



# **Employment Law**

## **An Employer's Guide to the Essentials**

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## 1. INTRODUCTION

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This Guide aims to provide a basic understanding of your legal responsibilities as an employer in England and Wales in the context of you employing staff and, if necessary, terminating their employment.

The objective is to provide an understanding of basic employment law which may encourage you to recruit staff and assist you in avoiding costly and time consuming mistakes.

The basic premise of employment law is that **ALL** employees with one year or more of continuous employment with you or your predecessor in a successive business have certain statutory employment protection rights. In addition, in the context of sex, race, disability, age, sexual orientation, religion or belief, marital or civil partnership status, pregnancy, maternity or gender reassignment related discrimination, or dismissal for trade union, part-time worker status, fixed-term employee status, application for flexible working, parental rights, health and safety or enforcement of a statutory right related reasons (which includes the rights conferred by the Working Time Regulations 1998, and the National Minimum Wage Act 1998) **ALL** employees or potential employees, irrespective of their length of service, are protected.

The Government has agreed to the incorporation into our domestic law of European legislation on social policy issues and as a result matters agreed by the Member States of the European Union are regularly introduced into our law.

The employment related objective of the European Union is stated to be:

“the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion”.

The EU Member States can adopt EU legislative directives by a qualified majority vote and lay down minimum requirements for the improvement in particular of the working environment to protect workers' health and safety, regulation of working conditions, informing and consultation of workers, equality between men and women with regard to labour market opportunities and treatment at work, and the integration of people excluded from the labour market.

***This Guide represents a summary of the basic employment law obligations of a new employer in England and Wales, and although accurate at the time of printing should not be relied upon without seeking specific legal advice upon the particular issue of concern and confirmation of whether or not any provision referred to is now in force or may no longer be in force. Similarly, the Guide should be read in conjunction with appropriate information from Governmental agencies such as the Health and Safety Executive and the Advisory Conciliation and Arbitration Service whose details appear in the Appendix.***

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## 2. BUYING OR SELLING A BUSINESS AND OUTSOURCING SERVICES

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The Transfer of Undertakings (Protection of Employment) Regulations 2006 apply when a business is being sold and where services are outsourced, "insourced" or

assigned to a new owner or contractor. Under the Regulations, original employees become the employees of the buyer or new contractor after the transfer takes place and they will generally be entitled to the same terms and conditions of employment as they enjoyed before the transfer. Further, the Regulations impose obligations on the parties to provide specified information and, in certain circumstances, to consult with affected employees or their representatives. This may include arranging to elect employee representatives.

If an employer fails to inform or consult as required, a disaffected employee may present a complaint to an Employment Tribunal. The Tribunal can make an award of up to 13 weeks' gross pay. Indeed unless there are mitigating factors the award is likely to be the maximum, 13 weeks' gross pay.

The detail about who should be informed/consulted and of who can present a claim to an Employment Tribunal if the employer(s) fails to comply with their obligations is complicated. We strongly recommend you seek legal advice if you are considering buying or selling a business, you wish to contract out services to a third party or you are a contractor who provides services on behalf of end users.

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### **3. EMPLOYING PEOPLE**

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#### **The Advertisement**

As a general rule an advertisement to attract job applicants for a vacancy does not form part of the contract of employment, but care must be taken if the written terms of any subsequent employment are ambiguous or non-existent as the Courts may look at any advertisement to assist them in interpreting the contract or terms of employment.

Employers must ensure that when advertising for prospective employees they do not show any intention to discriminate unlawfully in their recruitment on grounds of sex, sexual orientation, gender reassignment, pregnancy or maternity, marital or civil partnership status, race, colour, nationality, ethnic or national origin, religion or belief, disability or age.

Use of job descriptions with a sexual connotation such as "salesgirl", "postman", or "stewardess" will be taken to indicate an intention to discriminate, so non-gender based descriptions such as "salesperson" should be used and employers should include a disclaimer stating that applications are invited from men and women and that the employer is an equal opportunities employer. Employers should not use terms such as "youthful enthusiasm" or any expressions which imply a bias.

