that there will be deemed acceptance only where the employee's conduct in continuing to work is only referable to having accepted the new terms. The EAT found that Network Europe Group Ltd had made unauthorised deductions in respect of his normal pay, less the guarantee payments received for the period of lay-off.

IMPLICATIONS

This case demonstrates the importance of getting explicit employee agreement to changes to terms and conditions, rather than attempting to rely on deemed acceptance, particularly where the changes could have adverse financial consequences for the employee.

Employees should be asked to sign and return a copy of new contractual terms to confirm that they agree to be bound by them. The imposition of a change by the employer (rather than by agreement or by termination of existing contracts and re-engagement) means that the employee has an ongoing claim for breach of contract and the employer may be forced to reverse the change.

The main issue will be whether or not the employee can be said to have impliedly accepted the change by reason of his or her continuing in employment. As this case shows, it will be difficult for the employer to show deemed acceptance of the new terms in circumstances where the change in question will not impact on the employee until a later date. This would also be the case where, for example, an employer attempts to change contractual sick pay, maternity or redundancy benefits.

As the change may not affect employees until a later stage, the mere fact that the employee does not explicitly object may not be sufficient to show

acceptance, although it will assist the employer if the proposed change has been brought clearly to the attention of the employees.

5. Implied Terms

In addition to the express terms of the contract, ie those that are spoken or written, the courts have always taken it upon themselves to 'imply' terms into contracts where they feel that it is necessary… in order to understand the rules relating to unfair dismissal, you need to have a handle on these IMPLIED TERMS.

There are three types of situations where terms are likely to be implied into the employment contract:

- Where the parties have forgotten something important and it will have to be implied in order to deal with a problem.
- Where legislation requires the implication of a term eg equal pay, annual leave.
- Where the courts have traditionally implied a term on the basis that it is fair and ought to be part of the relationship - this has been done in the form of mutual obligations or duties owed by both employers and employees to each other. The list is never closed.

5.1 Employee's Duties

- **To obey lawful and reasonable orders.**
  This includes adaption to new techniques and skills, as long as proper training is given, and there is a basic understanding that the employee should be reasonably flexible, especially in small businesses.
- **To exercise reasonable care and skill in the performance of his/her employment.**
  This is not an obligation to be 'perfect' but to be reasonably competent in the context of the skills and experience you have, the responsibility you carry and the training you have received.
- **Not to delegate his/her duties** – the essence of a contract of employment is that it is performed personally.
- **To give faithful service** - this includes things like not leaking confidential information, taking bribes, working for a competitor or setting up in competition.
  NB: This usually only operates during the currency of the employment. If an employer wants to restrain an ex-employee from competing etc, a restraint of trade clause may be necessary, and that will have to be reasonable in order to be enforced by the courts.
- **Not to undermine the employer's trust and confidence in him/her**.
- **To take reasonable care for the safety of himself and his fellow employees**.

5.2 Employer's Duties

- **To pay him/her as agreed**. Failure to pay an employee's full salary will amount to a breach of contract, which will entitle the employee to leave and claim constructive dismissal, or to stay and claim breach of contract. This is only the case where it is a deliberate refusal, rather than an administrative error.
- **To cover the employee for reasonable work related expenses**.
- **To take reasonable care for the safety of his/her employee**, providing:
    - Competent fellow employees.
    - Adequate plant and equipment.
    - Safe place of work and system of work.
- To treat the employee with respect and not to destroy the mutual trust and confidence between the parties.
- There is no obligation to give a job reference, except in limited circumstances covered by the Financial Services Act, but where one is provided, it must be prepared:
    - with reasonable skill and care to ensure that the information contained within it is accurate;
    - AND with reasonable skill and care to ensure that the information does not give an unfair impression of the former employee.

Don't forget that a failure to give a reference to an ex-employee could be held to be discriminatory if a tribunal were to be convinced that it was victimisation on the grounds of eg, race or sex.

5.3 'Stress'

These are cases where the employee claims that psychiatric injury has been caused by work and that this is a breach by their employer of the obligation to take reasonable care of their health and safety. There has been a great range of cases on stress, and the general guidelines seem to be:

- As far as personal related stress is concerned eg bereavement, most responsible employers will give the employee some latitude and will try to provide help and support eg time off, light duties etc, for a reasonable period. It may also be appropriate to organise counselling which can be done through XXX ORGANISATION XXX, to which all staff have access and about which managers can inform employees where appropriate.
- In relation to work related stress:
    - The employer is usually entitled to assume that the employee can stand the normal pressures of work, unless he knew of some particular problem or vulnerability.
    - The test is always the same, there are no occupations considered intrinsically harmful to mental health.
    - The employer is generally entitled to take what he is told by his employee at face value, unless he had good reason to think to the contrary.

- The employer will only be liable for stress related illness where he could or should have been able to **foresee** the illness ie he knew or ought to have been aware of the 'warning signs' or his employee expressly brought them to his attention, warning signs may include employee actually complaining, absences accompanied by medical notes or self-certs stating 'depression' or 'stress' or behavioural change.
- A breach of the duty is only made out if it is proved that the employer failed to take reasonable steps to alleviate the stress, bearing in mind the magnitude of the risk, the gravity of any harm, the costs and practicability of preventing it and the justifications for running the risk - the size and scope of the employer's operations are relevant here.

5.3.1 How Should Managers Handle Stress Amongst Staff?

The danger of the whole stress problem is that managers are unsure how to deal with sick notes from employees citing 'stress' as a reason for absence and often choose not to act on them. The alternative is that managers adopt an immediately negative approach to these members of staff, and try to discourage their return or manage them out.

It is understandable that managers are loathe to upset 'fragile' staff, and are worried that any form of formal communication with them, or disciplinary action, may be more trouble than it is worth.

If the manager believes with good reason that the stress is work related, then action should be taken sooner rather than later to deal with the source of the stress by reducing workload or removing the employee from eg the 'difficult' work relationship. This should be done in consultation with HR and with the employee.

5.4 Trust and confidence

An employer must not conduct itself in such a way as to undermine the relationship of trust and confidence between the employer and the employee. This is a question of showing the employee respect.

This is a wide-ranging clause, and has been held to cover:

- Abusive or bullying conduct from the employer.
- Generalised unfair treatment of an employee, including depriving them of some benefit for no good reason, or leaving them out of a generalised pay rise arbitrarily.
- Applying inappropriate and disproportionate disciplinary measures.
- Refusing, or simply failing to deal with grievances or problems promptly when asked to do so by the employee.
- Breaking promises made to the employee, upon which the employee has relied.

All the cases in this area tend to involve the employee leaving employment in response to such behaviour by the employer and seeking to claim constructive dismissal.

6. The Working Time Regulations

These Regulations deal with maximum hours, breaks and holidays. They now apply both to workers who have fixed working hours and are paid overtime ('measured working time') and those (like many managers) who have core hours and then work at their discretion in excess of those hours. Effectively, it means that people who are voluntarily regularly working more than the limit ought to have signed an opt out.

- There is a maximum average 48 hour limit on the working week, calculated over a standard 17 week reference period. Individual workers may opt out of this by written agreement, and there is provision to extend the averaging period by collective agreement up to 52 weeks maximum (eg this is the case offshore). This is the only provision which the employee is permitted to 'opt out' of, although the opt out is currently the subject of considerable controversy and attempts are always being made to alter it at EU level.
- Adult workers have the right to a daily rest period of 11 consecutive hours and a weekly rest period of 24 hours**,** or 48 hours in fourteen days. Adults are also entitled to a minimum 20 minute rest break where the working day exceeds 6 hours. There is an additional right to 'adequate' rest breaks if the pattern of work poses a risk to health and safety, particularly where the work is monotonous or the work-rate is pre-determined.
- Workers are entitled to 5.6 weeks (effective 28 days in a normal 5 day working week) statutory paid annual leave. The right operates from day one of employment, but accrues according to time worked in the first year. None of these basic statutory 28 days, which include bank holidays, can be carried over or paid in lieu, unless the worker is leaving employment.
- Where people count as 'night workers', normal hours must not exceed average of 8 per day calculated over a standard reference period of 17 weeks. If the work involves special hazards or heavy physical and mental strain, then there is an 8 hour limit on actual working time in each 24 hour period. *The night work limits, including the rights to rest periods and rest breaks, do not apply where the worker works far away from where s/he lives eg off-shore work.*
- Act applies to 'work' where the employee is at the employer's disposal or carrying out his activities or duties. NOT non-working lunch breaks, travelling between home and work, and travelling outside normal working hours, but does include work done abroad, working lunches and job-related training. It does include on-call time on the employer's premises, even if the worker is asleep.

