

HILL DICKINSON

Fourth edition – April 2010



Employment **matters**: the 'at a glance' guide to employment law

Contents

Page

3	Introduction
4	Recruitment
7	Definition of employee
8	The contract of employment
11	Data protection
12	Discipline and grievance – the Acas Code of Practice
16	Termination of employment
18	Wrongful dismissal
19	Unfair dismissal
20	Constructive dismissal
22	Redundancy
25	Discrimination and equal pay
29	Work and family
32	TUPE
34	Business immigration
36	Confidentiality and restraint of trade
38	Employment tribunal practice and procedure
40	Conciliation, settlements and compromising claims
42	APPENDIX A – Table of basic statutory employment rights
46	APPENDIX B – Statutory payments
47	APPENDIX C – Compensation limits
49	Our services

Introduction

UK employment law changes at a relentless pace. The challenge for businesses to keep up with changes to often quite complex laws is difficult, but essential. All employers, regardless of size, are expected to comply with the law or face the consequences. If an employer falls foul of our employment laws, the consequences could be extremely damaging financially and reputationally.

Hill Dickinson's employment team is pleased to provide you with this handbook containing guidance on the main aspects of our employment laws covering the recruitment of employees, the contractual relationship between employer and employee, discrimination, the termination of employment as well as other basic statutory rights and obligations.

The information and any commentary contained in this handbook are for general purposes only and do not constitute legal or any other type of professional advice. We do not accept and, to the extent permitted by law, exclude liability to any person for any loss which may arise from relying upon or otherwise using the information contained in this handbook. Whilst every effort has been made when producing this handbook, no liability is accepted for any error or omission. If you have a particular query or issue, we would strongly advise you to contact a member of the employment and pensions team, who will be happy to provide specific advice.

Fourth edition
April 2010

Recruitment

The obligation on employers to ensure fair practice starts at the recruitment stage. The Data Protection Act together with the various discrimination statutes and regulations are fundamental to the recruitment process.

Discrimination law

For the purpose of recruitment, applicants are protected against the detriment of not being selected for employment for discriminatory reasons such as reasons relating to the applicant's gender, pregnancy, marital status, race, racial origin or nationality, religion or belief, sexual orientation, age (or perceived age) and/or disability. Discrimination is discussed in more detail on pages 25-27.

Data Protection Act

The Data Protection Act 1998 (DPA) legislates for the fair and lawful handling of personal data, i.e. data from which individuals can be identified. This is particularly important in the recruitment process as this often involves the processing of candidate's personal information. The DPA applies to information obtained about job applicants, not just employees. The Information Commissioner publishes a Code of Practice entitled "The Employment Practices Code", part 1 of which deals with recruitment and selection. (See also page 11).

Avoiding the pitfalls

Job descriptions: It is common practice to have a job description which defines what the job entails, although there is no strict legal requirement to do this. The job description provides a reference point to test the relevance of a candidate's experience, qualifications, knowledge and achievements and makes the selection process more open and fair.

Employers should be aware however that although a job description will not form an express term of the contract of employment, a significant change to the employee's duties could be deemed to be an implied variation of the contract which, if not accepted by the employee, could give rise to a claim for constructive dismissal.

Personal specifications: These often distinguish between "desirable" and "essential" characteristics. Care should be taken to ensure that any such characteristics do not result in indirect discrimination. For example women may be indirectly discriminated against where an employer requires certain qualifications and experience which women are less likely to have as a result of being out of work on maternity leave or a career break.

Advertising: Employers need to be careful not to give any unintended indications of unlawful discrimination in their job advertisements. Advertisements should not set out unnecessary qualifications or blanket bans on people with a particular disability. An employer can in some circumstances positively discriminate in favour of a disabled applicant as this is justified under the Disability Discrimination Act. However other strands of anti-discrimination legislation do not generally permit positive discrimination at all. Some positive action may be to encourage certain groups who may be under represented in the permitted workforce to apply for jobs.

In order to comply with the requirements of the DPA, an advertisement should give details of the organisation and should state how the information will be used (unless this is obvious).

Application forms: To comply with the DPA, any personal data sought in application forms must be relevant to the recruitment process. The application form should also state who the information is being provided to and how it will be used.

It is advisable on the application form to include a DPA declaration inviting candidates to acknowledge that their personal data will be processed in accordance with the DPA principles (see page 11) and to obtain the candidates consent.

Employers need to ensure that application forms themselves are not discriminatory. For example, where a job does not require an applicant to read or write, an application form can be deemed discriminatory against applicants who cannot read or write in English. As regards disabled applicants, it is helpful to include a section on the application form for the candidate to provide information about any disability he or she may have. This will draw the employer's attention to any adjustments which will be required for the applicant to attend the interview. This information must be used constructively and not to discriminate.

Interview: Employers need to be especially careful to avoid discriminating against applicants at the interview stage. For example, questions about domestic circumstances, unless absolutely necessary, should be avoided. It is prudent to ask the same questions to all candidates and records of all interviews must be taken.

Again, under the DPA, employers should only ask for information that is necessary and that can be justified for the job in question.

In order to show that there has been no discrimination, it is essential to take good notes which reflect what took place at the interview. These notes should be retained for at least one year.

References: Before references are taken up, the consent of the applicant should be obtained. This is obtained most easily by dealing with it in the application form.

Final steps: Once satisfactory references have been obtained, a formal offer should be made to the applicant, enclosing a contract of employment or written statement of particulars, which the employer is obliged to provide to an employee within two months of the start of the employee's employment. (Details of these requirements are set out on page 8.)



 mediaGroup
AG

Halle

Definition of employee

Employee or worker? Why is this distinction important? In ordinary English Language each word would be considered a synonym to the other. It is quite different in law.

In law, an “employee” will benefit from legal rights, such as the right not to be unfairly dismissed and protection in redundancy, which the “worker” or “self-employed” might not. Add to this the complications of income tax and social security and the possible liability of employers to third parties for the wrongful acts of their “employees”, and it soon becomes clear why the distinction between whether a person is an “employee”, “worker” or “self-employed” is so important to businesses.

An “employee” is widely defined as someone who works under a contract of employment. However, the absence of a written contract of employment will not give rise to a presumption that someone is not an employee. There is no strict tick box approach to deciding whether or not someone is an employee, but an employment tribunal will look at a whole variety of factors such as whether the employer pays the individual, whether the employer exercises control over the individual, whether the individual is obliged to carry out work and the employer is obliged to provide work, who provides the individual's tools of trade and whether the individual receives holiday and sick pay. No one factor will have enough weight to determine an individual's status on its own, but each will contribute to the ultimate decision of a tribunal.

The process of deciding who is an employee is complex in the modern workplace.

The line between employed and self-employed might in the past have been difficult to draw, but legislation increasingly provides protection for the wider concept of the “worker”; that being a person who falls short of being an “employee” but who is not considered to be self-employed. Protection for “workers” also varies, depending on the context and the legislation (for example, the Working Time Regulations) within which it is used.

Crudely, one might look at the difference between a chauffeur and a taxi driver as epitomising the distinction between employee and self-employed. But what is evident from the law is that the historical assessment of an employer – employee relationship being one of “master and servant” is no more and employers need to exercise caution in their categorisation of individuals when deciding how to treat them in business organisation and rationalisation.

The contract of employment

What is a contract of employment?

This is, in its most simple form, any agreement by which an employee agrees to perform work personally in return for the employer's agreement to pay the employee.

Does the contract need to be in writing?

