

A GUIDE TO UK EMPLOYMENT LAW

CONTENTS

| | <u>Page</u> |
|--|--------------------|
| A. INTRODUCTION | 1 |
| 1. Sources of UK employment law | 1 |
| 2. Types of worker in the UK | 2 |
| 3. UK employment courts | 3 |
| B. IMMIGRATION REQUIREMENTS | 3 |
| 1. Overview | 3 |
| 2. Work permit requirements | 3 |
| 3. Work permit applications | 4 |
| 4. Highly skilled migrant programme | 6 |
| 5. The Science and Engineering Graduate Scheme | 6 |
| 6. Employing illegal workers | 6 |
| C. CONTRACTUAL TERMS | 7 |
| 1. Overview | 7 |
| 2. Express terms | 7 |
| 3. Implied terms | 9 |
| 4. Varying terms | 10 |
| D. RIGHTS DURING EMPLOYMENT | 10 |
| 1. Overview | 10 |
| 2. Hours of work | 10 |
| 3. Salary and benefits | 11 |
| 4. Pensions | 12 |
| 5. Holidays | 13 |
| 6. Sick pay | 13 |
| 7. Maternity leave | 14 |
| 8. Paternity leave | 14 |
| 9. Adoption leave | 15 |
| 10. Parental leave | 15 |

| | | |
|-----------|---|-----------|
| 11. | Time off for dependants | 16 |
| 12. | Flexible working | 16 |
| 13. | Union membership | 17 |
| 14. | Data protection rights | 17 |
| 15. | Disciplinary and grievance procedures | 19 |
| 16. | Monitoring/surveillance | 20 |
| 17. | Health and safety | 21 |
| 18. | Whistleblowing | 22 |
| 19. | The Protection from Harassment Act 1997 | 23 |
| E. | TERMINATION OF EMPLOYMENT | 23 |
| 1. | Overview | 23 |
| 2. | Wrongful dismissal | 23 |
| 3. | Unfair dismissal | 24 |
| 4. | Dismissal procedures | 26 |
| 5. | Redundancy payments | 28 |
| 6. | Written reason for dismissal | 28 |
| 7. | Settling employees' claims on termination | 29 |
| 8. | Enforcing post termination restrictions | 29 |
| F. | DISCRIMINATION | 30 |
| 1. | Overview | 30 |
| 2. | Sex discrimination | 30 |
| 3. | Equal pay | 31 |
| 4. | Race discrimination | 31 |
| 5. | Disability discrimination | 32 |
| 6. | Sexual orientation discrimination | 33 |
| 7. | Discrimination on the grounds of religion or belief | 33 |
| 8. | Part time workers | 33 |

| | | |
|-----------|---|-----------|
| 9. | Fixed term workers | 34 |
| 10. | Age Discrimination | 35 |
| G. | BUSINESS TRANSFERS | 35 |
| 1. | Overview | 35 |
| 2. | Application of TUPE | 35 |
| 3. | Effect of TUPE | 36 |
| 4. | Information and consultation requirements | 37 |
| 5. | Occupational pension arrangements | 38 |
| 6. | Other proposed amendments to TUPE | 38 |
| H. | COLLECTIVE RIGHTS | 39 |
| 1. | Overview | 39 |
| 2. | Trade union recognition | 39 |
| 3. | Consultation on collective redundancies | 40 |
| 4. | Consultation on business transfers | 41 |
| 5. | Consultation on health and safety issues | 42 |
| 6. | Works Councils | 42 |
| 7. | National Works Councils | 42 |
| | USEFUL WEBSITES | 45 |

A. INTRODUCTION

1. SOURCES OF UK EMPLOYMENT LAW

There are three main sources of UK employment law: the common law, statute and European law (in the form of both European Directives and decisions of the European Court of Justice).

1.1 **Common law.** Since all employees in the UK work under a contract of employment with their employer, the common law (particularly the law of contract) forms the legal basis of the employer/employee relationship. A contract of employment need not be but is usually recorded in writing. The parties are free to stipulate which law will be the governing law of the contract. However, certain mandatory statutory employment protection rights will apply regardless of the law of the contract. In addition, the law of tort will govern matters such as an employer's liability for the acts of its employees and liability for industrial accidents.

1.2 **Statute.** Since the early 1970s there has been a dramatic growth in the amount of UK employment protection legislation which has supplemented the common law rules. The main employment law statutes are:-

Equal Pay Act 1970

Health & Safety at Work etc Act 1974

Sex Discrimination Act 1975

Race Relations Act 1976

Trade Union and Labour Relations (Consolidation) Act 1992

Disability Discrimination Act 1995

Employment Tribunals Act 1996

Employment Rights Act 1996

Public Interest Disclosure Act 1998

Data Protection Act 1998

National Minimum Wage Act 1998

Human Rights Act 1998

Employment Relations Act 1999

Employment Act 2002

Employment Relations Act 2004

Disability Discrimination Act 2005

In addition, there is a substantial amount of secondary legislation in the form of regulations which contain further provisions which affect the employment relationship. In some cases the legislation is supported by Codes of Practice drawn up by various government agencies. Although the Codes do not have direct legal effect, they are often, and in some cases have to be, taken into account by Employment Tribunals when deciding whether an employer has complied with its statutory obligations.

1.3 **European law.** If UK domestic law has failed properly to implement EC Treaty obligations, individuals may rely on the EC Treaty in the UK courts. EC legislation has been particularly important in the areas of equal pay, discrimination and employees' rights on business transfers. In addition, since the European Court of Justice is the final arbiter in matters of interpretation of European legislation, its judgments are important when it comes to questions relating to the interpretation of obligations derived from European Directives.

2. TYPES OF WORKER IN THE UK

There have traditionally been three main categories of worker in the UK: self-employed independent contractors, agency workers or temps, and employees, with each category enjoying different employment protection rights. In recent years, however, a fourth category, 'workers' has been established. Confusingly, this category overlaps with the others.