Although previously excluded, the rules on working time now apply in full to non-mobile workers in most sectors previously excluded altogether ie road

and sea transport, inland waterways and lake transport and sea fishing eg clerical or administrative personnel in those sectors. Many other workers who are mobile and in the excluded sectors are now entitled to their four week holiday and maximum working hours.

NOTE: In ***Transocean International Resources Ltd*** *v* ***Russell 2006****,* the EAT has handed down a decision clarifying the territorial scope of the Working Time Regulations 1998 SI 1998/1833 (WTR) as regards offshore work. The decision was that offshore work on the UKCS fell within the scope of the WTR from 1 August 2003 onwards, that being the date on which the 2003 amendment came into force.

> *In these cases, approximately 350 offshore workers, who are backed by differing trade unions, argued that offshore employers are not fulfilling their obligations under WTR to provide 4 weeks' paid annual leave. Most of the cases concern a typical work pattern in the sector whereby individuals work for a period on the installation, eg 2 or 3 weeks, followed by an equivalent period off the installation known as 'field break'. The first argument put forward is that the right under WTR to paid annual leave, means that existing rotations must be changed, in terms of which, working time on the installation is reduced from 26 weeks to 22 weeks, followed by 30 weeks of combined field break and annual leave.*

This argument is presented on the basis that annual leave under WTR must come from what would otherwise be scheduled offshore working time. The contrary argument is that annual leave entitlement is already incorporated under field break arrangements and that in fact, offshore workers enjoy leave entitlements which exceed the provisions under WTR. The consequence of the argument put forward by the offshore workers is that, eg, a teacher would require to take annual leave from term time.

The second argument put forward by one union is more controversial. This is to the effect that all time spent on the installation, even including time when the worker is sleeping in the accommodation unit, is working time. Following on from that, they further argue that rest entitlements cannot be taken offshore, with the result that the entire field break is taken up with compensatory rest. In support of that proposition, reference will be made to cases concerning doctors on call in the health service sector. From the employer's side, that argument is disputed and in particular the circumstances of an offshore worker should be distinguished from a doctor on call. Employers provide accommodation to offshore workers primarily because it would be absurd and arguably more unsafe to expect the employer to arrange daily transport from a remote location to the employee's home each day. This secondary argument, if upheld, would be potentially devastating for the sector. It would mean that the limitation on working time, being an average of 48 hours per week, would be breached. The consequence of that is the commission of a criminal offence. In order to comply, if all time spent offshore is working time, rotations would need to be reduced to 8 days offshore followed by 20 days of field break. That work pattern in itself raises significant health and safety issues, including increased helicopter flights, handovers between workers and less familiarisation with ongoing operations.

Furthermore, the economics of such a rotation would seriously put into question many fields and developments in the UKCS. There is also the significant practical issue of locating a hugely increased number of offshore workers, in a market which is already very tight and in which skills are in high demand. This case raises one of the most significant challenges that the industry has faced in terms of litigation exposure and threatens its future potential if all of the unions' arguments are upheld.

7. Equal Opportunities

The law recognises the right of an individual worker to be treated equally with others regardless of his/her race or sex. As a matter of course, we will often have to 'discriminate' or make choices at work. The fact that I decide to employ one candidate rather than another is itself a form of discrimination. The important issue is the **basis upon which I do it.**

The Equality Act became law in October 2010. It replaces previous legislation (such as the Race Relations Act 1976 and the Disability Discrimination Act 1995) and ensures consistency in what you need to do to make your workplace a fair environment and to comply with the law.

The Equality Act covers the same groups that were protected by our previous equality legislation - age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity - but extends some protections to groups not previously covered, and also strengthens particular aspects of equality law.

Anti-discrimination legislation has a number of features which make it different from standard employment protection (and more dangerous to the employer):

- There is no qualifying period of employment required before the worker can take advantage of the protection.
- All forms of discrimination allow for unlimited damages, but it is really the high legal costs in such areas, as well as the internal costs of investigation and morale issues which make this area so costly.
- The rules apply to all kinds of workers and self-employed people too.
- There is a reversed burden of proof once prima facie evidence of discrimination is found ie the employer has to show that there was NOT discrimination (eg ***Bodi v Teletext 2005*** where Bodi, a Muslim, was not short listed for a position as duty editor. He satisfied all published criteria for the job. His employers agreed they had used another unpublished criteria to shortlist. They had no equal opportunities training and had never had a Muslim Duty Editor. They failed to satisfy the tribunal that there had not been at least unconscious religious discrimination against him.)
- A discrimination action is often interesting enough to generate unwelcome publicity.

The Equality Act is a mixture of rights and responsibilities that have:

- **Stayed the same** - for example, direct discrimination still occurs when "someone is treated less favourably than another person because of a protected characteristic"
- **Changed** - for example, employees will now be able to complain of harassment even if it is not directed at them, if they can demonstrate that it creates an offensive environment for them
- **Been extended** - for example, associative discrimination (direct discrimination against someone because they associate with another person who possesses a protected characteristic) will cover age, disability, gender reassignment and sex as well as race, religion and belief and sexual orientation
- **Been introduced for the first time** - for example, the concept of discrimination arising from disability, which occurs if a disabled person is treated unfavourably because of something arising in consequence of their disability

7.1 Unlawful discrimination

It is unlawful to treat any worker unfavourably on the basis of:

- Sex (including pregnancy and maternity)
- Race, colour or ethnic or national origin
- Disability
- Gender Reassignment
- Sexual Orientation
- Religion
- Age
- Married or Civil Partnership

7.2 Forms of discrimination

In all cases, the legislation provides for four kinds of discrimination

1. **Direct Discrimination** - 'I don't employ Asians/Gays/Jews'. It is necessary to show that the employer has treated an employee unfavourably on these grounds compared with the way it treats or would treat other people.

2. **Indirect Discrimination** - Where an employer uses any provision, criterion or practice which puts people of a different sex or race or ethnic or national origin etc at a particular disadvantage, then it will be unlawful unless the employer can justify it as an appropriate way of achieving a necessary objective of the business. A minimum height requirement will indirectly discriminate against women, as will a strength requirement - a dexterity requirement will indirectly discriminate against men.

3. **Victimisation** - less favourable treatment because eg a person has brought legal proceedings or assisted another person to do so.

It will be essential to show a good paper trail for all decisions which have a potential unlawful discrimination element, and managers will have to be ready to provide a good explanation for such decisions.

4. **Harassment** – see below.

The Equality Act 2010 has added in discrimination by association, perception and made some other changes too.

7.3 Harassment

All of the anti-discrimination legislation listed above contains specific provision to make any harassment on these grounds unlawful.

Harassment is unwanted conduct violating the dignity of men and women in the workplace and causing a hostile and intimidating atmosphere for them. It may be related to age, sex, race, disability, religion, nationality or any personal characteristic of the individual, and may be persistent, or a very serious individual incident. The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient and are objectively something more than just trivial.

This means that the employer has an obligation to take all reasonable steps to ensure that such harassment does not take place and to support the worker if it does. The potential damages can be extremely high – even in an isolated example of severe harassment, the employer will have to demonstrate that it has a well enforced and well understood harassment policy and that it takes such matters very seriously.

7.4 Gender Reassignment

The **Sex Discrimination (Gender Reassignment) Regulations 1999** came into force on 1 May 1999, and cover discrimination on grounds of gender reassignment, including harassment.

The Gender Recognition Act 2004 came into force in April 2005 and was passed to give transsexual people legal recognition in their acquired gender. Legal recognition follows the issue of a full gender recognition certificate by a Gender Recognition Panel. The panel have to be satisfied that the applicant:

- Has, or has had, gender dysphoria.
- Has lived in the acquired gender throughout the preceding 2 years.
- Intends to live in the acquired gender until death.

On the issue of one of these certificates, the person will be entitled to a new birth certificate reflecting the acquired gender, and will be legally able to marry someone of the opposite sex. For all purposes they are legally regarded as being of their acquired gender.