Strictly speaking the full contract does not need to be in writing in order to be enforceable. However, written agreements are preferable as they promote clarity and should minimise disagreements over respective party's rights under the contract or the obligations they owe to the other.

S.1 of the Employment Rights Act 1996 places a legal duty upon employers to provide employees, whose employment is to continue for more than one month, with a written statement of certain terms of their employment no later than two months after their employment begins. A 'section 1 statement' will rarely cover all the terms of an employee's contract of employment, for example, section 1 does not require an employer to state any rules relating to confidentiality or business expenses, but if there is no separate written contract, the section 1 statement will be persuasive evidence as to the specific terms of the contract that it is intended to deal with.

A section 1 statement must contain:

- the names of the employee and employer;
- the date when employment (and the period of continuous employment) began;
- the amount of pay and how often the employee will be paid, for example, weekly or monthly;
- any terms and conditions relating to hours of work;
- any terms and conditions relating to holiday entitlement;
- any terms and conditions relating to entitlement to sick leave and sick pay;
- any terms and conditions relating to pensions and pension schemes;
- the employee's and the employer's entitlement to notice of termination;
- the job title or a brief job description;
- where it is not permanent, the period for which the employment is expected to continue or, if it is for a fixed-term, the date when it will end;
- either the place of work or, if the employee is required or allowed to work in more than one location, an indication of this and of the employer's address;
- details of the existence of any relevant collective agreements which directly affect the terms and conditions of the employment; and
- a note giving certain details of disciplinary and grievance procedures, and must state whether or not a pensions contracting-out certificate is in force.

Terms of employment

A contract gives both the employee and employer certain rights and obligations called contractual terms. A contract will usually be made up of two types of contractual terms; express and implied.

Express terms are terms that are explicitly agreed between the parties and will preferably, but not necessarily, be recorded in writing. It is unusual however for all the terms of an employment contract to be expressly agreed. For example, the courts have established that all employment contracts have the following terms in them, whether explicitly agreed or implied:

- To maintain trust and confidence through co-operation
- To act in good faith towards each other
- To take reasonable care to ensure safety and health in the workplace

When no express term exists, implied terms can become part of the contract by the conduct of the parties, by custom and practice if reasonable to do so and through an employer's own rules.

Statutory rights

As noted on page 7, employees have become entitled to a wide range of statutory rights, derived from parliamentary acts or regulations which affect the employment relationship. The rights an employee has under his/her contract of employment are in addition to the rights he/she has under statutory law. In general, despite any express term to the contrary, they cannot be waived. A table of employees' statutory rights is set out at Appendix A.

How can a contract be altered?

Most changes to an employment contract require the consent of employer and employee and it is important that changes are discussed and agreed where possible. Disagreement over the changes may lead to the ending of the contract and claims for unfair dismissal and wrongful dismissal. In view of the potential problems, any decisions concerning change where there is no employee agreement require very careful consideration and legal advice should always be obtained.

How can a contract be terminated?

For an explanation of the different ways in which contracts of employment may be terminated see pages 16 and 17.



ication id "7681197"

OK

Data protection

The Data Protection Act 1998 (DPA) regulates the ways in which employers can collect, handle and use information about employees.

The DPA also regulates the handling of personal data in relation to job applicants.

The DPA is based around eight “Data Protection Principles”. The principles apply to employers in that personal information held by employers must be:

1. Fairly and lawfully processed
2. Processed for limited purposes
3. Adequate, relevant and not excessive
4. Accurate and up to date
5. Kept for no longer than is necessary
6. Processed in line with employee rights
7. Securely kept
8. Not transferred to other countries without adequate protection

To ensure compliance with the above principles, employers should inform their employees that personal information about them will be retained and advise how that information will be used. This can be covered in the contract of employment.

Employers should also ensure that people who have access to the employment records are aware that the data protection rules apply and that personal information must be handled with respect.

Employers should only use the records for appropriate purposes, that is to say for the purpose of the employee’s employment with the employer only. Personal information should not be provided to third parties unless necessary or unless the employee has given consent.

Employers should ensure that they only keep relevant documents on employment records. Employment records should be kept for no longer than is necessary and as a rule, should be kept for no longer than six years after the end of employment.

Employees can ask to see information about themselves that is held on computer and in some paper records. This is done by way of ‘Subject Access Request’, for which they must pay the employer £10. Employers need to be careful when dealing with Subject Access Requests to ensure that they do not disclose confidential or personal information regarding other employees.

The Information Commissioner publishes a Code of Practice entitled “The Employment Practices Code” which is intended to help employers comply with the DPA. A copy of the code can be obtained from their website www.ico.gov.uk.

Discipline and grievance – the Acas Code of Practice

The Acas statutory Code of Practice on discipline and grievance provides basic practical guidance on handling disciplinary and grievance situations in the workplace and emphasises key elements of fairness, including avoidance of delay, consistency, proper fact finding, the right to reply, the right to be accompanied and the right to appeal. A copy of the code can be downloaded from the Acas website www.acas.org.uk.

Disciplinary action

The code applies to dismissals for misconduct, attendance/absenteeism, capability (health), qualifications and poor performance but does not apply to redundancies or the termination of fixed-term contracts. The table below sets out the principles for handling disciplinary issues in the workplace and the corresponding obligations on both employer and employee under the code.

Key steps	Employer's obligations under the code	Employee's obligations under the code
Establish the facts of each case	Investigate without unreasonable delay. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.	The employee should co-operate with the employer's investigation.
Inform the employee of the problem	Notify the employee in writing of the case to answer, providing sufficient information to enable understanding of the issues and a fair opportunity to answer the case. Provide copies of written evidence with this notification. Give details of the time and date of the disciplinary meeting and advise of the right to be accompanied.	

Key steps	Employer's obligations under the code	Employee's obligations under the code
Hold a meeting with the employee to discuss the problem	<p>The meeting should be held without unreasonable delay and every effort should be made to attend the meeting.</p> <p>At the meeting, explain the complaint against the employee and go through the evidence.</p> <p>Allow the employee the opportunity to set out their case, answer allegations, ask questions, present evidence and call witnesses.</p> <p>Advance notice of intention to call witnesses must be given to the employee.</p>	<p>Every effort should be made to attend the meeting.</p> <p>Advance notice of intention to call witnesses must be given to the employer.</p>
Right to be accompanied	The worker must be allowed to be accompanied by a fellow worker, trade union representative or an official employed by a trade union.	Workers must make a reasonable request to exercise their right to be accompanied.
Decide on appropriate action	<p>Decide on whether disciplinary action is justified or not and inform the employee in writing.</p> <p>If the employee is dismissed, advise of the reasons and offer the right to appeal.</p>	
Appeal hearing	<p>A manager not previously involved in the case should hear the appeal.</p> <p>The worker has a right to be accompanied at the hearing.</p> <p>Inform the employee, in writing, of the final decision.</p>	If the employee wishes to appeal, he/she should send the employer written grounds of appeal.

Grievance procedure

The code describes a grievance as “concerns, problems or complaints that employees raise with their employers”. There is no requirement on employees to lodge a grievance with their employer prior to lodging a claim at the employment tribunal. The table below sets out the key steps that should be followed when handling grievance issues in the workplace and the obligations on both employer and employee under the code.