- 2.1 **Independent Contractors.** In essence, an independent contractor is someone who is in business on their own account and who is responsible for making their own decisions as to how the job is performed. There are advantages for both the employer and the individual in having a relationship of this nature; the employer is freed from most statutory employment protection legislation, and the individual enjoys a favourable tax position. However, these types of relationship have come under increasingly closer scrutiny by the courts and HM Revenue & Customs (HMRC) (formerly the Inland Revenue). The fact that an individual is labelled an independent contractor by both parties to the relationship is not the determining factor. Current decisions suggest that the most important considerations are whether there is mutuality of obligations and an obligation on the part of the contractor to do the work personally. If there is, then the court and/or HMRC is likely to find that the relationship is actually one of employer/employee.
- 2.2 **Agency Workers.** Some workers are employed or engaged by an employment agency which then supplies their services to the hirer. Although the hirer will owe certain statutory duties (e.g. duties under the discrimination and health and safety legislation) it will not owe the agency worker many of the employment protection rights enjoyed by employees. Agency workers are generally used for temporary engagements although it is not uncommon for engagements to last for several months or even years. Case law has emphasised, however, that if an agency worker is used by a hirer for an extended period, and other facts point to an employer/employee relationship, the agency worker may be able to claim employment rights directly against the hirer (even if there is no contract directly between the agency worker and the hirer).
- 2.3 **Employees.** The majority of workers in the UK are employees of the company to which they provide their services. Unlike in some EU countries, there is no legal distinction between blue collar workers, white collar workers and senior directors, other than whatever may be written into their employment contracts. The basic principles of the common law and statutory employment protection legislation apply to all employees regardless of their status. As long as they satisfy the relevant qualifying conditions, employees will benefit from greater statutory employment protection rights than independent contractors and agency workers. In particular, after one year's service, an employee will benefit from the right not to be unfairly dismissed.
- 2.4 **Workers.** The idea of a separate legal category of 'workers' is a relatively new one in UK law. The concept derives from European law. In broad terms, a worker is someone who works under an employment contract, or some other contract under which they agree to provide services personally. In addition, to qualify as a worker the organisation to which the individual is providing their services must not be a client/customer of their profession or business. So, for example, some independent contractors may qualify as workers. Workers enjoy fewer rights than 'full' employees, but still benefit from, for example, rights relating to the number of hours they work, the amount of annual leave they can take, and the amount they are paid.

3. UK EMPLOYMENT COURTS

There are three forums which decide legal disputes between a worker and whoever employs them: Employment Tribunals, the common law courts (the High Court or County Court) and the recently introduced arbitration scheme operated by a government body called the Advisory Conciliation & Arbitration Service ("ACAS").

- 3.1 **Employment Tribunals.** These are specialist employment courts which hear the majority of disputes which arise between employers and the staff they engage. They deal mainly with claims brought under the employment protection legislation such as unfair dismissal and discrimination claims. They also have jurisdiction to hear contractual claims (subject to a maximum award of £25,000) provided the claim arises or is outstanding on the termination of employment. Employment Tribunals usually comprise three members: a legally qualified chair and two lay members (one from a Trade Union background and one from a management background). Their decisions can be appealed to the Employment Appeals Tribunal.
- 3.2 **Common law courts.** An employee who wishes to bring a contractual claim (such as for notice pay) may elect to pursue it in either the High Court or the County Court instead of the Employment Tribunal. In general, a claim may only be brought in the High Court if its value is more than £15,000. The process in the High Court and the County Court tends to be more formal and lengthy than in the Employment Tribunal, although the successful party can usually recover most of their costs from the unsuccessful party, which they cannot in the Employment Tribunal.
- 3.3 **ACAS Arbitration Scheme.** This is a voluntary scheme which came into force on 21st May 2001 and is intended to provide a faster, non-legalistic and more cost effective alternative to Employment Tribunals. It is currently only available for the resolution of straightforward unfair dismissal complaints, and in relation to flexible working disputes. Both parties must agree to opt for the scheme. The hearing is conducted in private before a single ACAS arbitrator who may award exactly the same remedies as would be available from an Employment Tribunal.

B. IMMIGRATION REQUIREMENTS

1. OVERVIEW

With limited exceptions, a non-EEA national who is subject to immigration control must obtain a work permit to be able to take up employment in the UK. The UK work permit scheme is administered by Work Permits (UK) on behalf of the Home Office. In January 2002, the Home Office launched the Highly Skilled Migrant Programme (see page 6). There are proposals to discard the work permit scheme and replace it with a simpler points based system in the future.

2. WORK PERMIT REQUIREMENTS

- 2.1 **Workers who require a permit.** Certain limited categories of persons do not require work permits – these include nationals of the EEA, Commonwealth citizens with leave to enter or remain in the UK on the basis of recent UK ancestry, persons with indefinite leave to remain in the UK, Gibraltarians, business visitors and persons wishing to engage in certain specified occupations (e.g. ministers of religion and representatives of overseas firms who are seeking to establish a UK branch or subsidiary). All other foreign workers must hold a valid work permit in order to enter and work in the UK. A visa may also be necessary before the individual is allowed to enter the UK. In addition, all individuals entering the UK for a stay of more than 6 months, with the exception of those coming from EEA member states, require prior entry clearance, which should be obtained after the work permit.

- 2.2 **Eligibility to apply.** Work permit applications may only be made by employers based in the UK who need to employ a person in England, Scotland or Wales. Overseas companies cannot make applications, nor can individuals apply on their own behalf. The application should be made for a named person to do a specific job, normally on a full-time basis. Permits are only issued for certain categories of skilled work, and are not issued for jobs at manual, craft, clerical, secretarial or similar levels. Work permits are not transferable between employers unless permission is firstly sought from Work Permits (UK).
- 2.3 **Work permit criteria.** Work permit applications are considered against the following four basic criteria:
- (a) **Whether there is a genuine vacancy for an employee in the UK.**
 - (b) **The skills, qualifications and experience needed for the job** – the nature of the job itself must require the qualifications or skills listed in (c) below.
 - (c) **The qualifications and experience of worker** – work permits are normally only issued for people who have one of the following qualifications or skills: a UK equivalent degree level qualification; a Higher National Diploma (HND) level occupational qualification which is relevant to the post on offer; a general HND level qualification which is not relevant to the post on offer plus one year's relevant work experience; at least three years' high level specialist skills acquired through doing the type of job for which the permit is sought (the type of job being at NVQ level 3 or above).
 - (d) **Availability of 'resident workers'** – the employer will need to show why it cannot fill the post with a suitably qualified 'resident worker' (i.e. a person who is an EEA national or has settled status within the meaning of the Immigration Act 1971). Except in Tier 1 applications (see below) the employer will usually need to show that it has advertised the vacancy appropriately: this will generally mean advertisements in local, national and/or EEA press, and in any appropriate trade and professional journals or appropriate websites.

3. **WORK PERMIT APPLICATIONS**

Application forms are available online from the Work Permits (UK) website (see page 45). Guidance notes for their completion, including further details of evidence to be furnished, are also available online. A fee of £153 is charged per application. There are two types of application, Tier 1 and Tier 2. Both types of application can be made up to 6 months in advance of the proposed date of entry of the worker and must state the length of permit required, which may be for up to 5 years.