7.5 Sexual Orientation

It is unlawful to discriminate against someone, or to harass or victimise them, on the grounds that they are gay, heterosexual or bisexual. The cases have mainly been concerned with homophobic bullying and harassment.

There have been a number of interesting cases on this. In ***Whitehead v Brighton Marine Palace 2005*****,** the employee was held to have been harassed on the grounds of his sexual orientation and unfairly constructively dismissed on trust and confidence grounds following a very offensive remark made by his manager about him in the hearing of another employee, who reported the remark to Whitehead. ***Brooks v Findlay Industries 2005*** was a more typical example of a company which allowed a homophobic atmosphere to build up in the organisation against an employee who had desperately tried to keep his sexual orientation a secret. One case that did attract much media attention and was an allegation of direct discrimination on the basis of unfair treatment was ***XY v AB Bank 2006*** in which a large merchant bank was accused of discriminating against a top broker for sacking him following an allegation of lewd conduct in the company gym. He lost his case; the tribunal were satisfied that the Bank genuinely believed on reasonable grounds that he had been guilty of the misconduct. This case is now being appealed. The recent case of ***Ditton v CP Publishing 2007*** resulted in an award of £118,000 being made against a company in Scotland, which had been guilty of a high level of harassment of a gay employee who had been in the job for less than a week. Of the award, £13,000 was for injured feelings.

7.6 Pregnancy

Pregnancy related discrimination amounts to direct unlawful sex discrimination. It is also always unfair dismissal to dismiss any woman by reason of pregnancy, no matter how long she has worked, and there is no legal justification for doing so.

Recent case law makes it clear that a woman is not to be disadvantaged by the fact that she has been ill either before the birth or in the maternity leave period. Once she returns, she is treated the same as all other employees in relation to sickness, starting from the date of her return, regardless of whether her illness is related to the birth eg postnatal depression.

The tribunals will have to look at the overall requirement being imposed on such employees, whether they can comply, whether there is any justification for the discrimination.

Don't forget that a failure to allow women to work part-time after their return from maternity leave, or to work from home some of the time where that is possible may well be seen to be indirect discrimination. You have to objectively justify any refusal. This is stronger than the rights under the flexible working provisions (see later).

7.7 Religious discrimination

It is unlawful to discriminate against workers because of religion or belief.

This applies, as do all the discrimination rules, to recruitment, provision of terms and conditions, promotions, transfers, dismissals and training, and therefore both to current, prospective and former workers. The legislation has the same structure as the rest of the anti-discrimination provisions, outlawing direct and unjustified indirect discrimination, victimisation and harassment on grounds of religion. This does not involve having to eg change working times or provide prayer rooms etc. unless it would be reasonable in all the circumstances, ie there is no great commercial or financial reason why not. You simply need to ensure that any refusal of such a request has been carefully considered and can be justified by reference to cost and convenience which outweigh the reasons for accepting it.

7.7.1 What is covered?

Any religion, religious belief or philosophical belief. An amendment in April 2007 removes the word 'similar' which used to come before 'philosophical', the effect of this will become clear as the cases develop. The law has been specifically amended as from April 2007 to protect non-believers.

7.7.2 Who is covered?

All workers – anyone who is contracted to work personally for you or an agency worker or a contractor ie someone employed by someone else working on your premises.

7.7.3 Are there any exceptions ie where discrimination is allowed?

There is an exception where it is a genuine occupational requirement that the job holder must be of a particular religion or belief eg a Chaplain for a hospital needs to be of some religious belief within the context of the post, a Muslim school may require Muslim teachers, but not maintenance staff. It needs to be a central requirement of the job. A recent case decided that a pastoral role in a Roman Catholic school was not one which this exception applied to, and it had been unlawful discrimination to refuse to consider an atheist for the position – any religious aspects to the counselling could easily have been dealt with by someone else.

7.7.4 What about special requests which are related to religion?

Where a worker makes a request based on some religious observance eg prayer room, time off to go to mosque, Friday afternoons off, particular holidays or extended holidays – employer should listen carefully, consider consequences and grant them if possible. If it is not possible, then he should explain carefully to the employee why, on good business grounds, his request cannot be granted.

In ***Williams-Drabble v Pathway Care 2005***, an employee was held to have been discriminated against under these provisions – she was a

committed Christian and had taken a job at a care-home on the basis that she could work shifts which would allow her to attend church on Sundays. When the employers altered the shifts and refused to be flexible about it or discuss it, the resulting claim was successful.

In January 2005 **Mohammed Khan** won his case against his employers when they failed to respond to a request from him to take extended leave to go on pilgrimage. When he received no reply, he submitted a written request. Again he received no reply, his manager said he could assume leave had been granted, but on his return to the UK after his 6 week trip he was sacked. He was awarded £10,000 in compensation.

Problems with this legislation include:

- Workers do not have to provide evidence of their religion or belief to their employer.
- It is not clear to what extent a worker has to follow a religion or belief for the legal protection to apply.
- Lack of clear definition of religion or belief makes it difficult to draw up workplace policies.

Difference in interpretation of different religions or beliefs could lead to legal disputes.

In 2006, it was decided in a highly publicised case, ***Azmi v Kirklees Metropolitan Council*****,** that a Muslim teaching assistant had not been subject to direct religious discrimination in being asked to remove her veil while teaching. Neither had she been indirectly discriminated against because it was a provision, criterion or practice which put her at a disadvantage, but was justified as being a proportionate response to the legitimate aim of providing unhindered language tuition to young children.

8. Age Discrimination

8.1 Who is covered?

All workers, and those accessing vocational training, including job applicants and people who have left their job (and, for example, have not received a reference). Specifically includes employees, agency workers, self-employed people who provide their work personally, contract holder, people in vocational training and partners in a partnership.

8.2 What is unlawful?

- **DIRECT** discrimination – where, because of B's age, A treats B less favourably than he treats, or would treat, other persons **unless** this treatment can be **objectively justified**.

- This includes discrimination based on someone's perceived age.
- It covers both age and youth

- **INDIRECT** discrimination – where:

  - A applies to B a provision, criterion or practice which A applies equally to other persons; and
  - That provision, criterion or practice puts persons of B's age group at a particular disadvantage, and
  - B suffers that disadvantage

  Unless

  A can show that his provision, criteria or practice is a **proportionate** means of achieving a **legitimate** aim.

  NOTE that it is age group, not particular age.

- **VICTIMISATION** – A discriminates against B where he treats B less favourably than he treats or would treat other persons by virtue of something done by B under or in connection with the Regulations eg, B has brought a case, or given evidence, or made an allegation, in relation to a matter covered by these Regulations.

- **INSTRUCTIONS TO DISCRIMINATE** – this is a separate ground under the Regulations and relates to a situation where A alleges that s/he has been treated unfavourably because s/he has refused to carry out instructions which are unlawfully discriminatory eg refused to carry out an order from his or her boss to shortlist only those under 40 for a position. This is swiftly followed by a poor appraisal and a failure to award a pay rise to A.

- **HARASSMENT** - the complainant would have to show:

  - either that their dignity has been violated, or
  - that they have been subjected to an intimidating, hostile, degrading, humiliating or offensive environment where the reason for the unwanted conduct was that person's age.

NOTE that the **burden of proof** rules are the same as with other areas of discrimination – if the complainant makes out a *prima facie* case, it is for the defendant to show that there has been no unlawful discrimination.

8.3 Are there any exceptions?

Nearly all grounds for unlawful discrimination allow for Genuine Occupational Requirement (GOR) eg Jewish person for rabbi, Chinese person to serve in Chinese restaurant. There is a GOR for age discrimination, at the moment this may be confined to acting jobs where being of a particular age is a critical part of the role.

Also: A specific exception is applied in relation to retirement (see below), and to minimum wage and redundancy provisions, which are still calculated by reference to a person's age.

8.4 Service related benefits

It is standard practice for employers to reward employees for length of service by giving them eg extra days holiday. This is legitimate in that it tries to ensure that the employer attracts, retains and rewards experienced staff.

Age and service related benefits are inextricably linked as they accrue with the passing of time! The Regulations permit any service related benefit which does not require more than 5 years - where it does then the employer must show that his use of length of service 'fulfils a business need of his undertaking (for example by encouraging the loyalty or motivation or rewarding the experience of all of his workers'.