Key steps	Employer’s obligations under the code	Employee’s obligations under the code
Let the employer know the nature of the grievance		The employee should raise the matter with the employer, in writing, setting out the nature of the grievance.
Hold a meeting	A formal meeting should be arranged without unreasonable delay. Every effort should be made to attend the meeting.	The employee should explain the grievance and make suggestions as to resolution. Every effort should be made to attend the meeting.
Right to be accompanied	The right to be accompanied is identical to the corresponding rights referred to at the discipline section of the code.	Workers must make a reasonable request to exercise their right to be accompanied.
Decide on appropriate action	Notify the employee, in writing, of the decision and where appropriate any action that is to be taken. Advise the employee of his/her right to appeal.	
Appeal hearing	A manager not previously involved in the case should hear the appeal. The worker has a right to be accompanied at the meeting. The employee should be informed, in writing, of the final decision.	If the employee wishes, he/ she should send the employer written grounds of appeal.

Implications for not following the code

The code is neither mandatory nor legally binding and a failure to follow it does not, of itself, carry legal sanctions. Consequently a failure to follow the code when dismissing an employee will not result in a finding of automatic unfair dismissal.

There is a but. In the context of unfair dismissal claims, employment tribunals are obliged as a matter of law to consider the code when determining whether or not a dismissal was fair or unfair. If a tribunal considers that an employer has unreasonably failed to follow a requirement of the code it may increase any award by up to 25%, if it considers it just and equitable in the circumstances. Conversely, if a tribunal considers that an employee has unreasonably failed to follow a requirement of the code it can reduce any award made by up to 25%, if it considers it just and equitable to do so.

Termination of employment

Contracts of employment may be terminated in a number of ways, depending on their terms, including:

1. Mutual agreement
2. Expiry of a fixed-term
3. Frustration
4. Dismissal on notice by employer
5. Summary dismissal (gross misconduct)
6. Resignation and constructive dismissal

1. Mutual agreement

In this case there is no dismissal. The employee and the employer agree that the contract should come to an end. There will be no scope for an employee to claim they were unfairly or wrongfully dismissed unless the employee can prove they were placed under undue pressure to agree to the mutual termination.

2. Expiry of a fixed-term

This type of termination is a dismissal for statutory purposes, but not common law. Many contracts will expire on a specified date, when a particular task has been completed or when a certain event occurs. Whilst employees under fixed-term contracts may not always have the same rights as employees under contracts of indefinite length due to their length of service, they are protected under the Fixed-Term Employees' (Prevention of Less Favourable Treatment) Regulations 2002. These regulations protect fixed-term employees against unfair dismissal, discrimination and give them the right to be informed about permanent vacancies and the right to minimum notice periods under short-term contracts of three months or less. [The Acas Code of Practice on discipline and grievance does not apply to the expiry of a fixed term contract.]

3. Frustration

Frustration can occur where the performance of the contract becomes impossible, usually due to factors outside the control of one or both parties. This may be the case where the employee is imprisoned or is unable to attend work due to prolonged sickness, for example.

Termination of a contract of employment due to frustration does not amount to dismissal for statutory procedures or common law.

Whether or not a contract of employment has become frustrated is a question of law for a court or tribunal to decide taking into account all relevant factors.

4. Termination on notice

The service of notice by an employer to terminate an employee's contract is a dismissal for both contractual and statutory purposes. Either party can terminate a contract by giving the notice stated in that contract. The current statutory minimum notice periods applicable to employment contracts are set out in Part IX of the Employment Rights Act 1996.

5. Summary dismissal

Where an employee has committed an act of gross misconduct or other serious breach of contract which goes to the root of the contract, the employer is entitled to inform the employee that they intend to treat the contract as terminated with immediate effect without affording the employee the entitlement to a notice period or payment in lieu of notice.

Examples of gross misconduct which may entitle an employer to dismiss include theft, drugs, violence, abuse of the internet and disobedience of a lawful order.

6. Resignation and constructive dismissal

Constructive dismissal is dealt with in more detail on page 20.

Where an employee uses clear words to indicate that he is resigning, it will be generally be found that he, not the employer, has terminated the contract. For example, if an employee says "I am leaving, you won't see me again" an employment tribunal is likely to find that the employee has resigned.

Wrongful dismissal

Wrongful dismissal claims are brought on the basis that the employer dismissed the employee in breach of the employment contract.

This claim is therefore a contractual one and can be dealt with in the employment tribunal or in the civil courts. It is brought on the basis that the employer dismissed the employee in breach of the employment contract. It follows that a claim of this nature can only succeed if there has been a dismissal.

The dismissal can be one of two types:

- Actual dismissal - whereby the employer has told the employee to leave the job.
- Constructive dismissal - whereby the employee feels they have no other option but to resign because the employer has made their position untenable.

In wrongful dismissal cases, the employee is entitled to be put in the same position he or she would have been in had the contract been properly performed. In addition to notice payments, this may also include other entitlements such as pay in lieu of outstanding annual leave, or loss of benefits such as commission, company car or even pension entitlement.

Where an employer dismisses the employee without giving the correct notice period, this provides a definite amount that the employee should have received under the contract. So, when an employer dismisses the employee immediately but the contract allows for a four-week notice period, the employee will, for a start, claim four weeks worth of pay.

The employment tribunal caps the amount an ex-employee can recover in these types of cases at £25,000. The civil court has no such limit and depending on the terms of the contract, employees often bring claims in the civil court, which exposes the employer to the risk of paying a bigger compensation payment than they would have done in the tribunal.

The ex-employee must attempt to reduce or mitigate the financial losses suffered as a result of losing their job. He or she must actively seek alternative employment and cannot refuse a reasonable offer of re-employment. This will be taken into account when calculating their loss.

Unfair dismissal

Qualifying employee

Generally speaking, employees with 12 months, or more continuous service qualify for the right not to be unfairly dismissed. Employees who are unfairly dismissed can pursue claims for compensation against their employer which in some cases can be substantial.

Reason for dismissal

For a dismissal to be legally fair, the employer should be able to identify a “potentially fair” reason for dismissal. The legislation lists the following potentially fair reasons:

- Misconduct
- Capability
- Redundancy
- Contravention of a statutory enactment
- Some other substantial reason

Dismissal procedure

As well as the need to identify a potentially fair reason for dismissal, an employer must be able to show that in the circumstances, they acted reasonably in treating the reason as a sufficient reason to dismiss the employee.

When assessing a claim of unfair dismissal an employment tribunal will scrutinise whether dismissal was within the “band of reasonable responses”. If the tribunal concludes that no reasonable employer would have acted as the employer acted in dismissing the employee for this reason, the dismissal will be unfair. In doing so a tribunal will look at the procedure the employer followed and consider whether or not this fell within the range of reasonable responses. When considering this point, a tribunal will take into account the size and administrative resources of the employer. A large corporation will often be judged by tougher standards than a small owner-managed firm.

If the Acas Code of Practice on discipline and grievance applies to the dismissal, a tribunal will take the code into account when considering whether a dismissal was fair or unfair. If a tribunal feels that an employer has unreasonably failed to follow the guidance set out in the code, they can increase any award of compensation by up to 25%. Employers should also ensure that they comply with their own internal procedures. (See section on ‘Discipline and grievance – the Acas Code’ on pages 12-15.)

Automatically unfair reasons for dismissal

Ordinarily, employees require 12 months or more continuous service to bring a claim for unfair dismissal. However, some dismissals are automatically unfair whether the employee has 12 months' service or not. Examples include dismissals for reasons relating to pregnancy/childbirth/family leave, assertion of statutory rights, a request for flexible working, trade union membership/activities and health and safety.

(See Appendix A for more details.)

Constructive (unfair) dismissal

If an employer commits a serious breach of a fundamental term of the employee's employment contract, the employee is often entitled to accept this breach and resign, with or without notice, in response to it. In such circumstances the employee will be 'constructively dismissed' by his employer, the idea being that the employer's behaviour has left the employee with no choice but to resign. However, if the employee unduly delays before resigning then he will be deemed to have waived the breach and will lose the right to claim constructive dismissal.