- 3.1 **Tier 1 applications.** Tier 1 applications may be made if the post meets the qualification and skills criteria set out above and the application falls under one of the following categories:-
- (a) **Intra-company transfers** ("ICT") - for employees of multinational companies who are transferring to a skilled post in the UK. The post must require an established employee who has essential company knowledge and experience. The transferring employee should have at least six months' experience working for the overseas company. To qualify for an ICT, the British company must have a direct link with the overseas company by common ownership;
 - (b) **Board level posts** - for senior board posts or posts at an equivalent level. The person must have a personal daily input into directing the company at a strategic level, and should have substantial senior board level experience;
 - (c) **Inward investment** - for new posts that are essential to an inward investment project by an overseas company, bringing jobs and money to the UK. The minimum investment normally needed to qualify under this category is £250,000;

- (d) **Shortage occupations** - for occupations where suitably qualified people are in very short supply. A list of the occupations which Work Permits (UK) recognise as being in short supply can be obtained from the Work Permits (UK) website (see page 45) or by telephoning (+44) (0) 114 259 4074.
- (e) **Sponsored Researchers** – this is a relatively new category for people who have a job overseas, who are still being paid for that job and have come to the UK to undertake a period of research at an employer/host organisation. This section also encompasses those on paid/unpaid sabbaticals. This list is not exhaustive. Further information can be obtained from the Home Office website (see page 45).

If an application qualifies under any of the Tier 1 categories the employer need only describe why it needs to employ the person and it does not have to undertake any recruitment search.

- 3.2 **Tier 2 applications.** For all other applications, the employer must give details of the attempts it has made to fill the post with a resident worker by providing supporting documents such as copies of advertisements placed (which should have been placed within the 6 month period prior to the application). The recruitment methods used, including advertising, should be appropriate to the job and represent a genuine attempt to employ a suitably qualified person. The employer will also be expected to provide details of the responses to the recruitment efforts, along with reasons why 'resident worker' candidates were declared unsuitable for the post.
- 3.3 **The Training and Work Experience Scheme (TWES)** This is a specific type of work permit which enables UK employers to provide training for a professional or specialist qualification, or work experience to non-EEA nationals. To qualify under this category, the following conditions must be met:- (i) they should not be filling a position that would otherwise be filled by a resident worker; (ii) the training/work experience should be for a minimum of 30 hours per week; (iii) they must already have a relevant academic/vocational qualification of at least N/SVQ level 3 or equivalent; and (iv) the pay and conditions should be in line with that of a 'resident worker' doing this kind of work experience.
- 3.4 **Proof of Trading Presence.** If the employer has not applied for a work permit in the four years preceding the application, it must provide documents showing proof of a trading presence (e.g. the company's latest audited accounts or annual report). If the employer provides services to a client under a contract, copies of contracts between all parties should also be provided.
- 3.5 **Extending work permits.** Applications to extend work permits must be made on Form WP1X (form SR1 for Sponsored Researchers) stating for how long the extension is required. The worker can continue to work for you after the expiration of the current permit while the application is being considered, provided the application for an extension is submitted before the person's existing work permit permission and leave to remain in the UK expires. A fee of £153 is also charged on extension applications.
- 3.6 **Successful applications.** If the worker is outside the UK, within 6 months from the date the permit is issued, he or she must apply to a local British Mission for entry clearance before travelling if they intend to stay in the UK for more than 6 months. If the worker is already in the UK, he or she must apply for limited leave to remain in the UK. If the worker is a national of one of the EU member states which joined in 2004, with the exception of Cyprus and Malta, he or she must register as a worker. Separate fees are payable for each of these applications.

4. HIGHLY SKILLED MIGRANT PROGRAMME

- 4.1 **The Programme.** The Highly Skilled Migrant Programme is a points-based scheme introduced by the Home Office in January 2002, and is designed to allow individuals with exceptional skills and experience to come to the UK to seek and take up employment or work on a self-employed basis. Applications are made by individuals to Work Permits (UK).
- 4.2 **The Points Scheme.** To be successful, applicants must score 65 points or more across a range of measures including qualifications, work experience, past earnings and special achievements. They must also demonstrate that they are able to continue their chosen career in the UK, are willing and able to make the UK their main home and support themselves and any dependants without recourse to public funds. Two different point schedules apply depending on whether the applicant is under or over 28. There are also specific provisions relating to general practitioners and those holding MBA qualifications. Full details of the programme are available from the Work Permits (UK) website (see page 45).
- 4.3 **Successful Applications.** Successful applicants will be granted permission to enter the UK for an initial period of twelve months. At the end of this period, applicants may request an extension of up to a further three years. As with the work permit scheme, after four years' presence in the UK, a Highly Skilled Migrant may apply for permanent residence.

5. THE SCIENCE AND ENGINEERING GRADUATE SCHEME

- 5.1 **The Programme and Eligibility.** This scheme allows nationals from non-EEA countries who (i) have graduated from a UK higher or further education establishment; (ii) have graduated in certain physical sciences, mathematics and engineering subjects; and (iii) have attained a grade 2.2 or higher, to remain in the UK for 12 months after their studies in order to pursue a career. The caveat is that at the end of the 12 month period, they must leave unless granted leave to remain as a work permit holder, highly skilled migrant, business person or innovator. The Department for Education and Skills has a list of eligible courses.

6. EMPLOYING ILLEGAL WORKERS

- 6.1 **Criminal liability.** It is a criminal offence for an employer to employ a person who is not entitled to work in the UK. An employer found guilty of an offence is liable to a fine not exceeding level 5 (currently £5,000) for each illegal worker employed. An employer will have a statutory defence to any prosecution if it has checked the original and kept a copy of one or more of a number of specified documents verifying the individual's right to work in the UK (check the Work Permits (UK) website (see page 45) for a full list). If an employee provides a UK or EEA/Swiss passport or national identity card, no other documents are required. If an employee does not provide this, an employer must ask for either:
- (a) a document giving the person's National Insurance number plus a UK birth certificate or a letter from the Home Office confirming indefinite leave to remain, or that the person can take the type of work the employer is offering; or
 - (b) a work permit or other work approval plus a passport endorsed to show the person can take up employment or a letter from the Home Office confirming that the person can take the work permit employment in question.

Although it is not compulsory, it is advisable for an employer to ask potential employees to produce at least one of these documents prior to the start of their employment so that it can take advantage of the statutory defence. However, the defence will not be available if the employer has actual knowledge that it would be an offence to employ the individual.