8.5 Retirement

The Employment Equality (Repeal of Retirement Age) Regulations 2011 came into force on 6th April 2011.

The default retirement age is being phased out over a 12 month transitional period - running to 4 April 2012. Employers will be able to give between 6 and 12 months' notice of retirement, with the last date for issuing the full 12 months' notice being 5 April 2011.

After this date employers will only be able to operate a compulsory retirement age if they can show, first, that there is a legitimate aim underpinning their policy and, second, that retiring employees at the chosen age is proportionate to the achievement of that aim. Otherwise, where an employer wishes to terminate the employment of an older employee, it will have to have a different potentially fair reason for doing so. Employers will also have to follow a fair dismissal procedure in respect of the stated reason.

Regulation 5 states that the current provisions relating to the DRA will only apply to an employee provided that:

- notice of intention to 'retire' the employee is given by 5th April 2011
- the employee has attained, or will attain, the age of 65 by 30th September 2011.

An employer may agree an extension to an employee's working period beyond retirement of six months. If the extension was to go beyond six months the employer will have to issue a fresh notice of intention to retire which it cannot do after 5th April 2011.

To ensure compliance with the regulations, employers need to ensure that they inform an employee on or before 5th April 2011 of the intention to retire

them. Such notice will only fall within the relevant regulations if the employee will be aged 65 or over by 30th September 2011.

Employers must consider requests made by employees to exercise their right to work beyond retirement if the request is made prior to 5th January 2012. This is on the basis that they were given 12 months' notice of intention to retire on 5 April 2011 and they exercise the right to request on the last day available (which is three months before the notice to retire expires). The maximum extension to the period of employment without having to issue a fresh notice of intention to retire is six months. This means that the last possible date for retirement is 3 October 2012 under the regulations (although there is some uncertainty about this date and whether the date can be extended to 4 or 5 October 2012).

The provision that currently permits employers to turn down job applicants who are aged 64½ or over is also likely to be repealed in line with the removal of the default retirement age. After October 2011, any refusal to employ a suitably qualified job applicant who is aged 65 or over for reasons related to his or her age will have to be objectively justified. Other issues that may have to be addressed include the continuation (in respect of employees over the age of 65) of contractual benefits such as life insurance. Denying these benefits to older employees would amount to age discrimination. A key point here is that the courts, to date, have tended to rule that cost alone is not acceptable as justification for operating a discriminatory policy or practice.

There is an exemption for group risk insured benefits such as income protection, life assurance, sickness and accident insurance, and private medical cover. The regulations say that it will not be unlawful for an employer only to provide such benefits to those under the age of 65, or state pension age if that is higher. Also, it will not be unlawful for an employer to cease paying out insurance benefits.

9. Staff Sickness

Staff sickness, whether long-term or short-term and frequent, needs to be dealt with rather than brushed under the carpet or ignored. Although it will not always be relevant, it is also important to understand the provisions of the Equality Act 2010, as they are an aspect of this area.

9.1 Sick Pay

There is no statutory right to sick pay. Many employers do provide some level of sick pay for employees, but otherwise employees only receive Statutory Sick Pay.

9.2 Types of sickness

The employee may be off sick **long-term** or have **short-term, frequent** absences.

- **Long-term sickness** - this will usually be covered by the Disability Discrimination Act 1995 (see below) and the manager's options will be dictated by the need to get good medical information and to adhere to the provisions of the Act.
- **Short-term sickness** - where the level of sickness becomes unacceptable, the manager will need to consider whether there is a clear **pattern** to the sickness. In this case, in the absence of clear evidence of sickness, the disciplinary procedure should be invoked if there is no improvement following an informal discussion. Where there is no pattern, it will be necessary to obtain medical information to determine whether the employee is covered by the Act.

9.2.1 Medical Information

Good medical evidence is crucial to every decision to be made about a person on grounds of sickness.

Most employers provide expressly that employees must see a company doctor or nominated specialist where they need information about the employee's medical condition. There is clear authority in the cases that a refusal to co-operate with the employer's reasonable requests for information when it is investigating ill-health may well amount to gross misconduct and at best, the employer will be entitled to proceed on the basis of the information it does have, if the employee refuses to co-operate.

There are particular rules about GP records (because they often contain much extraneous detail and are much more personal in nature) - the employee is entitled to withhold consent to disclosure of them in the first place, or to review them before disclosure and to require amendment.

Where, following the medical, the evidence is that there is no underlying physical or mental condition, it will be necessary to consult HR on the appropriate procedure, but full adherence to the Act below will not be necessary, as long as the employer acts fairly. The capability procedure will usually be invoked. *This is similar in structure to the disciplinary, but with the emphasis on achieving.* No action should be taken on these matters without consulting HR.

Where the medical information received by the employer indicates that the employee is suffering from a physical or mental condition it is likely that they will be covered by the Disability Discrimination Act.

9.3 Disability discrimination

This is a huge growth area and is full of pitfalls for the unwary manager.

It is unlawful for an employer to discriminate against a disabled worker or job applicant by treating that person **less favourably** than he treats or would treat

others for a reason relating to his or her disability - that treatment is defined as 'by dismissing him/her, or subjecting him/her to any other detriment'.

The duty placed on an employer is twofold:

(a) not to discriminate against a disabled person, and
(b) to make reasonable adjustments to accommodate the disabled person.

9.3.1 What is a disabled person?

A disabled person is someone who has:

'A physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.

- Covers any normal physically related illness which has a substantial effect on the person, eg heart conditions, angina, diabetes, epilepsy. Conditions such as MS, cancer and HIV are automatically covered, even if asymptomatic.
- A mental impairment includes mental health conditions (such as bipolar disorder or depression), learning difficulties (such as dyslexia) and learning disabilities (such as autism and Down's syndrome. "Note that Asperger's syndrome, ME, and chronic fatigue syndrome have all been held to be capable of being mental and/or physical impairments,"
- Also covers mental conditions such as schizophrenia or manic depression (reactive and clinical depression is also a disability). It is no longer essential that a mental illness is clinically well-recognised but it has to be an impairment which satisfies the criteria about seriousness of impact and likely duration.
- Dyslexia is now being recognised as a disability and this is a condition which may be suffered by 4% of the population and is often misdiagnosed by employers as being laziness or lack of intelligence – care is needed here. Autism is also covered by the legislation. It does not cover addictions except where they have resulted from medical treatment.
- The Act does not cover conditions which only make that work impossible, rather than everyday life.

9.3.2 What activities must be affected?

The physical or mental disability must impact on one of the following: mobility, dexterity; physical co-ordination; memory and the ability to learn or understand; continence; hearing; speech or eyesight; the ability to lift everyday objects and the perception of the risk of physical danger.

The First Duty – DO NOT discriminate

In an employment context, it is unlawful to discriminate against a disabled person ie treat them unfavourably, in the recruitment process, the terms offered to the worker, matters such as promotion and training, and dismissal decisions.

The Second Duty – to make reasonable adjustments

The Act places a specific duty upon the employer to make reasonable adjustments to work arrangements and the working environment so as to accommodate disabled persons.

Where any employer is faced with a disabled worker then there will be a fundamental duty to make a **full and proper assessment** to enable it to decide what steps it would be reasonable to take to prevent a disabled person from being at a disadvantage.

Thus, the duty arises where:

a. Any arrangements made by or on behalf of an employer; or
b. Any physical features of premises occupied by the employer place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled.

The sort of arrangements included here are procedures for recruitment and selection or promotion, eg also insistence on mobility or flexibility clauses or satisfaction of unreasonably high medical standards.

As far as physical features are concerned, the Act places a specific duty upon the employer to make reasonable adjustments to work arrangements and the working environment so as to accommodate disabled persons. This is an example of 'affirmative action'. Examples might include making adjustments to premises, allocating some of the disabled person's duties to another person, transferring the disabled person to fill an existing vacancy, altering the disabled person's working hours etc etc.

The combined effect of this new legislation and the existing unfair dismissal standards is to produce an obligation on an employer to hesitate before dismissing an employee on grounds of disability or incapacity.