The fundamental term breached by the employer may be an express or implied term (see the 'Contract of employment' section, page 9). Often, an employee will claim that an employer has breached the term of 'mutual trust and confidence' that is implied into all employment contracts. An employer should not act, without reasonable cause, in any way that would destroy or seriously undermine the trust and confidence between the parties. If an employer does so and the employee resigns as a result, the employee will be constructively dismissed. If the employer cannot establish a fair reason for their actions leading to the employee's resignation (see list of potentially fair reasons on page 19), the constructive dismissal will be unfair.

An employee may also argue that there has been a series of events over time which has eroded the relationship between him and the employer, culminating in a 'last straw' event which prompted him to resign. This last straw does not in itself have to be a serious breach by the employer of the employee's contract.

Remedies for unfair dismissal

An employee has three months less one day from the date of dismissal to bring a claim at tribunal. In some circumstances this time limit can be increased.

If the employee succeeds with his claim, then his compensation may include the following:

1. A basic award, which is calculated in the same way as a statutory redundancy payment. Currently, the maximum basic award is £11,400.
2. Loss of earnings from the date of dismissal. This is currently capped at £65,300. The employee does have the duty to make reasonable efforts to mitigate these losses. In relation to any losses incurred before the employment tribunal hearing, the Department for Work and Pensions will seek to recoup from the employer certain benefits if provided to the employee, such as Jobseeker's Allowance.
3. If the employee has also brought a discrimination claim, with which he succeeds, then he may be able to recover his loss of earnings under the discrimination claim rather than the unfair dismissal claim. In that case, his loss of earnings will be uncapped although he must still mitigate his losses. If an employer can show that an employee's behaviour or conduct contributed to his dismissal, then the tribunal may be persuaded to reduce any compensation awarded to the employee accordingly.
4. If the finding of unfair dismissal relates to an unreasonable procedure adopted by the employer, then the employer may be able to persuade the tribunal that the employee would have been dismissed anyway, even if a reasonable procedure had been followed. In that case, any losses would be limited to the amount of time it would have taken for the employer to conduct a reasonable dismissal procedure.
5. Where the Acas Code of Practice on discipline and grievance applies (as detailed on pages 12 and 15) and the employer unreasonably fails to comply with the guidance set out in the code, the tribunal can increase any award they have made by up to 25% (though the total compensation will not exceed the relevant caps referred to above). Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the code they can reduce any award by up to 25%.
6. An employee may also ask to be reinstated or re-engaged.

Written reasons

Finally, it is worth noting that an employee with one year's continuous employment is entitled, on request, to a written statement from his employer giving particulars of the reasons for dismissal. If an employer unreasonably refuses to provide this statement within 14 days of the request being made, or if the reasons the employer gives are inadequate or untrue, the employee can make a claim to the employment tribunal in relation to this and if successful, will be awarded two weeks' pay. Such a claim must be brought within three months of the date upon which the employee was dismissed.

Redundancy

As noted on page 19, redundancy is a potentially fair reason for dismissal.

In general terms a redundancy situation will arise from one of three circumstances:

- the closure of a business;
- the closure of a workplace; or
- the diminution in need for employees.

Where the redundancy is due to the closure of a business, the redundancy is fairly obvious, in that once a business stops trading it cannot continue to employ members of staff. Although the Acas Code of Practice on discipline and grievance does not apply to redundancies, employers need to operate fair dismissal procedures to avoid facing claims for unfair dismissal.

When the redundancy is due to the closure of a workplace an employer needs to consider what the “place of employment” is. This can be evidenced by the actual place of work where the employee carries out his day-to-day duties and by looking at the contract of employment. In such a scenario, it is important to consider whether there are alternative jobs available in other offices that the employees could undertake.

When a redundancy is due to a diminution in the need for employees it may occur in one of the following circumstances:

- there is the same amount of a particular kind of work but fewer employees are needed to do it;
- there is less work of a particular kind and less employees are needed to do it; or
- there is less work of a particular kind, but the same number of employees are required overall.

Redundancy has so many facets and nuances that it is often very easy for the unwary employer to act in breach of their legal obligations. Employers should be aware of the following basic requirements when carrying out any redundancy process.

Warning

It is a well established principle that a dismissal for redundancy will not usually be fair unless an employee has been warned about the proposed redundancy. An employer should give employees as much warning as possible of the proposed redundancies and inform any employee, whose job has been identified as potentially redundant, that their position is “at risk” of redundancy. Employees should be advised that being put “at risk” of redundancy does not necessarily mean that they will be made redundant and that no firm decision has been made at that stage.

Consultation

Consultation with employees and, where appropriate, their representatives, is fundamental to the fairness of any dismissal for redundancy. The matters that should be discussed during the consultation process will depend on the specific circumstances but, typically,

consultation will include discussions on the reasons for redundancy, the pool for selection and the selection criteria, ways to avoid redundancy and consideration of alternative positions.

Where the employer proposes to dismiss 20 to 99 employees within 90 days, the employer must consult with the trade union or employee representative at least 30 days before the dismissals take effect. The employer must also notify the Secretary of State for the Department for Business, Innovation and Skills at least 30 days before the first dismissal.

If there are 100 or more employees to be made redundant within 90 days, the consultation with the trade union or employee representative must begin at least 90 days before the first of the dismissals take effect. The employer must also notify the Secretary of State for the Department for Business, Innovation and Skills at least 30 days before the first of the dismissals takes effect.

Selection

A fair selection for redundancy involves the fair application of objective selection criteria to the correct pool of employees.

The employer must first identify the group of employees from which those who are to be made redundant will be selected. Once this has been done the employer should apply selection criteria to each employee. Selection criteria must be objective and should not reflect personal opinion and ideally should be capable of being verified e.g. attendance records, appraisals.

Once this has been done the affected employees must be consulted individually. The employer must explain to the employees that there is a redundancy situation and that their job is at risk. They must consider suitable alternative employment and allow employees time off to seek other jobs.

Once the employees have been notified that they are being made redundant, the employer should make sure that there is a mechanism in place to allow the employee to appeal against their selection for redundancy.

Statutory redundancy payments

Employees who have been employed continuously for two years and have been dismissed by reason of redundancy are entitled to statutory redundancy payments. The statutory redundancy payment is based on the value of a week's gross pay (currently up to a maximum of £380*) for each year of continuous service (up to 20 weeks).

For employees aged under 22, the redundancy payment is based on 0.5 week's pay multiplied by the number of years' continuous service.

Employees aged 22 - 41 payments are based on 1 week's pay multiplied by the number of years' continuous service.

Employees aged 41 and over are entitled to 1.5 weeks' pay multiplied by the number of years' continuous service.

*The cap will remain at £380 until February 2011.



Discrimination and equal pay

It is unlawful for an employer to discriminate against employees or potential employees because of their age, disability, race, religion or belief, sex, or sexual orientation.

Discrimination can be either direct or indirect.

Direct discrimination occurs when an employee is treated less favourably than another employee because of their age, disability, race, religion or belief, sex and/or sexual orientation. Direct discrimination also includes harassment, which occurs when someone is subjected to unwanted conduct which has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Bullying is a common example of discriminatory harassment. In most strands of anti-discrimination law (age discrimination being a notable exception), direct discrimination and harassment can never be justified by an employer.