- 6.2 **Race Discrimination.** An employer who carries out more rigorous checks on potential employees who look or sound foreign may be found liable for unlawful race discrimination. Therefore, it is important that all applicants are treated in the same way and are asked to produce the same type of document verifying their right to work in the UK. The Government

has issued a Code of Practice containing guidance on the measures which employers are expected to take in order to comply with their obligations and to avoid unlawful race discrimination. The Code of Practice is available from the Immigration and Nationality Directorate website (see page 45).

C. CONTRACTUAL TERMS

1. OVERVIEW

Although it is not mandatory to enter into a written contract of employment, in practice, most employees in the UK have a written contract. As a minimum, employers are obliged to give employees written particulars of the main terms and conditions of their employment. The contract will comprise both express and implied terms and may also incorporate terms contained in other documents such as an employee handbook or a collective agreement. The contract does not have to be in a particular form – the terms may be contained in a letter although it is common for them to be incorporated into a formal contract. In practice, the more senior the employee, the more detailed their contract is likely to be.

2. EXPRESS TERMS

2.1 **Statement of Particulars.** Section 1 of the Employment Rights Act 1996 requires employers to issue employees with written particulars of the main terms and conditions of their employment. These particulars have to be issued within 2 months of the commencement of the employee's employment. Some employers treat the statement of particulars as the contract of employment. However, it is usual for the minimum particulars to be incorporated into a formal contract (in which case it is not necessary to provide a separate statement of particulars). The written particulars which should be given include the following:-

- (a) The name of the employer and of the employee;
- (b) The employee's job title or a description of the work they are employed to do;
- (c) The employee's place of work. If the employee works in various places, details of this must be given together with the address of the employer;
- (d) The date on which the employment began and when the period of continuous employment is treated as having begun;
- (e) The scale or rate of remuneration or method of calculating remuneration including the intervals at which it is paid (e.g. weekly or monthly);
- (f) Terms and conditions relating to hours of work (e.g. start and finish times, overtime pay etc.);
- (g) Terms and conditions relating to public holidays, annual leave entitlement, sickness absence and sick pay;
- (h) Terms and conditions relating to pension schemes (including whether or not there is a contracting out certificate in force relating to participation in the state pension scheme);
- (i) If the employment is not intended to be permanent, the period for which it is expected to continue or, if the contract is for a fixed term, the date on which it will end;
- (j) Details of any disciplinary rules and details of the person to whom the employee can apply if they are dissatisfied with any disciplinary decision;

- (k) Details of the person to whom the employee can apply for the purposes of redressing any grievance and how any such application should be made;
- (l) The length of notice of termination required to be given by both the employer and employee;
- (m) Details of any collective agreements which directly affect the employee's terms and conditions;
- (n) The following details relating to any assignment outside the UK – length of the assignment, remuneration package (including details of the currency in which payment is to be made and any expatriate allowance) and any terms relating to returning to work in the UK.

Any changes to any of the written particulars must be notified to employees within 4 weeks of the change having taken place.

As of 1st October 2004, the written particulars also have to include:-

- (a) Details of any disciplinary *procedure* applicable to the employee;
- (b) Details of the person to whom the employee can apply if they are dissatisfied with any decision to dismiss them.

In addition, once that part of the Act comes into force, if an employee has brought other proceedings before an Employment Tribunal and the employer is in breach of its duty to issue an employee with written particulars, or of its duty to notify the employee of changes to them, Tribunals will be required to award the employee compensation of between 2 and 4 weeks' pay. (For these purposes, a "week's pay" is currently capped at £280). Where the other proceedings are an unfair dismissal claim, this award will be included within the compensatory award and the usual upper limit on compensatory awards (currently £56,800) will apply (see page 25).

2.2 **Contract of employment.** Instead of relying on the statement of main particulars, it is common for employers to issue all their employees with formal contracts of employment. The advantage of this is that it enables the employer to cover all the relevant terms in more detail and thereby reduce the risk of a dispute arising out of any uncertainty or ambiguity. In addition to the matters listed above, it is common for a contract of employment to cover the following additional issues:-

- (a) **Probationary Period** – contracts of employment often provide that the initial period of the contract (typically the first 3 months) will be on a probationary basis so that the employer can evaluate the suitability of the employee for the position. During this time, the notice of termination which either party is required to give will normally be shorter and the employee may not be entitled to certain benefits (such as membership of the employer's pension scheme). The contract can provide for the probationary period to be extended if further time is required to evaluate the employee. It is unusual for senior executives to be subject to a probationary period.
- (b) **Notice period** – although some employees are engaged on a fixed term basis (normally senior executives or staff hired for a particular project), most employees are hired on an indefinite contract which is terminable at any time by either party giving a specified period of notice. If the contract does not specify a period of notice, the common law implies that it will be terminable on "reasonable" notice. What is reasonable in this context will depend on factors such as the employee's seniority and the custom and practice within both the company and the relevant industry. In any event, the Employment Rights Act 1996 provides that all employees are entitled to a minimum of 1 week's notice after 4 weeks' service. This increases to a minimum of 2 weeks' notice after completion of 2 years' service and a further 1 week's notice

for each additional year of service up to a maximum of 12 weeks' notice after 12 years' service.

- (c) **Benefits** – in addition to basic salary, many employers offer additional benefits such as a pension scheme, a bonus or commission scheme, private health insurance, long term disability insurance, death in service insurance, a company car (or car allowance), gym membership and share options. Brief details of all of these would normally be included in the contract of employment with the exception of share options which are normally dealt with in a separate share option agreement.
- (d) **Confidentiality / IPR** – if the employee is likely to have access to the employer's confidential information, it is advisable for the employment contract to include specific provisions identifying the information and providing that the employee must not use it for personal gain or disclose it to any unauthorised person at any time during their employment or after its termination. Further, if the employee's work is likely to give rise to intellectual property rights then the contract can include provisions requiring the employee to assign any rights to the employer. Alternatively, some employers require employees to enter into separate agreements dealing with confidential information and IPR.
- (e) **Termination** – since most disputes between employers and employees arise on the termination of the relationship, it is often a good idea for the contract to specify the circumstances in which the employer will be entitled to terminate it without notice (such as gross misconduct or gross negligence). Further, many contracts give the employer the option of making a payment in lieu of notice and/or placing the employee on "garden leave" during any period of notice. A garden leave clause enables the employer to require the employee not to attend work during their period of notice but to stay at home "on call". It is often used to keep an employee out of the office but away from a competitor during their notice period.
- (f) **Post termination restrictions** - if an employee's access to the employer's confidential information, customers and/or other employees is such that they would pose a risk to the business following the termination of their employment, it is sensible to include post termination restrictions in the contract. The most common types of restriction are a ban on working for a competitor for a period of time and a prohibition on the solicitation of customers and employees. The courts will not enforce a post termination restriction unless it is both reasonable and necessary to protect the interests of the business. The court will look at all aspects of the restraint including its duration, geographical restriction and the precise nature of the prohibited activities. If any part of the restriction is too wide, the whole clause may be declared void. As a general rule, the more senior the employee the more likely it is that a restriction will be considered reasonable. In normal circumstances, restraints lasting more than 12 months after termination are unlikely to be enforceable.