BUT there is a defence…

Defence of Justification

Direct discrimination on the grounds of disability is unlawful and cannot be justified, eg a blanket rule preventing epileptics working for a particular company or in a particular job. Less favourable treatment for disability related reasons **can be justified** 'if, but only if, the reason for it is both material to the circumstances of the particular case and substantial'.

This doesn't mean very much, but the net effect is that if the employer can explain his/her treatment of this worker by reference to economic imperatives, health and safety of the worker or fellow workers or general impracticality, it may be possible to defend the action. Adjustments have to be **reasonable** in order for the employer to be obliged to make them, matters to be taken into account include cost and practicability. The burden of proof is on the employer.

A number of things to watch for with disability are:

- Where a department or office has a great deal of sickness, consider alternative explanations eg bullying, poor management.
- Where a worker is absent long term or short term repeatedly, ensure that a medical report is obtained if you are considering action.
- Ensure that you have a clear policy on disability, and on when and in what order action will be taken, and stick to it.
- Where a worker has a disability, ensure that you consider what adjustments might be made to his/her working environment, and where a worker asks for special consideration to be given to adjustments in the working environment, do a proper cost analysis of it, and be prepared to justify it if you refuse.
- Where adjustments cannot be made, consider redeployment.
- Ensure that worker is consulted at all stages, and any decisions are fully explained to him/her.
- Ensure that all decisions taken, interviews/consultations with the worker are minuted and/or recorded properly and fully in writing.

NOTE: The Equality Act 2006 created a single Equality Commission for all strands of discrimination which means that the EOC, CRE and the Disability Rights Commission will cease to operate as separate bodies and their work is subsumed within the new Commission as from October 2007.

10. 'Family Friendly' Measures

A number of important rights have been introduced in an effort to address the work/life balance problem. These rights are only accorded to employees.

10.1 Parental Leave

- Maximum is 13 weeks per child, (18 weeks where the child is disabled).
- Must be a parent of that child and parent must be named on the birth certificate, need **at least one year's continuous service with the employer.**
- Right applies to both parents individually.
- Is **not paid**, but all contractual benefits in kind must continue eg holiday, car, insurance etc.
- The right lasts until the fifth birthday or five years from adoption.
- Parents can take the leave on the birth of the child, or once they have 1 year's service, whichever is the later.

- If the child is disabled, then the right is extended up to the child's 18th birthday.
- At the end of parental leave, the employee is guaranteed the right to return to the same job as before, or, if that is not practicable, then a similar job with comparable terms and conditions and status.
- Where the leave taken is 4 weeks or less, there is an absolute entitlement to return to the original job.
- Part-timers enjoy pro-rata rights.

There is no obligation on employees to take this leave, but they cannot be discriminated against for doing so, either in terms of dismissal or action short of dismissal. Although there is no requirement to keep records, as a practical matter it would seem essential.

10.2 Dependent Care Leave

- An employee is entitled to take a reasonable amount of time off during working hours for various important family matters relating to a dependent.
- **There is no qualifying period for this right** - dependents include spouse, child, parent or someone who lives in the same household but is not an employee, tenant, lodger or boarder.
- There is a wider category of dependents, which includes any person who reasonably relies on the employee for assistance.
- There is no general right for time off for domestic incidents eg washing machine flood.
- There is no express limitation on the amount of time off that an employee can take, but it should be reasonable - the government is anticipating about 2 days max.
- There are no formalised notice requirements for the new right.
- *There is no right to payment.*
- Again, it will be unlawful to dismiss or subject any employee to a detriment because of it.

10.3 Paternity Leave and Pay

- Right to two weeks' paid paternity leave at the statutory rates.
- This is additional to the existing right to 13 weeks' parental leave.
- Employers pay but recover most, or all, of the amount from the State.
- The Regulations provide for leave to be taken in a single block of 2 weeks or 1 week at the option of the father, and this will follow the birth or the adoption of the child. *XXX ORGANISATION XXX allow two weeks or two one week blocks.*
- Paternity leave has to be completed within a period of 56 days beginning with that date.
- Employees taking paternity leave must have, or expect to have, responsibility for the child's upbringing, and be the biological father of the child or the mother's husband or partner. Employees can ask their employers to provide a self certificate as evidence that they meet their criteria.

- Employees are required to inform their employers of their intention to take paternity leave by the 15th week before the baby is expected, specifying the week the baby is due, whether they want to take one or two weeks leave and when they want their leave to start. They can change their mind as long as they give 28 days notice.
- There is a qualifying period of **26 weeks' service as at the 15th week before the child is expected to be born/the approved match is made**.
- Regulations provide for a right to return after paternity leave and protection for employees from detriment and unfair dismissal in connection with paternity leave.
- The rate in 2011 is £128.73 or 90% of the employee's average weekly earnings.

The Additional Paternity Leave Regulations 2010 came into force in 2011. Under the regulations, new fathers will be able to take between two weeks and six months' additional paternity leave (APL) if the mother of the child returns to work before the end of her statutory maternity leave period. The same right applies to employees whose partner (whether of the same or opposite sex) has taken adoption leave. The current two weeks' paternity leave will remain unchanged (this will be renamed "ordinary paternity leave").The conditions for eligibility for APL will be the same as those currently in place in respect of (ordinary) paternity leave.

In addition APL will have to be taken in a single block between the time the child is 20 weeks and its first birthday. However the father's leave does not need to start immediately when his spouse/partner returns to work, and the right is to take up to 26 weeks' APL even if this extends beyond the latest date the mother's maternity leave would have ended (so long as APL ends before the child is one).

If the mother has unused statutory maternity pay when she returns to work this may be transferred to the father/partner. However, the employee can only receive statutory paternity pay during APL. Where employers grant enhanced contractual benefits to employees on maternity leave, they will need to consider whether to offer equivalent benefits to those taking APL. There is a risk that if they do not do so, this could be interpreted as sex discrimination. Staying on the subject of family-friendly rights, the right to request flexible working is to be extended in April 2011 to employees with parental responsibility for a child up to the age of 18 (at present it is up to the age of 17 unless the child is disabled, in which case it is 18). The procedure for considering requests and the reasons which employers are entitled to rely on to refuse them will remain unchanged.

10.4 Adoption Leave and Pay

- Applies to employees where an approved adoption agency notifies of a match.
- Application to the employer must be made within 7 days of notification of the placement. *XXX ORGANISATION XXX requires copies of the*

relevant legal documents as soon as practicable, at which point entitlement would be confirmed.

- Ordinary adoption leave is for a period of up to 26 weeks and additional adoption leave is for another 26 weeks, giving 1 year.
- It is available to an adoptive parent who is matched with a child by an approved adoption agency, to employees who give their employer a matching certificate from an approved adoption agency to support their entitlement to leave.
- It's available to both married couples and individuals who adopt and for placements of children up to age 18. Where a married couple adopt, only one spouse is entitled to take the leave, while the other can get paternity leave if they qualify.
- This leave does not apply to step-parent adoptions or adoptions by people who are already fostering the child.
- During adoption leave, an employee is entitled to all the same terms and conditions (apart from the right to be paid which is instead replaced by statutory adoption pay), had s/he not been away from work. Equally, s/he is bound by any obligations under the contract, unless they conflict with the right to take leave. S/he is also still entitled to receive all benefits such as pension contributions or the use of a company car. All service-related benefits accrue during maternity leave.

  Paid annual leave (both contractual and statutory under the Working Time Regulations 1998) continue to accrue, as do other rights such as seniority and pension rights. The employee can take leave either before or after adoption leave, as long as s/he gives you the correct notice.

10.5 Maternity

Women who are pregnant are entitled to certain rights that you, as employers, must comply with. If you don't, you may find yourselves facing a tribunal claim. The following is an overview of the main provisions that apply.

Antenatal stage
Employed women are entitled not to be "unreasonably refused" paid time off to attend antenatal appointments during working hours.

It may be reasonable for you to refuse a woman time off if she works part time, and could easily attend the appointment or class on one of her non-working days. If your refusal is unreasonable, then the woman can complain to a tribunal.

Women receiving fertility treatment are not entitled to paid time off for antenatal care because they are not pregnant.

Maternity leave
All pregnant employees are entitled to 52 weeks' maternity leave, irrespective of how long they have worked for you or how many hours they work per week. This is made up of 26 weeks' ordinary maternity leave (OML) and 26 weeks' additional maternity leave (AML).