#### **The Interview**

Having placed an advertisement the next thing to consider is the interview of the applicants. Employers must take care not to make promises concerning terms and conditions of employment at the interview which cannot be fulfilled, but which they could be stuck with. They must also ensure that no discriminatory conduct or statements occur at the interview. Making enquiries about job candidates' family commitments, dependants or plans to conceive are not in themselves unlawful but are likely to constitute unlawful sex discrimination if the answers are used to screen out female candidates.

The Equal Opportunities Commission, which has been replaced by the Equality and Human Rights Commission, issued a Code of Practice giving guidance on how the principles of the Sex Discrimination Act 1975 should be applied in the context of recruitment. Although it is not unlawful to disregard the Code, its contents are taken into account by any Court asked to consider whether a candidate has been the subject of sex discrimination.

On job applications and interviewing the Code states that:

“Questions should relate to the requirements of the job. Where it is necessary to assess whether personal circumstances will affect the performance of the job, e.g. where it involves unsocial hours or extensive travel, this should be discussed objectively without detailed questions based on assumptions about marital status, children and domestic obligations. Questions about marriage plans or family intentions should not be asked as they could be construed as showing bias”.

There are currently two other Codes of Practice giving guidance to employers on their obligations not to discriminate on the grounds of race and disability, including during recruitment and selection of staff. As with the Code on Sex Discrimination, Courts will take them into account when deciding if a candidate has been discriminated against on the grounds of race or disability.

Particular care should be taken when interviewing disabled applicants to ensure that they are able to access the place of interview, or that other arrangements are made to allow an interview to take place. It is important to remember that employers should similarly not discriminate at interview or in offering employment on grounds relating to trade union membership, religion or belief, age, sexual orientation or gender reassignment.

### **The Offer**

Assuming that the interview is successful employers should ensure that any offer of employment that is made is clearly stated to be conditional upon such matters as receiving a reference satisfactory to the new employer from the former employer, the production by the prospective employee of proof of entitlement to work in the UK or of any relevant certificates or qualifications, the results of a medical to establish the fitness of the prospective employee for the job (if relevant), the prospective employee being free from any contractual restrictions, e.g. restrictive covenants in favour of a previous or current employer preventing or inhibiting the prospective employee from joining the new employer and satisfactory completion by the prospective employee of a probationary period.

An employer is liable to a civil penalty if it negligently employs someone who does not have permission to work in the UK. There is a statutory defence if the employer checks certain documents before the employment starts and (in some cases) at least every 12 months during employment. In addition, an employer will commit a criminal offence if it knowingly employs someone who does not have permission to work in the UK. Further, an employer who asks employees to produce evidence of entitlement to work in the UK must ask the same question of **ALL** applicants at the relevant stage of the recruitment process and not just those from particular racial or nationality groups. If immigration approval or a specific working visa is required for the individual to work in the UK, the employer should make any offer of employment conditional on the necessary approvals being obtained and adjust the start date as there may be a delay whilst approval is obtained.

Other than in cases of discrimination or in the case of employees dismissed for health and safety, enforcement of a statutory right or trade union reasons, employees do not ordinarily obtain statutory employment protection rights until they have been in the employer's employment for one year. Given this basic premise, it is important to make sure that there is a system for monitoring an employee's performance during a probationary period. At the end of this period, the employer can decide whether the individual is suitable or whether he or she should be dismissed. This process should ideally take place before the employee accrues one year's service. If the employer suddenly realises after the expiry of a year that the employee is not capable of or is unsuitable for the job, then on dismissal the employer faces the risk of an unfair dismissal claim. Please note that an employee accrues one year's service at 51 weeks, as the statutory notice due must be included to determine the termination date.

It is worthy of note that the Courts have stated that employers owe the subject of a reference, i.e. the employee, a duty of care when compiling and giving a reference. Also, if an employer receives a reference that turns out to be negligent and unjustifiably favourable and as a result the employer suffers loss, i.e. in reliance on the reference the employer took on a dishonest or incompetent employee, then the employer may have a right of action against the old employer who gave the reference. Conversely, employers should make sure that if they give a reference that it is true, fair, accurate and carefully prepared. Any reference should refer to matters of fact rather than opinions unless they can be objectively supported, but must not give an unfair or misleading impression overall even if its discreet components are factually correct.