2.3 **Policies and Procedures.** In addition to the contract of employment many employers publish separate policies and procedures (which may or may not be incorporated into the contract) dealing with various aspects of the employment relationship. Typical policies include those concerning equal opportunities, harassment, health and safety, maternity and other family leave, discipline, data protection issues and email and internet use. Further, many employers have written procedures for dealing with matters such as employee grievances, breaches of the disciplinary rules and poor performance. These types of policies and procedures are often incorporated into an employee handbook which is issued to all staff at the start of their employment.

3. **IMPLIED TERMS**

In addition to the express terms, all UK employment contracts are subject to various implied terms which impose additional duties and obligations on both the employer and employee.

For example, an employee will be subject to an implied obligation of fidelity and obedience, a duty to work with due diligence and care and an obligation not to use or disclose the employer's trade secrets or confidential information. In some circumstances, senior employees (and, in particular, directors) may also be under a duty to disclose their own wrongdoing to their employer. The employer will be under an implied duty not to destroy the relationship of trust and confidence between the employer and employee and to take care of the employee's health and safety. Further, both parties will be under an implied duty to give a reasonable period of notice to the other if no notice period has been agreed in the contract.

4. **VARYING TERMS**

Any changes to an employee's contract require the employee's consent. Typically, an employee would be asked to consent expressly, by confirming either orally, or preferably in writing, that they agree to the changes. However, sometimes it may be possible to imply that an employee has consented if the employee continues to work for the employer for a significant period without protesting after a change has been made. If an employer makes significant changes to an employee's contract to which the employee does not consent, then the employee may be able to resign and claim constructive dismissal (see page 25) Where an employer tries to make changes following a business transfer, these may be ineffective, even if the employee consents (see page 36).

D. **RIGHTS DURING EMPLOYMENT**

1. **OVERVIEW**

The position under common law is that the parties to an employment contract are entitled to agree such terms as they wish. However, the last few years have seen the introduction of various pieces of legislation which require employers to observe certain minimum requirements in relation to the working conditions of their employees. In particular, regulations have been introduced regulating the number of hours employees can be required to work and providing for a minimum amount of annual leave, maternity leave, parental leave and other similar types of leave, and the right to take time off work to deal with emergencies involving dependants. In addition, regulations guarantee a minimum hourly rate for all workers aged 16 and over.

2. **HOURS OF WORK**

2.1 **Maximum working hours.** The Working Time Regulations 1998 provide that employers must take all reasonable steps to ensure that workers do not work more than an average of 48 hours in each week. This average is taken over a reference period of 17 weeks (which is extended to 26 weeks for certain workers). Employers must maintain records for two years to show compliance with these provisions.

2.2 **Opt-Out Agreements.** Workers may opt out of the 48-hour weekly limit by written agreement. The opt-out agreement must give the worker the right to terminate it by giving no more than 3 months notice. Opt-out agreements must be entered into voluntarily and it is unlawful to victimise or dismiss a worker for refusing to sign an opt-out agreement. For example, it would be unlawful to require a prospective employee to enter into an opt-out agreement as a condition of offering them a position.

2.3 **Night workers.** Employers must also take all reasonable steps to ensure that the normal working hours of night workers do not exceed an average of 8 hours in any 24-hour period over a 17 week reference period. Night workers must also be given the opportunity of a free health assessment before they take up night work and thereafter at regular intervals. If a registered medical practitioner advises the employer that a worker is suffering from health problems connected to the night work, the employer is required, if possible, to transfer the worker to suitable day work.

- 2.4 **Rest periods.** Subject to certain exceptions, adult workers (i.e. those over the age of 18) are entitled to a rest period of at least 11 consecutive hours in each 24 hour working period. In addition, adult workers are normally entitled to an uninterrupted weekly rest period of at least 24 hours (which may be made up of two weekly rest periods of at least 24 hours in each 14 day period or a single rest period of at least 48 hours in each 14 day period). The minimum weekly rest period for young workers is normally 48 hours. Finally, workers who work for at least six hours are entitled to a rest break away from their workstation. In the absence of a workforce or collective agreement specifying the duration, the rest break should be at least 20 minutes. In addition to these specific obligations, there is a general requirement that adequate work breaks should be offered to workers if the work pattern puts health and safety at risk, in particular because the work is monotonous or the work-rate is predetermined.
- 2.5 **Exemptions.** None of the above provisions applies to workers who can determine their own working hours or whose working time is not measured or predetermined (such as managing executives). In addition, for workers whose time is partly measured or predetermined but who may also carry out additional work, the duration of which is not measured or predetermined (such as voluntary overtime), the 48 hour weekly limit does not apply to those additional hours.
- 2.6 **Young Workers.** Employers are required to take all reasonable steps to ensure that young workers (i.e. those aged over 15 but under 18) do not work more than 8 hours a day or 40 hours a week. Unlike the 48 hour weekly limit which applies to adult workers, these limits are not averaged over a reference period. There is no provision for young workers to opt-out of the limits. Employers are also required to take all reasonable steps to ensure that young workers do not work between 10pm and 6am.

3. **SALARY AND BENEFITS**

- 3.1 **National Minimum Wage.** Under the National Minimum Wage Act 1998, most workers, including home and piece workers, are entitled to a minimum gross hourly wage. The rate is usually increased annually, based on the recommendations of the Low Pay Commission. From October 2005, the rate for workers aged 22 and over is £5.05 per hour; for workers aged 18 to 21 it is £4.25. The Government has also introduced a new rate for 16-17 year olds from this date, who will be entitled to £3.00 per hour. This hourly amount is calculated as an average over the relevant pay reference period, which is usually the actual pay period (i.e. usually one week or one month). The calculation of "pay" includes bonuses paid in the reference period and tips paid through the payroll, but does not include advances or loans made to the worker. As a general rule, the value of benefits in kind is not included for the purposes of calculating pay.
- 3.2 **Itemised Pay Statements.** All employees must be provided with an itemised pay statement at or before the time payment is made, setting out the gross amount of wages, the amounts of any deductions (such as for tax and national insurance contributions), the net wages payable and, where parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.
- 3.3 **Tax and Social Security Contributions.** Under the Pay as You Earn System ("PAYE") employers are required to deduct income tax direct from employees' salaries and pay it monthly to the HMRC. In addition, both employers and employees have to pay National Insurance Contributions ("NIC") on the cash remuneration paid to employees. The standard NIC for employees is 11% of the excess of their weekly cash remuneration over £94 (subject to a weekly earnings limit of £630). A 1% contribution is made by the employee in respect of their salary above £630 per week. The standard NIC for employers is 12.8% of the excess of the employee's total weekly cash remuneration over £94 (with no upper limit on weekly earnings). If the employer operates an occupational pension scheme which is contracted out of the state earnings related pension scheme, the contribution rates are lower. The various thresholds are reviewed annually, usually with effect from April.