There is a compulsory two-week period of leave that starts with the date of birth and applies to all employees. It is a criminal offence if you fail to ensure that the woman takes two weeks' leave once the baby is born. Factory workers are prohibited from working for four weeks after the birth.

To apply for maternity leave, a woman must tell you at least 15 weeks before the week in which baby is due if possible:

- that she is pregnant
- the date when the baby is due (you can ask to see evidence of this such as a medical certificate, MAT B1 form)
- the date when she intends to start her maternity leave.

If the woman subsequently decides that she wants to delay the start of her leave, she needs to tell you 28 days before the original date. If she wants to bring it forward, she needs to tell you 28 days before the proposed new start date, if that is practical. The new date cannot be earlier than the 11th week before the baby is due, as maternity leave cannot start before that.

Once your employee has told you when she intends to start her leave, you must write to her within 28 days telling her when she is expected to return, based on the assumption that she wants to take her full leave entitlement of 52 weeks.

Women have to give eight weeks' notice if they want to change the date on which they want to return from maternity leave. You can also make "reasonable contact" with your employees while they are on leave to help you plan for the woman's return and to ease her return to work.

If a woman has a pregnancy-related illness at any time in the four weeks leading up to the expected week of childbirth, then her maternity leave will be automatically triggered.

Terms and conditions

During maternity leave, a woman is entitled to all the same terms and conditions (apart from the right to be paid), had she not been away from work. Equally, she is bound by any obligations under her contract, unless they conflict with her right to take leave. She is also still entitled to receive all benefits such as pension contributions or the use of a company car. All service-related benefits accrue during maternity leave.

Paid annual leave (both contractual and statutory under the Working Time Regulations 1998) continue to accrue, as do other rights such as seniority and pension rights. The woman can take her leave either before or after maternity leave, as long as she gives you the correct notice.

During the leave

You are allowed to make contact with your employee (and vice-versa) during the maternity leave period, as long as the amount and type of contact is not

unreasonable. For instance, to discuss her plans for returning to work, or to keep her informed of important developments at the workplace.

The employee can undertake up to 10 days' work under her contract of employment (called "keeping in touch" days), as long as both you and she have agreed to this. You must also agree with her what work she is to do and how much she will be paid for it.

Returning to work
If a woman wants to return before the end of her full leave period, she has to tell you at least eight weeks beforehand of the date on which she intends to come back. Otherwise she does not have to give any notice.

After OML a woman is entitled to return to the same job that she was doing before she left, on terms that are no less favourable. If you refuse to allow her to do that, she can make a tribunal claim for less favourable treatment by reason of pregnancy and maternity leave, sex discrimination and possibly also unfair dismissal.

As with OML, someone returning from AML is entitled to return to the job they were doing before they went on leave, on terms that are no less favourable. However, if it is not reasonably practical for you to allow the woman to return to her old job (apart from a redundancy situation), you can offer an alternative job that is "suitable" and "appropriate" in the circumstances.

If you make a woman redundant during her maternity leave, you must offer her suitable, alternative employment (if it exists) which is appropriate for her to do. She has priority in being offered alternative work over other staff who are not on maternity leave. The terms and conditions should not be substantially less favourable than her old job.

Statutory Maternity Pay
Statutory Maternity Pay (SMP) is the money that you pay to a pregnant woman for up to 39 weeks if she:

- is pregnant at the 11th week before the expected week of childbirth
- has been in continuous employment for 26 weeks with you up to and including the 15th week before the expected week of childbirth
- has average weekly earnings during an eight week reference period ending with the qualifying week that are high enough to make her eligible to pay class 1 National Insurance Contributions (NICs)
- has given you 28 days' notice as to when you are liable to start paying SMP (or less than that if it is not reasonably practical to give 28 days' notice)
- has produced a medical certificate from a doctor or midwife, which gives the date when she is due to give birth
- has stopped work

SMP is paid at a rate of 90 per cent of average weekly earnings for the first six weeks of maternity leave, followed by a flat rate which changes every April for

the remaining 33 weeks. The current rate (which can be found on the website for the Department for Work and Pensions) is £128.73.

The amount you get back depends on your total gross Class 1 National Insurance liability. Currently, if it is £45,000 or less, you are entitled to recover 100 per cent of the SMP you pay out, plus 4.5 per cent compensation for the NICs you pay on the SMP. However, if your annual liability for NICs is always more than £45,000, you are only entitled to recover 92 per cent of the SMP.

10.6 Flexible Working

10.6.1 The Right to Apply for Flexible Working

- To be eligible to make a request, employees must have responsibility as the parent for a child aged under 17 (or 18 if disabled). As from 1/4/07 this right was also extended to people caring for sick or disabled adults. The employee needs to be, or expects to be, caring for an adult who:
- Is married to, or is a civil partner to the employee; or is a near relative of the employee; or
- Falls into neither category, but lives at the same address as the employee.
- The 'near relative' definition includes parents, parents-in-law, adult child, adopted adult child, siblings (including those who are in-laws), uncles, aunts or grandparents and step-relatives.
- The employee needs **26 weeks continuous service** with the employer.
- The parent must not be an agency worker, or someone who has made an application to work flexibly under the right in the last 12 months.
- The parent must make the application no later than 2 weeks before the child's 18th birthday.
- The parent must have or expect to have responsibility for the child's upbringing, and must be making the application in order to care for the child.
- Parents wishing to adopt a flexible working pattern will need to submit a written application to their employer.
- There is no **automatic** right to work flexibly as there will always be circumstances when the employer is unable to accommodate the desired work pattern.
- Parents are able to request:
  - a change to the hours they work
  - a change to the times when they are required to work
  - to work from home.
- Where the change is agreed it takes effect as a **permanent** alteration to the employee's contract.
- An employee who is dismissed in connection with a request for flexible working will be unfairly dismissed even if s/he has not been continuously employed for one year.

10.6.2 What is the Procedure?

1) The employee makes written application, only one per year allowed.

2) Within 28 days the employer will arrange to meet with the employee. This will provide an opportunity to discuss the desired work pattern in depth and decide how or whether it might be accommodated. Alternatives might be explored. The employee is entitled to bring a 'companion' to the meeting - this person is chosen by the employee and is permitted to address the meeting, but not to answer questions on behalf of the employee, and has a right to confer with the employee during the meeting.

3) Within 14 days after the date of the meeting, the employer will write to the employee either agreeing a new work pattern and a start date, or providing a clear business ground as to why the application cannot be accepted and the reasons why the ground applies in these circumstances. Note that if an employer provides spurious or ill-considered grounds and the employee is forced to leave, s/he may well have a claim for constructive dismissal on the grounds of a breach of trust and confidence.

4) The employee has a right to appeal within 14 days of the decision being notified.

Regulations provide for breaches of the rules about flexible working and allow the employee to make a complaint that a meeting has not been called or s/he has not been notified of the decision.

11. Termination of Employment

There are four ways that a contract of employment may be ended,

1. By **notice** to the employer ie **resignation** (look out for those constructive dismissal claims!)
2. **Agreement** between employer and employee ie **consensual termination.**
3. **Dismissal** by the employer, with or without notice.
4. **Expiry** of a fixed term contract.

11.1 Resignation

If the employee clearly indicates his/her intention to leave in plain words, at a specific time then s/he has not been dismissed, but has resigned. Once an employee has resigned in clear and unambiguous terms, the employers do not need to accept the resignation to make it effective. Once it has taken effect it cannot then be withdrawn unilaterally.

Beware, however, the expression of the intention to resign at some future unspecified date - that is not normally a resignation, unless there are special circumstances.

As far as the employer is concerned, any employee who has worked for more than 4 weeks must give 1 week's notice of his/her intention to leave. Otherwise, notice is governed by contract, although there is not usually much that employers can do if an employee walks out without giving proper notice, although sometimes senior employees are sued where the ex-employer has suffered particular loss as a result.

11.2 Consensual Termination

Sometimes, it may suit both parties for the employee to give up his/her job.

Where the agreement is genuine, eg early retirement, then the courts will be quite willing to recognise it as something that has been agreed between the parties and that the contract is now at an end.

A compromise agreement may be made between the employer and employee, which has the legal effect of terminating the contract of employment consensually. This is used in a variety of situations where the employer judges it appropriate to offer money in exchange for such a termination.