At the same time as any offer of employment is made, the new employer should consider issuing terms and conditions of employment to the prospective new employee.

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#### **4. CONTRACTS OF EMPLOYMENT AND THEIR VARIATION**

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The law requires that employers provide every employee whose employment will last for more than one month with certain information within two months of the employment commencing. Even if the employment comes to an end within the two-month period the information must still be provided before it ends. The prescribed information must be given in writing. This could be in the form of a written contract of employment and/or a letter of engagement and/or a written declaration signed by the employer or some other document given to the employee, which must notify the employee of certain essential aspects of the employment relationship comprising "mandatory" and "referable" issues as follows:

##### **Mandatory Matters**

1. The name of the employer and the employee;
2. The date when the employment began;
3. The date on which the employee's continuous employment began (it is important to identify this accurately as it identifies the entitlement to a number of employment rights);
4. The scale or rate of remuneration;

5. The intervals at which remuneration is paid; and how it is to be paid (i.e. cash, credit transfer);
6. The hours of work, (including overtime) even if there are no normal hours, that fact should be stated;
7. Entitlement to holidays and holiday pay and details sufficient to enable the employee to calculate entitlement including any entitlement to accrued holiday pay on termination of employment;
8. The title of the job which the employee is employed to do or a brief description of the work;
9. The place of work or, if mobility is required, an indication of that and of the address of the employer;

### **Referable Matters**

Although the “mandatory” matters must be noted in a written statement given to the employee, an employee can be referred to the provisions of some other document which the employee has a reasonable opportunity of reading in the course of his employment, or which is made reasonably accessible to him in some other way for details of the following:

1. Any terms and conditions relating to incapacity to work due to sickness or injury including any provisions for sick pay;
2. Any terms and conditions relating to pensions and pension schemes; be wary of changing a discretionary pension to a contractual entitlement by virtue of the language used in the particulars;
3. The length of notice, which the employee is obliged to give and entitled to receive. It should not be overlooked that UK law requires certain minimum periods of notice. Basically, an employer must give not less than one week's notice for each complete year of continuous employment up to a maximum of 12 weeks' notice after 12 years' continuous employment, whereas employees are only required to give one week's notice to their employers after they have been employed for one month. Employers and employees can, however, agree to give each other greater notice periods;
4. If the employment is not intended to be permanent, the period for which it is expected to continue or if it is for a fixed-term, the date when it is to end;
5. If the employee is required to work outside the United Kingdom for more than one month any terms relating to the duration of the stay abroad, currency of payment, any additional benefits and provisions for return to the UK;
6. A statement of whether or not a contracting out certificate dealing with state pension contributions is in force in respect of the employment;
7. Any disciplinary rules and grievance procedures applicable to the employee;

8. Details of a person to whom the employee can apply if dissatisfied with any disciplinary decision, and of a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment, together with details of the manner in which any such application should be made. It should also be stated that the employee has a right to be accompanied by a trade union representative or fellow worker at disciplinary and grievance meetings. It is worth noting that the failure of an employer to establish a grievance procedure can potentially afford grounds for an employee to leave the employment and claim constructive unfair dismissal; and
9. Any collective agreements, which apply to the employment.

Although employers are obliged to state any disciplinary rules and grievance procedures applicable to the employee, it is preferable that such disciplinary and grievance procedures are stated not to expressly form part of the employee's actual contract of employment, since employees with a contractual right to be disciplined in accordance with a specific procedure have been granted injunctions compelling their employers to continue to employ them until that procedure has been properly followed.

As a result, employers may wish to ensure that disciplinary and grievance procedures are separate from the basic terms and conditions of employment and expressed to be non-contractual terms. Employers may also wish to exclude entirely from their application those employees who have less than one year's continuous employment, i.e. those who are unlikely to qualify for normal statutory unfair dismissal protection.

If there are no agreed terms of employment in respect of holidays, sickness or pensions, or in respect of any of the "Mandatory" or "Referable" particulars then that fact must be stated. So far as the statement concerning notice particulars is concerned, the employer may refer the employee to the UK law concerning periods of notice. If there are no agreed terms relating to matters such as rates of pay, hours of work, annual leave, maternity, paternity, adoption or parental leave or flexible working rights then the employee will be entitled to the minimum entitlements stipulated by UK legislation.