Indirect discrimination occurs when an employer applies a provision, criterion or practice that disadvantages one group of people of one sex/race/religion etc. compared to other groups of persons of a different sex/race/religion etc. Employers can defend indirect discrimination claims if they can objectively justify their actions.

Age

Employers need to be especially careful of discriminating against older or younger prospective employees in job adverts. Any advert that requires a certain number of years' experience, or that asks for "youthful" employees could be deemed indirectly discriminatory.

Direct discrimination would occur if, for example, an employer were to refuse an employee promotion because he was approaching retirement age. However, such discrimination may be justified if the employer can demonstrate it is a proportionate means of achieving a legitimate aim.

Disability

An employee is disabled for the purposes of the Disability Discrimination Act 1995 (DDA) if they suffer from a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. It is not always clear cut whether or not an employee is disabled for the purpose of the DDA, and if you are unsure, you should seek advice.

If an employer employs someone who suffers from a disability, it is important that they make reasonable adjustments to accommodate that person and their disability. Such adjustments can be in relation to access to the workplace, provision of equipment,

allocation of duties, working hours and time off. Where an employer fails to make reasonable adjustments for a disabled employee, it will be liable to a claim for direct disability discrimination.

Race

In the employment context, a person's race incorporates a person's colour, nationality, ethnic or national origin.

An employee does not have to be of a particular race in order to make a claim for race discrimination against his employer. For example, if a restaurant owner instructed an employee to tell non-white enquirers that there were no tables left in the restaurant, this would amount to direct race discrimination.

Indirect race discrimination may occur, for example, where, in the recruitment process, an employer refuses applicants from an area or community in which a higher percentage of a given race live.

Religion and belief

"Religion or belief" includes all recognised religions. It also covers some practices that you would not perhaps think would amount to a "religion or belief". Any system of collective worship with a clear belief system and a profound belief affecting way of life or view of the world can be classed as a religion or belief in the employment context.

Any bullying in the workplace that centres on a person's religion or belief amounts to direct discrimination.

A common, and much publicised example of indirect religious discrimination can result from an employer's dress code. Whether the dress code is discriminatory will depend on the facts. For example, an employer who prohibits beards for hygiene purpose will not discriminate against Sikh or Muslim employees. However, if the prohibition of beards is purely aesthetic, it will be likely to be deemed discriminatory.

Sex

Sex discrimination is historically the most common form of discrimination, and it applies equally to both men and women.

An obvious example of direct discrimination occurs when a man is offered a promotion ahead of an equally capable woman of child bearing age, because the employer is concerned that the female employee will get pregnant.

Indirect discrimination can occur, for example, where a woman is refused flexible working hours in order to take her children to and from school.

Sexual orientation

Direct discrimination on the grounds of an employee's sexual orientation will occur, for example, if an employee is subjected to bullying and harassment in the workplace for being homosexual.

Indirect discrimination may occur, for example, where a company's death in service policy allows payments to be made to an employee's wife or husband, but does not refer to civil partners.

Equal pay

The principle of equal pay is very basic, in that men and women should receive equal pay for equal work, regardless of gender. The application of equal pay claims is not so simple however.

The claimant must select a comparator of the opposite sex, who undertook or undertakes the same work for the same employer. Finding such a comparator is not always easy. If there is no comparator who carried out the same work, the claimant must select someone who carried out work of equal value, or work that is rated as equivalent.

An employer can defend a claim for equal pay if there is a genuine material factor which can explain the difference in pay between the claimant and the comparator. Factors such as length of service, seniority, responsibility or qualifications are normally accepted by tribunals as suitable defences.



Work and family

Flexible working

The law enables qualifying employees to request a contractual variation in relation to hours of work, times they work, the place at which they work and any other aspect of their terms and conditions of employment. This is known as the right to request flexible working. To be eligible to make a request for flexible working the employee must:

- have a child under 17 or a disabled child under 18 or be the carer for an adult;
- have worked for their employer for 26 weeks continuously at the date that the application is made; and
- have not have made another application to work flexibly during the past 12 months.

The employer can only refuse a request on the grounds of cost, detrimental consequences, effect on staff or planned structural changes.

Once a request for flexible working is received a statutory procedure must be followed which involves meeting the employee to discuss the application, informing the employee of the grounds of refusal and granting a right of appeal against the decision.

Time off for dependants

Employees have the right to take a reasonable amount of unpaid time off work to deal with emergencies involving a dependant and to make any necessary long-term arrangements.

A dependant is defined as a spouse, child, parent, anyone else living in the same household except as employee or tenant and for certain purposes only, anyone else who “reasonably relies on the employee” for that help.

The employee must need to take time off to take action related to events concerning a dependant, for example, if a dependant falls ill or is injured, if care arrangements break down, or to arrange or attend a dependant’s funeral.

Parental leave

A parent is legally entitled to unpaid time off during the first five years of a child’s life or during the first five years after adoption as long as they have one year or more continuous service and parental responsibility for a child.

Eligible employees may take parental leave up to a total of 13 weeks, with leave for each child being taken in blocks no shorter than a week. The right to parental leave expires on the child’s fifth birthday or the fifth anniversary of the adoption.

The right is also available to employees who have parental responsibility for a disabled child under the age of 18. The maximum leave is 18 weeks instead of 13 and the right expires on the child's 18th birthday. Leave does not have to be taken in minimum blocks of a week, the minimum is a day.

Maternity rights and maternity leave

All pregnant employees are entitled to time off with pay to keep appointments for antenatal care which may include relaxation classes and parent-craft classes. Except for the first appointment, the employee must show the employer, if requested, a certificate from a registered medical practitioner, midwife or health visitor, confirming the pregnancy together with evidence showing that an appointment has been made.

All pregnant employees are legally entitled to 52 weeks' maternity leave regardless of length of service. The first 26 weeks of maternity leave is known as Ordinary Maternity Leave (OML) and the second 26 weeks is known as Additional Maternity Leave (AML).

With the exception of terms and conditions concerning pay, an employee taking maternity leave is entitled to the benefit of all the terms and conditions of employment that would have applied if she had not been absent. Whilst on maternity leave an employee can agree with her employer to work up to ten days known as "keeping in touch" days.

An employee on maternity leave must not be subjected to any detriment for taking leave and has the right not to be unfairly dismissed for a reason connected with maternity leave. An employee who is subjected to a detriment can bring a claim in the employment tribunal entitling her to compensation if successful.

Maternity pay

A woman who takes maternity leave or stops working due to childbirth, will be entitled to Statutory Maternity Pay (SMP) provided:

- she earns at least the lower earnings limit; and
- has been employed by the same employer continuously for at least 26 weeks into the 15th week before the week the baby is due.

SMP is paid for a maximum period of 39 weeks and is payable at two rates:

- 6 weeks at 90% of average gross weekly earnings
- 33 weeks at the weekly rate set by the government or average gross weekly earnings (if the 90% rate is less than the weekly rate). (See Appendix B for the relevant weekly rate set by the government).

To claim SMP the employee must tell her employer at least 28 days before the date she wants to start receiving payment. SMP is payable by the employer but is partly (or, for small firms, wholly) reimbursed by the state.

An employer may offer an enhanced maternity pay scheme over and above the statutory minimum entitlement and this would normally form part of the contract of employment.

Paternity leave and pay

For an employee to be eligible for paternity leave, he must:

- have 26 weeks' continuous service at the start of the 14th week before the expected week of childbirth;
- be the father of the child or married to or the partner of the child's mother; and
- have or expect to have responsibility for the upbringing of the child.