3.4 **Deductions from Wages.** Subject to certain exceptions (such as when the deduction is made to reimburse the employer for any overpayment of wages or expenses) no deduction from a worker's wages may be made unless either the deduction is required or permitted by a statutory or contractual provision or the worker has given their prior written consent to the deduction. Not only may sums wrongfully deducted be ordered to be repaid to the worker, but the employer may also lose the right to recover the sums which it was seeking to deduct. Therefore, it is advisable for an employee's contract to include a provision giving the employer the right to make deductions from wages in order to recover any sums due from the employee. This will be particularly relevant on termination of employment if the employee has taken more than their accrued holiday entitlement and the employer wishes to recover the excess from the employee by deducting it from their final salary payment.

3.5 **Non-cash benefits.** With the exception of pensions (see below) there is no statutory requirement for employers to provide non-cash benefits to employees. However, many contracts expressly provide for the provision of a number of benefits in addition to basic salary. Benefits that are commonly given to employees in the UK include private medical expenses insurance, long-term disability insurance (which is often called Permanent Health Insurance), death in service benefit, a company car (or a car allowance) and participation in schemes such as a commission, bonus or profit sharing scheme.

4. **PENSIONS**

4.1 **Stakeholder Pension Schemes.** Any employer who employs 5 or more employees and who does not already provide appropriate pension arrangements is required to designate a stakeholder pension scheme that employees can join if they want to. Although there is no obligation on the employer to make contributions into the scheme (unless it chooses to do so), arrangements must be made to enable an employee's own contributions to be deducted directly from their earnings. If the employer is obliged to offer access to a stakeholder scheme it must consult with its employees about the choice of scheme. The chosen scheme must comply with certain minimum standards established by the Government and must be registered with the Pensions Regulator. After a scheme has been chosen, the employer must give its employees certain information about the scheme (such as the name and address of the pension provider).

4.2 **Exemptions.** An employer will be exempt from the requirement to designate a stakeholder pension scheme if:-

- (a) It employs fewer than 5 employees (an employer who previously employed fewer than 5 employees has 3 months in which to designate a scheme from the date on which it employs its 5th employee);
- (b) It offers an occupational pension scheme which all staff can join within 12 months of starting at the company (excluding those who are under 18 or within 5 years of retirement); or
- (c) It offers employees access to a personal pension scheme which is available to all employees over the age of 18 and which has no penalties for members who stop contributing or who transfer their pension. Further, the employer must make contributions of at least 3% of the employees' basic pay and offer payroll deduction for employee contributions.

4.3 **Employees who qualify.** An employer who is obliged to designate a stakeholder pension scheme must provide access to it to all employees except those:-

- (a) who have been employed for less than 3 months;
- (b) who either have joined or who have chosen not to join the employer's occupational pension scheme;

- (c) who are unable to join the employer's occupational pension scheme because they are under the age of 18 or who are within 5 years of retirement age;
- (d) who have continuously earned below the National Insurance lower earnings limit (currently £82 per week) for the last three months; or
- (e) who are ineligible to make contributions because of HMRC restrictions (e.g. an employee who does not normally live in the UK).

5. **HOLIDAYS**

5.1 **Public and Bank Holidays.** Although employees do not have a statutory entitlement to paid leave for bank and public holidays, most employment contracts provide for this. In England, Wales and Scotland these holidays are: 1st January, 2nd January (Scotland only), Good Friday, Easter Monday (except Scotland), the first Monday in May, Spring Bank Holiday (usually the last Monday in May), August Bank Holiday (usually the last Monday in August), 25th and 26th December.

5.2 **Minimum annual leave.** Under the Working Time Regulations 1998 agency workers and employees have a statutory right to a minimum of four weeks' annual paid holiday. Public and Bank holidays may count towards this entitlement. During the worker's first year of employment, the right accrues on a *pro rata* basis. Since the Regulations set only the minimum requirements, more generous provisions relating to annual leave may be made in the contract of employment. The contract of employment may set out the procedure to be followed when the employee wishes to take annual leave. In the absence of any contractual provisions, the employee must give notice of at least twice the period of leave they are proposing to take. The employer may also require the employee to take all or part of their leave on certain dates by giving him notice of that requirement. Where a worker's employment is terminated and they have not taken all of their accrued minimum leave entitlement, the employer must pay them in lieu of that untaken leave. Equally, the contract of employment may include an obligation for the employee to reimburse the employer if they have exceeded their accrued annual leave entitlement.

6. **SICK PAY**

6.1 **Statutory Sick Pay ("SSP").** All employees earning over the weekly lower earnings limit for National Insurance Contributions (currently £82 per week) are entitled to receive SSP for days on which they are unable to work due to sickness. The current maximum weekly rate of SSP is £68.20 (this rate is usually increased annually each April). The rules governing payment of SSP are complex but the main ones are that:-

- (a) there is a maximum entitlement of 28 weeks of SSP in any period of entitlement;
- (b) an employee is not entitled to be paid SSP for the first 3 days of any period of absence (unless it is a case of a recurring absence within a specified timescale); and
- (c) the employee must provide the employer with evidence of incapacity for work (such as a self-certificate or a doctor's certificate).

6.2 **Contractual Sick Pay.** In view of the fact that the rate of SSP is usually much lower than most employees' weekly salary, many employers operate contractual sick pay arrangements whereby employees are paid their full salary for a specified number of days' sickness absence per year. Any contractual sick pay paid to an employee is set off against any SSP due for the same day. Therefore, where an employee is entitled to both SSP and contractual sick pay for the same day of absence, they will receive the higher of the two sums.