The agreement is binding if the employee has received independent advice, and this may be from a lawyer or from an accredited Trade Union or a CAB representative. *The agreement must be in writing. Such matters should always be dealt with through the HR Department.*

11.3 Actual Dismissal

This is where the contract is ended by the employer dismissing the employee. There are two possible remedies which the employee might have; wrongful dismissal and unfair dismissal.

11.4 Wrongful Dismissal

Wrongful dismissal is of limited use. It only applies where the employer has broken its contract with the employee by dismissing him/her without giving the employee his or her contractual rights. Unfortunately for most employees, their contractual rights are often limited to proper notice (either under the contract or in accordance with their statutory rights).

XXX ORGANISATION XXX includes a clause permitting the company to pay an employee in lieu of notice (Pilon clause). This is usually used to terminate the contract immediately.

The **notice** that both employer and employee must give is usually provided for in the contract. If it is not, then the statutory minimum periods of notice will

usually apply as far as notice to be given to the employee is concerned, these are broadly one week per year of continuous employment up to a maximum of 12 weeks.

A wrongful dismissal claim is useful for employees such as some directors who are on long fixed term contracts which are terminated because their 'face no longer fits'. Wrongful dismissal claims are conducted in the tribunals where they are less than £25,000 and otherwise in the normal civil courts.

For other employees the introduction of the action for unfair dismissal allowed them for the first time to challenge the **reason** for their dismissal and claim compensation for the unjustified loss of their job.

12. Unfair Dismissal

The concept of unfair dismissal is one of the most important statutory rights given to employees. It has become much more significant in the last few years for two reasons;

- The fact that maximum compensatory damages is set quite high - £68,400 from 1/2/11. Plus a basic award calculated in the same way as Statutory Redundancy Pay.
- The fact that there are now many reasons for which an employee can be dismissed which are regarded as 'special' in that, if they can prove the reason, damages are UNLIMITED and they don't even have to have worked for any qualifying period.

12.1 Unfair Dismissal – A Practical Guide…

There are **seven** main questions which you will have to answer before you consider dismissing in order to have the best chance of avoiding any unfair dismissal claim. Or you will have potentially got a claim against the company.

1. **Is the employee eligible to claim?**

2. **Has the employee been dismissed in law?**

3. **What is the reason for the dismissal?**

4. **Is the dismissal automatically unfair or does it fall within one of the statutory reasons?**

5. **Has the company acted reasonably in all the circumstances in treating the reason as sufficient to dismiss the employee?**

6. **Has the company adopted an appropriate procedure in dismissing the employee?**

7. **What remedies may be available to the employee?**

12.1.1 Who can claim?

- An employee who has been employed continuously for one year.

- An employee who is within the jurisdiction. As a general principle, an employee will be entitled to bring an unfair dismissal claim under the Employment Rights Act 1996 if the claim relates to 'employment in Great Britain'. This, however, should not be treated as a firm rule. Expatriate employees working wholly outside Great Britain will be entitled to bring unfair dismissal claims in certain unusual circumstances. As for employees who, owing to the nature of their work, do not perform services in one particular territory, it is sensible to treat their base as the place of their employment — **Serco v Lawson 2006**. Even where an employee is working wholly outside the UK, the Lords gave a couple of examples of where they would be covered. The first was of an employee posted abroad by a British employer for the purposes of a business carried on in Great Britain - for example, a foreign correspondent on the staff of a British newspaper. The second was of an expatriate employee of a British employer 'who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country'. Following this case, in **Anderson v Stena Drilling 2006** the EAT held that a Scottish employee working on an oil rig in the Far East was not entitled to bring an unfair dismissal claim. Though the claimant fell within the category of peripatetic worker, he had failed to show that his base was in GB.

When it comes to contract claims eg wrongful dismissal, failure to pay notice, breach of health and safety/trust and confidence, the test is more flexible and will depend upon which forum is the most appropriate to the matter in dispute. The stronger the connection with the UK, the more likely that this will be the correct forum.

In terms of place of employment, there is jurisdiction in all cases where a worker is 'at an establishment in Great Britain'.

This is defined as, if:

- the employee does his or her work 'wholly or partly in GB, or
- the employee does his or her work wholly outside GB and the following conditions apply:
  - the employer has a place of business at an establishment in GB
  - the work is for the purposes of the business carried on at that establishment
  - the employee is ordinarily resident in GB:
    - at the time when he or she applies for or is offered employment, or
    - at any time during the course of employment.

12.1.2 What is a dismissal?

The burden of proving a dismissal is on the **EMPLOYEE**. It must be one of the three below:

1. Dismissal with or without notice ie summary dismissal or 'the sack' with notice.
2. Failure to renew a fixed term contract.
3. Where the employee walks out, usually without notice, in circumstances in which s/he is entitled to do so because of the employer's conduct - 'constructive dismissal'.

    - The employer's actions must be a breach of contract by the employer - a breach of any of the employer's implied obligations by the company might amount to a constructive dismissal eg trust and confidence.
    - The breach must be sufficiently important to justify the employee resigning or be the 'straw that broke the camel's back'.
        - The employee must leave in response to the breach and not for an unconnected reason, like finding a better job.
        - The employee must not delay too long in leaving in response to the employer's breach or he may be deemed to have 'accepted' the employer's breach.

12.1.3 What Is the reason for the dismissal?

The burden is on the **EMPLOYER** to show the reason for the dismissal, which applies at the date of the dismissal and at the date of the employee leaving work.

In practice, the employer will normally be saying that the reason for the dismissal is misconduct, or incapability or incompetence – but the employee may challenge this, arguing that the REAL reason is one of the automatically unfair statutory reasons set out below.

Bear in mind the importance of establishing a clear reason or reasons, with a good **audit trail**. What have the problems been, where is the evidence of them, what did you do, why did you do it, at what dates did you see the employee, what did you say?

Never put forward a reason which you cannot justify and which you cannot provide evidence of – stick to your strong reason(s) at all times.

12.1.4 Summary dismissal

It may be fair to dismiss an employee who has been guilty of gross misconduct. Where this is the case, and it has been **properly investigated** (see below) – the employer is entitled to dismiss without notice – so called 'summary' or 'instant dismissal'.

Sometimes, gross misconduct is defined in the contract. The sorts of things that may be covered include theft/dishonesty, violence, unauthorized computer use, vandalism of company property,

drunkenness etc. – to some extent what is considered gross misconduct may vary with the kind of business involved, although some, like dishonesty, are universal.

12.2 Dismissals during Probation

Where an employee is being dismissed before the end of his or her probation or at the 6 month stage, it is not necessary to carry out the full XXX ORGANISATION XXX disciplinary process. However, any employee who is clearly not performing from an early stage should be given an indication of where s/he is going wrong and an opportunity to put it right. Where the decision is taken to dismiss a probationer, the manager should carry out some minimum procedure. It is recommended that a letter is sent to the employee, detailing the reasons why the manager is considering dismissal, and this should be followed by a meeting at which the decision to dismiss could be taken following representations from the employee. Assistance should always be sought from HR with all dismissals.

12.3 Automatic unfair dismissal

As stated above, if the reason for dismissal provided by you is not strong enough, there is always a danger that the employee may allege that the REAL reason is one of those set out below.

There is **no qualifying period** for any of these dismissals**, AND MOST OF THEM HAVE UNLIMITED COMPENSATION**, and don't forget, you have to add these to any dismissals which are alleged to be unlawful discrimination eg motivated by sex or race, all of which also carry unlimited compensation and have no qualifying period

- **Health and Safety Dismissals** The reason or principal reason for the dismissal was that the employee, as a designated Health and Safety official, or as a Health and Safety representative, carried out or proposed to carry out Health and Safety activities.

  Alternatively, where an employee working in a place where there are no such officials, brings Health and Safety matters to the attention of his employers, refuses to work in circumstances of danger or tries to take steps to avert such danger.

- **Trade Union Dismissals.** The employee concerned was, or proposed to become a member of a TU or had taken part or proposed to take part in TU activities or was not a member of a Trade Union or a particular Trade Union.

- **The 'Troublemaker' Ground -** The reason or principal reason for the dismissal is that the employee brought proceedings against the employer to enforce a relevant statutory right or alleged that such right had been infringed. This is the 'troublemaker' ground eg the employee asks for a written contract or for his paid holidays, or some similar right and gets dismissed later as a result.