Employees can take one or two consecutive weeks of paternity leave which can be taken any time from the birth up to 56 days later. Statutory paternity pay is paid at the same rate of statutory maternity pay after the first six weeks. An employer may offer an enhanced paternity pay scheme over and above the statutory minimum entitlement and this would normally form part of the contract of employment.

Adoption leave and pay

If an employee is matched with a child for adoption or if the employee has a child placed with him/her for adoption, he/she may be entitled to adoption leave. The employee must have worked for the employer for at least 26 weeks ending with the week in which he/she is notified as being matched with a child for adoption.

Adoptive parents are entitled to up to 52 weeks' adoption leave.

Most parents will be entitled to 39 weeks of Statutory Adoption Pay (SAP). This is paid at the same rate as statutory maternity pay. An employer may offer an enhanced adoption pay scheme over and above the statutory minimum entitlement and this would normally form part of the contract of employment.

Where a couple adopts a child, only one parent is entitled to take adoption leave. The other parent may be able to take paternity leave. This includes same-sex couples.

TUPE

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the regulations) there are two definitions as to what constitutes a “relevant transfer”:

1. A transfer of (or part of) an undertaking/business which is situated immediately before the transfer in the UK, to another person, when this transfer constitutes a transfer of an economic entity which retains its identity.
2. A service provision change i.e. a situation in which activities (e.g. cleaning services) are “in-sourced”, “outsourced” or where there is a change in the service provider. Immediately before the service provision change, there must be an organised grouping of employees situated in Great Britain which has, as its principal purpose, the further carrying out of the activities concerned on behalf of the client and that the client intends that the activities will, following the service provision change, be carried out by the new service provider. The regulations do not cover single specific events or tasks of short-term duration (for instance, a security guard employed to cover the Olympic Games). They also do not cover activities which consist wholly or mainly of the supply of goods for the client’s use.

If there is a relevant transfer from one employer (the transferor) to a new employer (the transferee) the effect in law of the transfer is as follows:

- The contracts of employment of the transferor’s affected employees will automatically transfer to the transferee, with full continuity of service on the transfer date.
- All of the transferor’s rights, powers, duties and liabilities under or in connection with those employment contracts will automatically transfer to the transferee on the transfer date.
- Any act or omission before the transfer is completed of, or in relation to, the transferor (in relation to any such contracts of employment) will be deemed to have been an act or omission of, or in relation to, the transferee.

If the transferor formally recognises a trade union for the purpose of collective bargaining in relation to the affected employees, then this too will transfer to the transferee.

The primary purpose of the regulations is to protect the employment rights of the affected employees and if an affected employee is dismissed (whether by the transferor or the transferee) and the sole or principal reason for their dismissal is the transfer itself, or a reason connected with the transfer, and that reason is not an economic, technical or organisational reason entailing changes in the workforce (such as redundancy), then the dismissal shall be regarded by a tribunal as automatically unfair. Therefore, if the dismissed employee has 12 months’ service he will be able to pursue a claim of unfair dismissal at the employment tribunal.

Under the regulations, there is a specific list of employee liability information that the transferor must provide to the transferee. The regulations also provide that the transferor must ensure that long enough before the transfer date it informs the appropriate

representatives of the affected employees that the transfer is to take place, the (proposed) date of the transfer and the reasons for it; the legal, economic and social implications of the transfer for the affected employees; and any measures that the transferor envisages it or the transferee may take in relation to the affected employees (or if none are envisaged that fact).

The transferor also has an obligation to ensure appropriate representatives are properly appointed and the regulations detail how employee representatives ought to be elected if there are no suitable existing workforce representation.

If the transferor fails to provide the necessary employee liability information, the transferee may present a complaint to an employment tribunal within three months from the date of the transfer. If successful, the transferee will be awarded an amount not less than £500 per employee in respect of whom the transferor has failed to provide the necessary information (unless the tribunal considers it just and equitable to award lesser sums).

If the duty to inform and consult representatives is not complied with, then the affected employees may bring a claim to the tribunal within three months from the transfer date. If successful, the affected employees will be awarded up to 13 weeks' gross pay.

Employees have a statutory right to object to their employment transferring as a consequence of the regulations. If any employees do object then the usual consequence is that their employment will be treated as terminated but they will not be treated as having been dismissed (constructively or otherwise) and therefore they will not be able to pursue any claims for unfair dismissal.

Business immigration

If an employer is looking to recruit or employ employees from outside the European Economic Area¹ and Switzerland, it will need to comply with the UK Border Agency's points based system (PBS).

The PBS combines more than 80 pre-existing work and study groups into five tiers, of which tier 2, sponsored skilled workers, is likely to be the most relevant for the majority of UK employers. Tier 2 is for people coming to the United Kingdom with a skilled job offer to fill a gap in the UK labour force and it is further sub-divided into four sub-categories: General, Intra-Company Transfers, Ministers of Religion and Sports People.

Migrants will need to score the requisite points relevant to their category, based on a variety of criteria including their job, qualifications, prospective earnings, ability to fund themselves when they arrive (maintenance) and English language skills. They must also be "sponsored" by their proposed UK employer. Those that are deemed to carry out a "shortage occupation" will find it easier to qualify since they will immediately score 50 points out of the 70 required; the remaining 20 points have to be scored by passing the English language skills test (10 points) and the maintenance test (£800 per migrant plus £533 for each dependant) (10 points). If the job is not on the shortage occupation list, the employer will need to demonstrate that it has passed the Resident Labour Market Test - this requires compliance with specific advertising rules and documented evidence that no suitable candidate applied.

The employer must, therefore, be registered as a licensed sponsor, which requires an online application, payment of the requisite fee (dependent on the tier(s) the employer would be using and the size of the organisation) and the employer's agreement to comply with a variety of sponsorship duties, including, for example, notifying United Kingdom Border Agency (UKBA):

- If the sponsored migrant does not turn up to work on the first day of work.
- If he is absent from work for more than ten working days without the employer's reasonable consent.
- If his employment is terminated.
- If the employer stops sponsoring the migrant for any other reason.

¹ Countries belonging to the EEA are: Austria; Belgium; Bulgaria; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Republic of Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; The Netherlands; Norway; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden and the United Kingdom. Iceland, Liechtenstein and Norway are not members of the European Union (EU), but are included within the EEA and citizens of these countries have the same rights to enter, live in and work in the United Kingdom as EU Citizens.

The employer is also required to appoint individuals to the new roles of key contact (who is responsible for liaising with UKBA), Level 1 User (responsible for accessing and maintaining the online sponsorship management system) and authorising officer (with overall responsibility for the employer's registration).

When making the application for sponsorship, the employer should also expect to be visited by a Compliance Officer of UKBA, who will check whether or not the employer has the necessary human resources in place to comply with the sponsorship duties. Firms are being assessed at random and/or if UKBA have reasonable concerns about their ability to comply with their duties.

The new PBS requires the employer to develop a detailed knowledge of their workforce, a good understanding of the new sponsorship duties and an ability to keep abreast of the ongoing changes to the guidance, relevant codes of practice and immigration rules failing which their sponsorship application is likely to fail and/or their licence may be revoked.

Confidentiality and restraint of trade

Employers often, and understandably, identify a business need to impose binding restraints on employees' use of confidential business information and their ability to compete against the employer whether during their employment or after it has ended. For example, employees may have knowledge of strategic information about the employer's business or customer contacts that an employer would want to ensure the employee does not use for the benefit of future employers or businesses.