7. MATERNITY LEAVE

- 7.1 **Time Off for Ante-natal Care.** All pregnant employees are entitled to paid time off to keep appointments for ante-natal care made on medical advice. Except in the case of the first appointment, the employer can require the employee to produce a medical certificate confirming that she is pregnant together with a document showing that the appointment has been made.
- 7.2 **Maternity Leave.** All pregnant employees (regardless of length of service) are currently entitled to 26 weeks' Ordinary Maternity Leave ("OML") which can be taken at any time from the 11th week before the expected week of childbirth ("EWC"). Employees who have completed 26 weeks' service by the start of the 14th week before the EWC also qualify for Additional Maternity Leave ("AML"), which starts from the end of the OML and continues for up to a further 26 weeks. All contractual benefits except wages or salary continue to be payable throughout OML. Only limited rights and benefits (such as redundancy rights and the right to notice of termination) continue throughout the AML. In order to qualify for maternity leave, an employee must notify her employer by the 15th week before her EWC, unless this is not reasonably practicable. If the employee wishes to change her mind about when she wants to take her maternity leave, she must give her employer 28 days' notice. Maternity leave is automatically triggered if an employee is absent from work for a pregnancy-related illness during the four weeks immediately before her EWC.
- 7.3 **Maternity Pay.** Employees who have at least 26 weeks' continuous service up to the "qualifying week" (which is the 15th week before the EWC) are entitled to up to a total of 26 weeks' Statutory Maternity Pay ("SMP"). The first 6 weeks of SMP is paid at 90% of the employee's normal weekly earnings (calculated as an average of her actual earnings over the 8 week period prior to the qualifying week). The remaining 20 weeks are paid at a flat rate which is set by the Government. That rate is currently £106 per week (or 90% of the employee's normal weekly earnings if lower). An employer can recover from the Government either 92% or 100% plus compensation (depending on the size of the company) of SMP paid by setting it off against the National Insurance contributions which it sends to the Inland Revenue each month.
- 7.4 **Rights on returning to work.** The employee must give 28 days' notice to her employer if she intends to return to work before the end of her full OML or AML entitlement. If she intends to return to work at the expiry of the OML or AML, no notice is required to be given. An employee returning from OML is entitled to return to the same job that she had before taking maternity leave. An employee returning from AML is entitled to return to the same job unless it is not reasonably practicable to do so, in which case she must be offered suitable alternative employment. If a redundancy situation arises during an employee's maternity leave, the employer must offer her a suitable alternative position if one is available or the redundancy will be regarded as automatically unfair.
- 7.5 **Contractual maternity rights.** Many employers operate contractual maternity schemes which offer benefits over and above the statutory scheme. For example, employers may agree to continue to pay full salary for all or part of the maternity leave period. Some employers provide that any such enhanced contractual payments are repayable in the event that the employee does not return to work for a minimum period of time after the end of her maternity leave.

8. PATERNITY LEAVE

- 8.1 **Paternity Leave.** Employees who (i) expect to have responsibility for the child's upbringing, (ii) are the biological father or the mother's husband or partner and (iii) have completed 26 weeks' service by the 15th week before the baby is due, are entitled to two weeks' paternity leave. Leave must be completed within 56 days of the date of childbirth (or, if the child is born early, within 56 days of the EWC). Employees earning over the weekly lower earnings limit for National Insurance Contributions (currently £79 per week) are entitled to Statutory Paternity Pay (SPP), which will be at the same rate as flat rate Statutory Maternity Pay,

currently £106 a week (see page 14). Employers can recover either 92% or 100%, plus compensation, of SPP paid (depending on the size of the company). All contractual benefits except wages or salary continue to be payable throughout the paternity leave.

- 8.2 **Procedure for taking Paternity Leave.** Notice of the intention to take leave must be given to the employer by the end of the 15th week before the EWC unless this is not reasonably practicable. Employees may choose to take one or two consecutive weeks' leave.
- 8.3 **Rights on returning to work.** Employees are entitled to return to the same job following paternity leave.

9. ADOPTION LEAVE

- 9.1 **Adoption Leave.** To qualify for adoption leave, an employee must (i) be newly matched with a child for adoption and (ii) have completed 26 weeks' service by the week in which they are notified of the adoption. Employees earning over the weekly lower earnings limit for National Insurance Contributions are entitled to 26 weeks' paid Ordinary Adoption Leave (OAL). Employees are also entitled to a further 26 weeks' unpaid Additional Adoption Leave (AAL). Statutory Adoption Pay (SAP) is paid at the same rate as Statutory Maternity Pay (see page 14). Employers can recover either 92% or 100% plus compensation of SAP paid (depending on the size of the company). Employees may start their leave either from the date of the child's placement or up to 14 days before the expected date of the placement. During OAL, all contractual benefits except wages or salary continue to be payable. Only limited rights continue through AAL.
- 9.2 **Procedure for taking Adoption Leave.** Employees must inform their employer of their intention to take adoption leave within 7 days of being notified that they have been matched for adoption, unless this is not reasonably practicable. If an employee changes their mind about when they wish to start adoption leave, they must give 28 days' notice to their employer.
- 9.3 **Rights on returning to work.** Employees wishing to return to work before the end of their full adoption leave must give their employer 28 days' notice. No notice is required if an employee wishes to return at the end of their full adoption leave entitlement. An employee returning from OAL is entitled to return to the same job that they had before taking leave. An employee returning from AAL is entitled to return to the same job unless it is not reasonably practicable to do so, in which case they must be offered suitable alternative employment.
- 9.4 **Interrelation with Paternity Leave.** Only one member of a couple who adopt jointly may take adoption leave. The equivalent of paternity leave may be available to the other, and paternity leave may also be available to the partner of an individual who adopts a child but who does not, themselves, adopt the child. There is no requirement for an employee taking paternity leave to be the biological or adoptive father of the child so long as they are the partner, male or female, of the mother or adoptive parent and expect to have responsibility for bringing up the child.

10. PARENTAL LEAVE

- 10.1 **Entitlement to Parental Leave.** The Maternity and Parental Leave Regulations 1999 introduced a right for parents of both sexes who fulfil certain qualifying conditions to take up to 13 weeks' unpaid parental leave per child for whom they have responsibility. In the case of disabled children the period of leave to which parents are entitled is 18 weeks. The right is available to employees with over one year's service and who have parental responsibility for a child. The right to take parental leave normally ends when the child is 5, although special rules apply to disabled or adopted children. Under the Regulations, the leave has to be taken for the purposes of caring for a child.

- 10.2 **Procedure for taking Parental leave.** The Regulations allow employers to agree with employees as to how and when parental leave can be taken. In the absence of any such agreement, the Regulations provide that employees must give at least 21 days' notice of their intention to take parental leave and that the leave can only be taken in blocks or multiples of one week. Unless otherwise agreed, an employee cannot take more than four weeks' leave in respect of an individual child in any one year. The Regulations also allow employers to require an employee to postpone taking leave by up to six months if the proposed timing of their leave would cause undue disruption to the business.
- 10.3 **Rights on returning to work.** An employee who takes parental leave of 4 weeks or less is entitled to return to work to the same job on the same terms and conditions. If more than 4 weeks' leave is taken or if leave is taken immediately after Additional Maternity Leave, the employee must be permitted to return to the same job unless it is not reasonably practicable to do so, in which case they must be offered suitable alternative employment.