### **The National Minimum Wage Act 1998**

The National Minimum Wage Act 1998 established a legal framework for a National Minimum Wage for employees. Anyone who is over compulsory school age and who works for someone and is not genuinely self-employed is entitled to the National Minimum Wage.

### **The Working Time Regulations 1998**

The Working Time Regulations 1998 regulate working hours and entitlement to annual leave. In essence, the Regulations provide for a 48 hour maximum average working week and a limitation on night work of a maximum of 8 hours with an accompanying right to health assessments. The Regulations also stipulate minimum daily and weekly rest periods of 11 hours in 24 hours and 24 hours in any 7 days. They also stipulate a minimum amount of annual leave, which is currently 5.6 weeks. Employees can currently opt out of the 48 hours working week.

## **Maternity Leave**

All pregnant employees irrespective of their length of service may take up to 52 weeks' maternity leave and may be entitled to statutory pay for 39 weeks of the leave. Pregnant employees and those on maternity leave enjoy many rights and are entitled to special protection, including protection from dismissal by reason of the pregnancy or the maternity leave. In addition, pregnant employees have the right to take time off for ante-natal appointments and to health and safety protection. Further, employees on maternity leave have the right to return to the same or an equivalent job as that which they were employed to do immediately before taking the leave. Unfavourable treatment of pregnant employees or of those on maternity leave could amount to sex discrimination. Any employers who have concerns regarding employees in those circumstances or who are considering dismissing such employees should seek legal advice before taking any action.

## **Adoption Leave**

Employees with 26 weeks' continuous service or longer and who adopt a child can take up to 52 weeks' adoption leave and may be entitled to statutory pay for 39 weeks of the leave.

## **Paternity Leave**

The Paternity and Adoption Leave Regulations 2002 give employees with 26 weeks' continuous employment the right to one week or two consecutive weeks' paternity leave, which should be taken within the period of 56 days (eight weeks) beginning with the date of childbirth or the date of placement of an adopted child. Employees may be entitled to statutory pay during the leave. The employee has the right to return to the same job as that which they were employed to do immediately before taking paternity leave.

## **Parental Leave**

The Employment Relations Act 1999 confers the right to up to 13 weeks' unpaid parental leave upon employees who have responsibility for a child and who have one year's service at the time of the leave. Leave must normally be taken before the child's fifth birthday (unless the child is disabled, in which case it must be taken before the child's eighteenth birthday).

## **Time Off to Care for Dependants**

The Employment Relations Act 1999 also confers the right upon employees to take a reasonable amount of time off work to care for dependants in circumstances of illness, childbirth, accident or injury, or in the event of the unexpected breakdown of care or schooling arrangements or in order to make arrangements for a funeral in the event of the death of a dependant.

## **Right to Request Flexible Working**

The Employment Act 2002 introduced the right to request flexible working. Under this Act, employees with 26 weeks' employment or longer can request to change their working pattern to allow them to care for a child under 17 (or 18, if the child is disabled) or to care for a relevant adult. Employers must give serious consideration to any such requests and follow the procedure set out in the Act and may only refuse the request in certain specified circumstances. Given the risk of sex discrimination

claims, employers should seek legal advice whenever an employee makes a request to work flexibly.

### **Contractual Changes**

If an employer proposes to make any change to any of the terms and particulars which have been provided or referred to in a statement then the employer will have to give the employee a personal written statement containing particulars of the changes at the earliest opportunity and in any event not later than one month after the change.

Such personal written statements may refer the employee to the provisions of some other document which the employee has a reasonable opportunity of reading in the course of his employment or is made reasonably accessible to him in some other way if the change is in respect of terms dealing with sickness, injury, sick pay, pensions and disciplinary rules or procedures.

If the name of the employer changes without any change in the legal personality or identity of the employer, e.g. a corporate name change, or the identity of the employer changes in circumstances in which the continuity of the employee's period of employment is not broken (e.g. pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 on the sale of a business) and the change does not involve any change in any of the particulars of employment then the "new" employer is not required to give the employee a complete new statement of particulars. However, the 'new' employer must still notify the employees of the changes. If a transfer of an undertaking is involved, the date on which the employee's period of continuous employment began must be specified.