Employers may seek to restrain their employees' activities for the duration of the employment relationship, for example, preventing the employee from 'moonlighting' and/or will want to restrict where and for whom the employee works and in what capacity for a reasonable period. These restraints must be in writing and properly incorporated into the employees' contract of employment. Further, because such restraints (often described as restrictive covenants) are generally anti-competitive in nature (and therefore contrary to public policy) it is essential that they are carefully drafted. Expert legal advice is highly recommended.

Restrictive covenants must be considered carefully on a case by case basis. This is because the tribunal's and court's starting point is that restraint of trade clauses are unreasonable unless an employee can show that they are necessary to protect a legitimate business interest, such as business secrets, goodwill, the workforce or trade connections.

- **The protection given by the clauses should be limited to the protection of the company's legitimate interests only.**

The duration of the restriction and the area it covers (for example, the employer may not want an employee to work within a ten mile radius of its head office) should be carefully considered and should be as conservative as possible.

- The activities which the clause seeks to prevent must be reasonable. For instance, if the employer's business covers a number of interests, the restriction on any one employee should relate only to the business in which the employee worked.
- If more than one restriction is to be placed on the employee, each restriction should be dealt with separately in the contract so that they can be more easily severed from the contract if need be.
- There is no "one clause fits all" and clauses will have to be modified for each individual employee. For example, a sales representative will inevitably face different restrictions than a financial controller. Employers should regularly review their restraint of trade clauses to ensure they remain reasonable for each employee.
- Finally, if an employee is serving his notice period as garden leave, this period may have to be credited against the contractual duration of any restraint of trade clauses. If not, it could result in the employee being restrained for an unreasonable length of time i.e. the notice period and the duration of any restraint of trade clauses.

Types of clauses

The most common post-termination restraint of trade clauses used by employers include restraining the employee from:

- 'poaching' the employer's employees;
- soliciting and/or dealing with other businesses in which the employer was involved;
- dealing with the employer's customers;
- dealing with the employer's suppliers;
- working within a particular area; and
- working for particular companies (usually direct competitors of the employer) or in particular business areas.

At Hill Dickinson LLP we are experts in the preparation of restrictive covenants and in pursuing actions through the courts to enforce these kinds of restraints on behalf of our clients.

Employment tribunal practice and procedure

Employment tribunals have jurisdiction to hear almost all employment related disputes based on either statutory employment law, or contract claims arising from termination of an employment contract up to £25,000.

The tribunal system was set up with the intention of providing a quicker, cheaper and more efficient system than the normal court system. However, with the relentless and extensive development of employment laws in the modern era, the employment tribunal system is now one of the most technically challenging legal environments in the UK. By far the majority of employers (and many claimants) engage legal representation to advise and represent them and the associated costs for parties involved in tribunal proceedings are now much more comparable to the civil courts.

Employees and ex-employees make claims to the employment tribunal by lodging a claim form at the employment tribunal. Once a claim form has been lodged the “respondent” employer must provide a defence, known as a “response”, to the claim within 28 days.

Once the claim and response form have been filed, they are sent to Acas, who offer a neutral conciliation service free of charge, to encourage early settlement of disputes.

If a claim is not settled in the early stages the tribunal may order pre-hearing reviews to weed out particularly weak cases.

If the claim is not struck out or settled, it will go to a full hearing at the employment tribunal. A tribunal itself is generally seen as being less formal than a civil court and the parties do not have to be legally represented. The employment tribunal panel normally comprises three members made up of a legally qualified judge and two ‘lay’ members to represent both the employee and employer interests, respectively.

Unlike in the civil courts, costs are rarely awarded to the successful party in the employment tribunal. The reason for this is so that employees are not put off from making claims where they believe they have been wronged by their employer, due to the risk of having costs orders made against them if they are unsuccessful. The downside to this from the employer’s perspective is that employers often incur more expenditure in legal fees by defending a claim to tribunal than they would spend by settling the matter with the employee in the early stages of a claim. Employers have to consider the benefits of settling claims on a commercial basis, compared to defending them as a point of principle in the hope of preventing other employees from making claims in the future.

The tribunal has power to award compensation, re-engagement and reinstatement. The most common form of remedy is, unsurprisingly, compensation.

If either of the parties dispute the decision made by the employment tribunal the parties may be able to appeal to the Employment Appeals Tribunal (EAT), which has similar status and powers as the High Court. Appeals from the EAT go to the Court of Appeal and occasionally to the House of Lords.

Conciliation, settlements and compromising claims

When a problem or disagreement arises in the workplace and/or when an employee has brought a claim at tribunal, the parties will often seek to resolve the issues either by using the services of Acas or entering into a compromise agreement.

Acas is an independent neutral organisation that acts for both employers and employees in attempting to offer guidance and resolve disputes and conflicts. Where a workplace dispute arises, the role of the Acas officer is to conciliate between the parties either before a claim is made to the tribunal (pre-claim conciliation) or after a claim has been submitted, usually with a view to resolving the issues by reaching an agreement in the form of a COT3 agreement.

Pre-claim conciliation

Where a problem or disagreement in the workplace is likely to lead to a tribunal claim but before a claim has been submitted, Acas will often be able to offer a pre-claim conciliation service (PCC) to the parties.

A request for PCC can be made by either party and will be accepted by Acas where the following four criteria have been fulfilled:

1. the employee is eligible to make a claim to an employment tribunal;
2. there is nothing to prevent conciliation from succeeding;
3. parties have already made reasonable attempts to address the matter; and
4. the employee is likely to make a claim if the assistance of Acas is not provided.

Acas COT3 agreement

If the parties do not engage in PCC, or PCC is unsuccessful the employee may lodge a claim at tribunal. If so, the employer must provide a defence and an Acas conciliator will be appointed to the case to try and help the parties mediate their differences.

If it is possible for the parties to reach an agreement to settle the employee's claims then this will be recorded by the conciliator in a COT3 agreement. This agreement is signed by both parties and the conciliator will then notify the tribunal that the employee's claims have been resolved and they will be withdrawn. Usually the agreement will provide that

the employer is making a payment to settle not only the claims the employee has already raised at tribunal, but also all other claims the employee may have against the employer in respect of his employment or its termination.

Compromise agreement

A compromise agreement is one which does not involve Acas and may be used instead of a COT3 agreement, for instance, if proceedings have not yet been issued. For example, an employer and employee may be negotiating an exit package for the employee and wish to record this in a compromise agreement. The aim of the agreement is to compromise any claims the employee may be able to bring against the employer, usually in return for some sort of compensation.

Only certain claims can be settled by a compromise agreement and examples include claims relating to unlawful discrimination, unfair dismissal, breach of contract and various payment claims such as redundancy payments and holiday pay.

There are statutory rules governing how a compromise agreement must be drafted. The employee must also receive advice from a relevant independent adviser on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue any claims before an employment tribunal. Because of this requirement for an employee to seek legal advice, it is common practice for employers to make a small contribution to the legal fees the employee will incur. Similarly, because the employee is compromising the claims he may have against the employer, an employer should expect the employee to try and negotiate over the compensation he is to receive for this.

If the employee enters into a compromise agreement but then attempts to bring a claim that has been compromised within the agreement, the employer can rely upon the agreement. The compromise agreement can be used to settle both claims that the employee has actually raised at tribunal and those which the employer suspects the employee may have grounds to bring. However, the agreement cannot settle claims that have not yet arisen, for example, personal injury claims of which the employee is not reasonably aware.

One final point is that the employer should consider carefully his timing when seeking to introduce the idea of entering into a compromise agreement with the employee. If the employer does this too early, for example, whilst the employee is still employed, and there is not a dispute between the parties, the employee may be able to claim that the employer is trying to 'force him out' and succeed with a claim for constructive dismissal.