- **Whistle Blowing** – ie the reason or principal reason for the dismissal is that the employee made a protected disclosure under the **Public Interest Disclosure Act 1998**. Such disclosures will be ones which show eg that a criminal offence is being/has been/will be committed, that a person is or has failed to comply with a legal obligation, that a miscarriage of justice is or has occurred or that health and safety is or is likely to be endangered. The sorts of situations covered is where the employee reports a fraud or suspected fraud going on in the higher reaches of the company, or tries to alert senior managers to the fact that illegals are being taken on as casual workers, or that the company is polluting a river.

- **Jury Service -** The reason or principal reason for dismissal is the fact that the employee carried out jury service even though their absence would cause severe problems to the employer and they refused or failed to ask to be excused.

12.4 Potentially fair reasons

If it was not for one of the above reasons, a dismissal is **capable of being fair**, but it MUST be for one of the following: -

1. A reason relating to the **capability or qualifications** of the employee for performing the work of the kind which he was employed by the employer to do.

   Look at:
   - competence
   - Capability related to sickness, whether long-term (disability discrimination issues?) or short term, the latter tending to be a 'reliability' issue.

2. A reason relating to the **conduct** of the employee**.**

   Misconduct will tend to be 'graded':

   - Gross misconduct - really serious and justifying instant dismissal.
   - Serious misconduct - conduct which may well have justified instant dismissal, but the employer decides to give the employee a last chance - and a final written warning.
   - Minor misconduct - usually justifying an informal chat followed by an oral warning and so on, if behaviour does not improve.

3. The **redundancy** of the employee.

4. The fact that the employee could not continue to perform the work without **contravention of a legal duty** or restriction, eg travelling salesman loses his driving licence.

5. **Retirement** (see section 8.5 for the fair process to follow in connection with retirement and note this will go in 2011)

6. Some other **substantial reason** eg refusal to accept a reasonable change in terms, pressure from a third party client, irreconcilable differences between employees**,** directors face no longer fitting after takeover.

Proportionality...

AND then, once the reason is established, the employer is not home and dry yet – he must show that in all the circumstances the decision to dismiss was a fair one.

How is this done?

The tribunal would have to be satisfied on the evidence in relation to this employee that the company's decision fell within the 'band of reasonable responses'. If it does, then the dismissal is fair. What that really means is that if we had a room full of average employers, whether a good proportion of them would agree with the decision that has been taken - not all of them - if a good proportion would agree, the dismissal will be fair.

12.5 Disciplinary and Dismissal Procedure

REMEMBER, unfair procedure can make what would otherwise have been a fair dismissal, unfair. It is absolutely crucial that the proper procedure is followed.

With misconduct, competence and incapability dismissals, the standard are set by the **ACAS Code of Practice on Disciplinary Practices and Procedures in Employment** (can be found on www.acas.org.uk.). A failure to follow the recommendations therein will often count against an employer in judging the fairness of the dismissal and could result in an uplift in compensation payments. The standard procedures of most large employers conform to this.

Important points are:

- It is crucial that any individual employee should be aware that s/he is to attend a disciplinary hearing. Employees must have notice of the charge against them and they have a statutory right to be accompanied at any formal disciplinary hearing by a fellow worker or a trade union official of their choice. This right does not apply at the investigation phase (although the ACAS code does mention it).
- Employers should try to ensure that the decision to dismiss is not taken by the person who has initiated the complaint, investigated or someone whose dealings with the employee might have already tainted his/her view of the case.

- The employee should have an opportunity to put his/her side of the story - this is of vital importance.
- The employer should talk to any witnesses and gather relevant documentation; there is no general principle that the employee must be shown the witness statements, as long as they are told the substance of the accusations.
- The employee should be able to present evidence (including witnesses) and/or cross-examine witnesses if s/he wishes.
- It is not generally acceptable to dismiss an employee for a 'first offence' unless it is gross misconduct. He should normally be subject to a series of warnings before dismissal is an option. It will not be fair to take into account expired warnings in taking the decision to dismiss.
- Reasons for the decision should be given and the panel should consider a full range of actions it might take, not just dismissal.
- There should be a right of appeal against any disciplinary decision and this is often a rehearing and should be held by someone to far uninvolved and preferably more senior than the previous decision maker.
- Each step should be:

    - carried out without unreasonable delay;
    - with the timing and location of meetings being reasonable;
    - with both sides being able to explain their cases;
    - at the appeal stage, with management being represented by a higher level of manager where possible.

As for investigation policies will often say something like:

Where an employee is thought to be guilty of gross misconduct or where their continued attendance may impeded a swift and fair investigation, it may be appropriate to suspend him or her or move to a different work area - provision is made for this on full pay, although such suspension should not normally be for more than 5 days.

In order to justify a dismissal for misconduct, the employer will have to show that s/he honestly believed on reasonable grounds that the employee was guilty, and this belief must exist at the time that the employer took the decision to dismiss.

In order to back this up, the employer must show that s/he has carried out as much investigation into the matter as is reasonable in all the circumstances and this will depend, to some extent on the size and administrative resources of the employer.

The employer **may not** rely on after-acquired information to justify a previous dismissal, but where this was discovered during the appeal process, they may so rely.

With illness, the tenor of the procedure is different, but the principles are the same. Tribunals consistently stress that to warn a genuinely ill person is inappropriate - what is important is consultation and the gaining of medical evidence as to future prospects of the employee.

The advice would seem to be:

- Follow a basic procedure for all employees who have not yet successfully passed their probation. This involves a letter explaining your reasons for termination and a meeting at which the employee will have an opportunity to make representations.
- Where an employee has passed his/her probation, but has not yet obtained one year's service and is proving unsatisfactory, get cracking quickly. You will need to follow the company's disciplinary procedure, but if you commence it in plenty of time you will still be able to complete it before the one year's service is complete.
- For all others, follow a proper full disciplinary process which is as fair as you can make it.

What is a grievance?

It is critical for managers to recognise and act on a grievance presented by an employee. It is important to realise that the definition of a grievance for the purposes of this legislation is not confined to a formal written document under the company's grievance policy. In the months since this legislation came in, the tribunals have recognised a wide variety of documents as grievances including:

- A letter detailing various complaints about a practice manager at a GP Centre - the tribunal said it was sufficient if the employer can understand the general nature of the complaint being made.
- A resignation letter detailing issues amounting to a complaint.
- A letter before action from an employee's solicitor laying out the grounds for the employee's complaint.
- A letter to management complaining about bullying behaviour of workmates.

Where a manager fails to deal with a grievance, and the employee resigns and makes a claim against the company, the failure to carry this through exposes the company to an enhanced damages claim where the tribunal may increase the damages payable by anything between 25%.

Compensation

If the employee is successful in claiming unfair dismissal, and the relevant ACAS code was not complied with, then the tribunal may increase the level of the award to the employee, and the converse applies if the non-compliance was a result of the employee's failure to comply with its requirements. The adjustment may be up to 25% and is made to the compensatory award, not the basic award and the statutory cap of £68,400 is applied at the end.

13. Remedies for Unfair Dismissal

13.1 Reinstatement and Re-engagement

Reinstatement is taking the employee back to his/her job, treating him/her as if s/he were never dismissed, inclusive of benefits such as increments/promotion etc.

Re-engagement is where the employee is taken back by the employer or by a successor or associated employer, in an employment comparable to that from which he was dismissed or other suitable employment. Here the tribunal specifies the identity of the engaging employer, the nature of the employment and the rate of remuneration. In either case, continuity is preserved. These orders are made in less than 1% of cases, and are rarely requested by the employee.

13.2 Compensation

Compensation is the main remedy and is divided up into various 'heads'. The employee is eligible for a 'basic award' calculated in the same way as redundancy payment, and a 'compensatory' award, which seeks to put a figure on the employee's actual loss. Both heads are subject to a maximum and tribunals are now permitted to award interest on their awards. The basic award is the same as statutory redundancy pay, and is calculated based on length of service and age and the compensatory award looks at what the employee has lost as a result of the unfair dismissal ie loss of earnings, benefits etc.

The normal limit is £68,400, but there is no limit on the compensation for most of the automatic unfair dismissal provisions, in particular those on the grounds of discrimination, whistle blowing and Health and Safety.