It should not be overlooked however that any change in the terms and conditions of employment of employees which amounts to more than a minor change has serious legal implications.

The terms of an employment agreement are determined at its formation and strong evidence of mutual agreement will be required to establish that these have been varied. A change imposed by one party in contravention of this would possibly entitle the other party to remedies in the Courts or in an Employment Tribunal.

If an employer needs to introduce new or revised terms and conditions of employment the employer should seek detailed advice on the legal situation before any action is taken.

### **Casual Workers**

If employers engage casual workers to whom they do not wish to afford employment protection, it is imperative that no mutuality of obligation arises between them. The House of Lords has found that, in order for a worker to be considered an employee, it is necessary for an obligation to be imposed on the employer to provide a reasonable amount of work to that worker (the so called 'mutuality of obligations'). In order to prevent such a term being implied into the contract of a casual worker, it would be prudent to expressly prohibit the term. The law in this area is complex and whether a worker is likely to be considered an employee depends upon a number of factual tests. Specific legal advice should always be sought. Employers should note that workers are entitled to some rights, including the right not to be discriminated against.

There are regulations issued by HM Revenue and Customs regarding work undertaken by workers via the mechanism of personal service companies which aim to close a perceived loophole where workers who are employees to all intents and purposes, avoid the less favourable tax implications of employment in favour of self-employed status by use of a personal service company. This significantly impacts upon the distinction between employees and independent contractors. Specific advice should be sought on this complex issue.

### **Part-Time Employees**

Employers must ensure that part-time employees (and workers) are treated no less favourably than full-time employees in relation to matters such as rates of basic pay and overtime, rates of sick pay and maternity pay and access to these contractual rights.

Furthermore, employers must avoid discriminating against part-time employees in relation to access to pension schemes, training, career breaks and their entitlement to holiday, parental and maternity leave.

Employers are therefore required to pro-rata part-time employee entitlement to the full time employee entitlement.

### **Fixed-term Employees**

Similarly, 'fixed term employees' must receive no less favourable treatment than other employees. In summary, employers must ensure that their fixed-term employees are treated no less favourably than their permanent employees as regards the terms of their contract or by being subjected to any other detriment by any act, or deliberate failure to act, of their employer.

Employers should offer similar contractual terms and benefits, opportunities for training and promotion and access to pension schemes as they offer to permanent employees. If any terms or benefits depend on length of service, the same service qualifications should apply to permanent and fixed-term employees. In addition, fixed-term employees have the right to be informed of any permanent vacancies in the establishment at which they work.

As with part-time workers, employers are required to consider offering any benefits they offer their permanent employees to fixed-term employees on a pro rata basis in proportion to the duration of their contract.

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## **5. PROBLEM SOLVING**

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### **Disciplinary Procedures**

The key elements required to ensure that any disciplinary proceedings involving employees are conducted fairly are worthy of note, and whilst the building blocks are simple they are often overlooked. If an employer has detailed procedures in its Contracts of Employment, it must ensure that they are followed; as already noted there have been cases in the past where employees have obtained injunctions restraining their dismissal from employment until contractual procedures are completed. As stated above, we recommend that disciplinary procedures are non-contractual and that employees are made aware of this.

Employers must follow the ACAS Code of Practice on Discipline and Grievance whenever they wish to start a disciplinary process against an employee or when an employee raises a grievance. The Code is supplemented by a Guide, which employers should try to comply with. In summary, the Code and Guide encourage employers to try and resolve disciplinary matters and grievances informally first and only move on to a formal procedure if the matter could not be resolved informally or if it was too serious to be dealt with informally.