Appendix A

Table of basic statutory employment rights

Dismissal rights

Statutory right	Qualifying service	Basic time limit
Unfair dismissal	1 year	3 months from EDT*
Unfair dismissal for taking part in official industrial action	None	3 months from EDT
Unfair dismissal for reasons connected with pregnancy, childbirth, or statutory maternity, paternity, adoption, parental or dependant care leave	None	3 months from EDT
Unfair dismissal for health and safety reason	None	3 months from EDT
Unfair dismissal of a shop or betting workers for refusing to work on a Sunday	None	3 months from EDT
Unfair dismissal for a reason connected with rights under the Working Time Regulations 1998	None	3 months from EDT
Unfair dismissal for performing functions as an occupational pensions trustee	None	3 months from EDT
Unfair dismissal for performing functions as an employee representative or collective redundancy	None	3 months from EDT
Unfair dismissal for making a protected disclosure (whistleblowing)	None	3 months from EDT
Unfair dismissal for asserting a statutory right	None	3 months from EDT
Unfair dismissal in connection with an application for flexible working	None	3 months from EDT
Unfair dismissal related to the national minimum wage	None	3 months from EDT

* Effective Date of Termination

Statutory right	Qualifying service	Basic time limit
Unfair dismissal in connection with carrying out jury service	None	3 months from EDT
Unfair dismissal in connection with information and consultation agreement activities	None	3 months from EDT
Unfair dismissal related to status as a part-time worker	None	3 months from EDT
Unfair dismissal relates to status as a fixed-term employee	None	3 months from EDT
Unfair dismissal in connection with trade union recognition	None	3 months from EDT
Unfair dismissal for trade union membership or non-membership or participation in trade union activities	None	3 months from EDT
Unfair dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing	None	3 months from EDT
Unfair dismissal for taking part in protected industrial action	None	3 months from EDT
Automatically unfair dismissal: Failure to follow the statutory dismissal procedure	1 year	3 months from EDT
Unfair dismissal by reason of business transfer (TUPE)	1 year	3 months from EDT
Written reasons for dismissal	1 year	3 months from EDT
Interim relief (where available)	None	7 days from EDT
Redundancy payment	2 years (from 18th birthday)	6 months from trigger date

Rights to time off work

Statutory right	Qualifying service	Basic time limit
Unpaid time off for public duties	None	3 months from failure to permit time off
Reasonable paid time off to look for work during notice of dismissal by reason of redundancy	2 years	3 months from the date the time off was taken or should have been taken
Right to paid time off for employee representatives	None	3 months from the date the time off was taken or should have been taken
Right to paid time off for health and safety representatives	None	3 months from the date the time off was taken or should have been taken
Right to paid time off for pension scheme trustees	None	3 months from failure to permit time off
Right to paid time off for trade union activities	None	3 months from the date the right should have been permitted
Right to annual leave	None	3 months from the date the right should have been permitted
Right to payment in lieu of accrued holiday on termination of employment	None	3 months from EDT*
Right to unpaid time off to care for dependants	None	3 months from the date the right should have been permitted
Right to rest breaks	None	3 months from the date the right should have been permitted
Paid time off for antenatal care	None	3 months from the date of the appointment concerned

* Effective Date of Termination

Miscellaneous

Statutory right	Qualifying service	Basic time limit
Guarantee payment	1 month	3 months starting with date payment claimed
Written Particulars of Employment	1 month	3 months from EDT*
Itemised pay statement	None	3 months from EDT
Unlawful deduction from wages	None	3 months from date of last deduction
Right to be accompanied at a grievance or disciplinary hearing	None	3 months from date of/or threat of refusal
Contract claim	None	3 months from EDT(or 6 years if brought in County Court/High Court)

* Effective Date of Termination

Families and pregnancy

Statutory right	Leave entitlement	Qualifying service
Compulsory maternity leave	2 weeks	None
Ordinary maternity leave	26 weeks	None
Additional maternity leave	26 weeks	None
Paternity leave	2 weeks	26 weeks by end of 15th week before EWC *
Parental leave	Up to 4 weeks unpaid leave per year where child under 5 (or 18 if disabled) subject to a maximum of 13 weeks per child (18 weeks if disabled)	1 year

* Expected Week of Confinement

Appendix B

Statutory payments

Type of payment (from 12 April 2010)	Current rate	Maximum period
Statutory maternity pay (higher rate)	90% normal weekly earnings	6 weeks
Statutory maternity pay (basic rate)	£124.88 a week or 90% of normal weekly earnings if lower	33 weeks
Statutory paternity pay	£124.88 a week or 90% of normal weekly earnings if lower	2 weeks
Statutory adoption pay	£124.88 a week or 90% of normal weekly earnings if lower	39 weeks
Statutory sick pay	£79.15 a week	28 weeks in any 3 years

National minimum wage per hour	From Oct 2007	From Oct 2008	From Oct 2009
Workers aged 22 and over	£5.52	£5.73	£5.80
Workers aged 18 – 21	£4.60	£4.77	£4.83
Workers aged 16 and 17	£3.40	£3.53	£3.57

Appendix C

Compensation limits

Employment right

Unfair dismissal

Basic award

Compensatory award

Additional award (where employer ignores re-engagement/reinstatement order)

Redundancy pay

Failure to consult employees re: collective redundancies – protective award

Discrimination

Wrongful refusal of flexible working

Refusal of right to be accompanied

Failure to inform/consult over transfers

Dismissal for trade union/employee representative or pension trustee reasons or dismissal for making a protected disclosure

Basic award

Compensatory award

Guarantee payment

Contract claims in a tribunal

Limit on a week's pay

Maximum award

£11,400

£65,300 (for dismissals on or after 1 February 2010)

£9,880 – £19,760

(i.e. 26 – 52 weeks x £380)

£11,400

90 days' pay

No limit

£3,040 (£380 x 8 weeks)

£760 (£380 x 2 weeks)

13 weeks' pay

£11,400 (£4,700 minimum)

No limit

£21.20 a day, five days in any period of three months

£25,000

£380 (where applicable)



0.5 S

Our services

Hill Dickinson offers legal advice on the full range of employment matters including:

- Absence management
- Agency workers
- Business immigration
- Business transfers, acquisitions and disposals
- Confidential information and business protection
- Discrimination and equal pay
- Employee benefits
- Employee privacy and data protection
- Employment contracts, policies and procedures
- Employment tribunal and court services
- Executive appointments and severance
- HR telephone advice and support
- Performance management
- Redundancy and organisational change
- Trade unions and collective labour law
- Training
- Workplace dispute resolution

To discuss how we can work with you, contact the employment team on 0161 817 7200.

About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Piraeus and Singapore. Collectively the firms have more than 1,100 people, including 160 partners.

Hill Dickinson has award-winning employment, property and construction practices. The firm is widely regarded as a leader in the fields of insurance, company and commercial, commercial litigation, intellectual property, NHS clinical/health related litigation and wealth management. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK.

Manchester

Will Clayton
Partner
+44 (0)161 817 7275
will.clayton@hilldickinson.com

Chester

Andrew Gibson
Partner
+44 (0)1244 896627
andrew.gibson@hilldickinson.com

Liverpool

Rob Coward
Partner
+44 (0)151 600 8626
robert.coward@hilldickinson.com

London

Nick Humphreys
Partner
+44 (0)20 7280 9246
nicholas.humphreys@hilldickinson.com

HILL DICKINSON



WINNER

National law firm of the year
Legal Business Awards 2010

www.hilldickinson.com