If it becomes necessary to convene a formal disciplinary interview of an employee then the employer should adhere to the following basic steps as recommended by the Code and Guide:

1. Carry out any necessary investigations;
2. Write to the employee informing him of the problem and inviting him to a disciplinary meeting;
3. Provide copies of evidence including witness statements prior to the meeting;
4. Advise the employee of his/her right to be accompanied by a fellow employee or Trade Union official;
5. Allow enough time for the employee to prepare for the meeting;
6. At the meeting explain the nature and purpose of the meeting to the employee; if possible do not have the same person who conducted the investigation conduct the disciplinary meeting;
7. Identify everyone in attendance, make sure someone is keeping notes of what is said and **NEVER** conduct an interview alone, always have a witness present;
8. Confirm to the employee the allegations made against them;
9. Identify as fully as possible the evidence the employer is relying on, call witnesses if appropriate;
10. Invite the employee to ask questions and to call their own witnesses;
11. Permit the employee to address the meeting to explain the situation, set out his case, answer the allegations and make representations in their own mitigation;
12. Listen to the arguments from all concerned;
13. Consider whether any mitigating circumstances are present;
14. Invite the employee to present any further evidence that may be relevant or may assist the employee's explanation;
15. After the meeting, consider what was said and all evidence and decide on the appropriate action and inform the employee in writing, giving him/her the right to appeal;

16. If the employee appeals, hold a meeting to deal with it and make sure if possible that a different person hears the evidence; the employee has the right to bring a companion to the appeal meeting; confirm the final decision in writing;

17. All steps in the process should be taken without unreasonable delay.

In certain circumstances new evidence may emerge during a disciplinary interview, if necessary an employer should consider adjourning the interview in order to allow any further investigation to be undertaken.

Do not forget the principles of natural justice: the employer must act fairly and reasonably and give the employee the chance to explain and the same person should not be involved in investigating the issue, examining it with the employee and reaching a verdict and adjudicating at any subsequent appeal.

### **Grievance Procedures**

Employers should have procedures in place to deal with employee grievances. The procedure should ensure that the employee is treated in a fair and non-discriminatory manner and a full investigation is carried out into the employee's grievance. The employer should observe the principles of natural justice and act fairly and reasonably towards the employee. As stated above, the employer should follow the ACAS Code and Guide when dealing with grievances, namely:

1. Invite the employee to a meeting to discuss the grievance;
2. A manager who is not the subject of the grievance should deal with the grievance;
3. At the meeting, allow the employee to explain the grievance and explain how they think it should be resolved;
4. Investigate the grievance as appropriate;
5. Write to the employee confirming the decision, explaining what action, if any, will be taken and informing the employee of the right to appeal;
6. If the employee appeals, ensure the appeal is dealt with by someone who has not been previously involved in the grievance process (where possible), hold an appeal meeting and confirm the final decision in writing;
7. All steps in the process should be taken without unreasonable delay.

The employee has the right to be accompanied by a fellow employee or Trade Union official at any meeting to deal with his/her grievance, including any appeal meetings.

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## **6. THE END OF THE ROAD**

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### **Redundancy of an Employee**

If circumstances dictate that an employer must reduce its workforce then a redundancy situation may arise. The concept of "Redundancy" is defined in law and states that an employee is redundant, if the termination of the employee's

employment will be attributable wholly or mainly to the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed, or the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where so employed, have ceased or diminished or are expected to cease or diminish.

In order for an employer to achieve a fair termination of employment by reason of redundancy, it must not only establish that the fact of redundancy exists but also follow a fair and reasonable procedure.

The Courts have made it clear that an employer who fails to consult potentially redundant employees about their impending redundancy cannot argue that consultation would have made no difference to the eventual outcome and thus that the redundancy was fair except where there is clear evidence that consultation would have been “utterly useless”.

The Courts do not require that employers must consciously decide not to consult. The test is purely objective – could a reasonable employer in the light of the facts known to it at the time have dismissed the employee without consultation?

An employer’s belief that any particular employee is the only candidate who could be made redundant is no justification for a failure to consult. The purpose of consultation is to obtain knowledge of all the facts, and the Courts have in the past commented that there may have been circumstances known to the employee, but unknown to the employer, which may have caused the employer to change its mind. For example, the employer may not be aware that the employee may have been prepared to accept a more junior post or a significant pay cut in order to remain in work. Unless employers consult with the redundancy candidate prior to reaching any decision as to whether or not that employee’s job is redundant, the employee will have no opportunity to put forward any suggestions which may save that employee’s employment from being terminated.

Even if redundancy appears to be inevitable, consultation benefits the employee by providing the opportunity to discuss whether the employer can help find the employee alternative employment. If redundancy is to fall amongst a group of employees the employer must ensure that any selection criteria are objectively fair and not subjectively applied. The most objective criteria is LIFO or “First In and Last Out”, although an employer may risk discrimination claims if the application of LIFO results in the dismissal of employees of a certain age (LIFO usually leads to younger employees being dismissed), a disproportionate number of women, disabled employees or employees from ethnic minorities. Recent case law has confirmed that employers can still use LIFO as a criterion to select employees for redundancy, however, they should not make it the sole criterion. Other selection criteria such as absence or disciplinary record or qualifications can be adopted, provided they can be objectively checked and are not discriminatory.

Employers are obliged to take reasonable steps to seek alternative employment for employees before dismissing them for redundancy and this duty extends, if the employer is part of a group of companies, to searching for alternative work throughout that group.

If suitable alternative employment is offered to an employee and unreasonably refused, then the employee may be disentitled to a redundancy payment (an employee is normally entitled to redundancy pay on completion of 2 years continuous

service), although the reasonableness of the refusal can only be considered subjectively.

If an employer finds it necessary to consider a reduction in its workforce, then detailed legal advice should be sought as to the obligations of the employer to inform and consult the relevant employees, Government Agencies, and (if appropriate) relevant Trade Unions or elected employee representatives.

If it appears that it will be necessary to consider a large scale redundancy (in excess of 20 employees) the law prescribes minimum periods of consultation (which can be as long as three months in cases where the number of redundancies exceeds 100) and detailed legal advice should be sought in good time in each case.

### **Dismissal of an Employee**

If it becomes necessary to terminate an employee's employment, the law states that in determining whether or not the dismissal of an employee is fair or unfair it is for the employer to show that it has a potentially fair reason and that in all the circumstances, including the size and administrative resources of the employer it acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The question of fairness or otherwise shall then be determined in accordance with equity and the substantial merits of the case.

There are six potentially fair reasons for terminating an employee's employment, which relate to the employee's capability or qualifications, conduct, redundancy (as already considered), illegality, retirement and some other substantial reason such as to justify the dismissal of an employee holding the position which the employee held.

Ordinarily, unfair dismissal protection only applies to employees with one year's continuous employment. However, as stated above in a number of situations employees are entitled to claim unfair dismissal irrespective of qualifying service. Indeed, any dismissals will be automatically unfair if the reason or principle reason for the dismissal was that the employee brought proceedings against the employer to enforce a relevant statutory right; that the employee alleged that the employer had infringed such a right (the so called "whistle blower" situation); that the dismissal was for a reason connected with the employee's pregnancy; or that the employee was an elected employee representative for the purposes of various legally imposed obligations on consultation. Employment protection is also acquired immediately in the context of discriminatory behaviour by the employer on the basis of sex, race, disability, age, sexual orientation, religion or belief, marital or civil partnership status, pregnancy, maternity or gender reassignment related discrimination, or dismissal for trade union, part-time worker status, fixed-term employee status, application for flexible working, parental rights or health and safety issues.

The statutory rights referred to above include any right conferred under the Employment Rights Act 1996, for which the remedy lies by way of application or reference to an Employment Tribunal.

Rights under the Employment Rights Act 1996 include the right to receive written particulars of employment, guarantee payments during periods of short-time working or lay off, the right not to be subjected to any detriment or dismissal in connection with health and safety arrangements, the right to time off for ante natal care, the right to return to work following pregnancy or maternity leave, the right to statutory minimum notice, the right to receive written reasons for dismissal provided the employee has one year's continuous employment, the right not to suffer an unlawful

deduction from wages, and unfair dismissal and redundancy rights. There are also certain rights in respect of activities by employees concerning Trade Union contributions and activities.

It is important to ensure that any termination of an employee's employment is handled fairly both in the context of the employee's contractual rights but also the employee's statutory right not to be unfairly dismissed. If an employee is able to prove to the satisfaction of the Employment Tribunal that termination of employment whether by reason or redundancy or otherwise, was unfair, then in addition to any breach of contract claim, which may arise, the employee may also be entitled to compensation for unfair dismissal. The maximum compensation payable for unfair dismissal has increased to £70,700. In some cases, notably cases of discrimination there is no maximum. Employers could face a claim from a former employee for a significant sum. Detailed legal advice should always be sought when considering dismissing an employee.

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## 7. RECENT DEVELOPMENTS

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The Safeguarding Vulnerable Groups Act 2006 has established a centralised vetting system for those working with children and vulnerable adults. The vetting system came into force on 12 October 2009. The Act establishes a new body, the Independent Safeguarding Authority (ISA), which decides if individuals should be barred from working with children or vulnerable adults and it will maintain lists of such individuals.

Employers will be able to seek checks on all employees applying for jobs that bring them into close contact with children or vulnerable adults with the ISA. If employers dismiss an individual because they identify a risk to children or vulnerable adults, they will be legally obliged to report the dismissal to the ISA.

Employers who knowingly employ a barred individual or fail to carry out checks will be liable to a fine or up to five years' imprisonment. A barred individual will likewise be liable to a sentence of up to five years' imprisonment if they seek, offer or engage in activity from which they are barred.

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## 8. PROPOSED NEW LEGISLATION

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### **Proposed changes to Paternity Leave and Pay and Maternity Pay**

In May 2007, the Government consulted on the introduction of additional paternity leave and pay, enabling fathers to take up to 26 weeks' leave (some of which will be paid) if the mother returns to work before the end of her maternity leave period. It is also planning to increase the statutory maternity pay period from 39 to 52 weeks.

It was originally planned that these changes would apply where a baby was due in April 2009 or later. However, *HM Revenue & Customs (HMRC)* has announced that this date will no longer be met and that it is "planning" implementation for babies due in April 2010 or later, though no firm timing decisions have yet been made.

### **Equality Bill 2008-2009**

The Equality Bill was published on 27 April 2009 and part of it will come into force in the Autumn of 2010 subject to receiving Royal Assent in the Spring of 2010. The Bill will bring together and re-state the existing discrimination legislation and it will make

some significant changes, including proposals to limit the enforceability of “pay secrecy” clauses, to make gender pay discrimination more transparent and to extend the concept of positive action to allow employers to recruit or promote someone from an under-represented group where they have a choice between two or more equally-suitable candidates

### **EU Agency Workers Directive**

The Government has just finished consulting on Regulations, which will implement the EU Agency Workers Directive into UK law. The Regulations will have to be in place by 5 December 2011. In summary, agency workers who have worked for 12-weeks for the same end user will be entitled to at least the same basic employment conditions in relation to working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay as those employed by the end user. Agency workers will also, from day one, have the right to access the same amenities as employees of the end user and to be informed of vacancies and be given the opportunity to apply for such vacancies.

### **LEGAL SUPPORT**

**Our Corporate Employment Services Team are always pleased to help you. If you would like to discuss any aspect of this Guide or any other employment law problems, please contact Rosine Dawson on 01908 300701 or [rosine.dawson@borneos.co.uk](mailto:rosine.dawson@borneos.co.uk).**

### **IMPORTANT NOTE**

**Whilst Borneos Solicitors has attempted to make this Guide as accurate as possible, detailed advice should be obtained before taking or refraining from any action, as a summary of this nature can never be a substitute for a considered professional opinion.**

## **APPENDIX**

Useful sources of further information

### **Health and Safety Executive Infoline**

Caerphilly Business Park  
Caerphilly  
CF83 3GG

Tel: 0845 3450055  
Fax: 0845 4089566

[www.hse.gov.uk](http://www.hse.gov.uk)

### **Advisory Conciliation & Arbitration Service (ACAS)**

Head Office  
Euston Tower  
286 Euston Road  
London  
NW1 3JJ

Tel: 08457 474747 (Helpline)

[www.acas.org.uk](http://www.acas.org.uk)

Useful information can also be found via the internet at the following Government sites:-

General site:-

[www.direct.gov.uk](http://www.direct.gov.uk)

The Information Commissioner (Data Protection):-

[www.ico.gov.uk](http://www.ico.gov.uk)

The UK Department for Business, Innovation and Skills:-

[www.berr.gov.uk](http://www.berr.gov.uk)

The Equality and Human Rights Commission:-

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)