11. TIME OFF FOR DEPENDANTS

- 11.1 **Entitlement to time off.** All employees (regardless of length of service) are entitled to take "reasonable" unpaid time off work to deal with an emergency involving a dependant. The guidance issued by the Government suggests that, in most cases, one or two days will be sufficient to deal with a particular incident. The employee must tell the employer the reason for the absence and how long they expect to be absent "as soon as reasonably practicable". The right to take time off is limited to the following situations:-
- (a) to provide assistance when a dependant falls ill, gives birth or is injured or assaulted, or to make arrangements for the care of a dependant who falls ill or is injured;
 - (b) following the death of a dependant;
 - (c) because of the unexpected disruption or termination of care arrangements for a dependant; or
 - (d) to deal with an unexpected incident involving a child of the employee that occurs while the child is at school.
- 11.2 **Definition of Dependant.** For the purposes of situation (b) above, a dependant is defined as a spouse, child or parent of the employee, or someone else living in the same house as part of the family (e.g. unmarried partners or step-children). For situation (a) the definition is widened to include anyone who reasonably relies on the employee for assistance or to arrange care if they are ill or injured. For situation (c) a dependant will also include anyone who reasonably relies on the employee to make arrangements for their care if care has been disrupted or terminated.

12. FLEXIBLE WORKING

- 12.1 **Right to request flexible working.** Parents with children under the age of 6, or disabled children under the age of 18, may request flexible working. The right is available to individuals who have been continuously employed for 26 weeks and who have responsibility for the child's upbringing. Employees are able to request a change to the hours they work or the times they are required to work and may also request that they work from home.
- 12.2 **Procedure for requesting flexible working.** An application must be made for the purpose of enabling the employee to care for the child. An employee can only make one application a year and the application must be made no later than two weeks before the child's 6th birthday (or, if the child is disabled, their 18th birthday). The employee must first make a written application to the employer, who must then arrange a meeting within 28 days. The employer must then write to the employee within 14 days of the meeting either agreeing to the new working arrangements or setting out clear business grounds as to why the application cannot be accepted. The grounds listed in the legislation include the burden of additional costs and

any detrimental effect on the employer's ability to meet customer demand. The employee may appeal against a decision within 14 days of being notified of it.

13. UNION MEMBERSHIP

All employees have the right to join, or to refuse to join, a trade union. A recent decision of the European Court of Human Rights has now gone so far as to say that offering employees financial inducements to relinquish their trade union rights is contrary to the European Convention on Human Rights. If the trade union is recognised by the employer, and in some circumstances an employer is obliged to recognise a trade union, then the employee will have certain rights to take part in trade union activities. Employees are also protected from dismissal and action short of dismissal on the grounds of their membership, or non-membership, of a trade union.

14. DATA PROTECTION RIGHTS

- 14.1 **Processing of Personal Data.** The Data Protection Act 1998 requires that all employers must comply with certain data protection principles when processing personal data relating to their employees. Personal data is broadly defined and may include any data from which a living individual can be identified. However, a recent Court of Appeal case has suggested that data must have "the person as its focus" or otherwise be "biographical in nature" in order to constitute personal data. Under the legislation, an employer is generally prohibited from processing an employee's personal data unless the employee has consented or the employer needs to process the data either to perform its obligations under the contract of employment or to comply with any other legal obligation. In addition, when processing any personal data, an employer must comply with the other data protection principles in the legislation. These require employers to ensure that the personal data which they hold is accurate, kept secure, not kept for longer than is necessary, not excessive, only processed for certain specified purposes and not transferred to countries outside the EEA without adequate data protection safeguards.
- 14.2 **Sensitive Personal Data.** Stricter pre-conditions need to be satisfied before an employer can process "sensitive personal data" (i.e. information relating to an employee's racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical/mental health or condition, sex life or criminal offences/proceedings involving the employee). Unless the employee has made the information public themselves or the employer needs to process sensitive personal data to comply with UK employment law, an employer will generally need to obtain the employee's explicit consent to the processing. Since an employer is likely to need to process an employee's sickness records (which will qualify as sensitive personal data) it is advisable to include a clause in the employment contract whereby the employee gives their express consent to such processing.
- 14.3 **Information to be provided.** Employers also need to provide or make available to employees certain information such as the purpose for which it will process any personal data and the name of any representative who processes employees' data on the employer's behalf (e.g. if the employer contracts out its payroll function, it will need to inform employees of the identity of the contractor). An employer could comply with this obligation to make the information available by including the relevant details in employees' contracts or in the staff handbook or by posting it on the company's intranet.
- 14.4 **Employees' rights of access.** On making a written request an employee is entitled to be provided with a copy of the personal information which their employer holds about them (unless this would involve a disproportionate effort or is not possible). The employer can charge the employee a fee of not more than £10 and must respond to the request promptly and, in any event, within 40 days. There are a number of exemptions from the duty to make information available. The exemptions most likely to be applicable in relation to access requests by employees are:-

- (a) References – an employee is not entitled to have access to any reference given in confidence by a current employer. However they will be able to gain access to references received by that employer from a third party;
- (b) Information identifying another individual – an employer need not provide information which would identify another individual unless that individual has consented or it is reasonable to dispense with their consent;
- (c) Management forecasting information – personal data which is processed for the purposes of management forecasting or management planning cannot be accessed by employees if this would prejudice the conduct of the business (e.g. data relating to proposed pay reviews, redundancies or a possible take over); and
- (d) Information which may prejudice negotiations between the employer and employee – this would cover matters such as details relating to intended salary rises.

14.5 **International transfer of data.** The legislation prohibits an employer from transferring employees' personal data to any country outside the EEA unless it has adequate data protection laws. Although the US does not have generally applicable federal laws on data protection for the private sector, it is permissible for data to be transferred to companies in the US which have adopted the "safe harbor" principles (which have been recognised by the European Commission as providing adequate protection). If an employer wishes to transfer data to a non-safe harbor US company or anywhere else outside the EEA (save for Argentina, Guernsey, the Isle of Man and Switzerland which have been approved as having adequate data protection laws and to Canadian recipients subject to the Personal Information Protection and Electronic Documents Act) it must either require the organisation receiving the data to sign appropriate contractual undertakings or rely on one of the derogations in the legislation. The derogations most likely to be relevant to employment related information are:-

- (a) The employee has given consent to the transfer;
- (b) The transfer is necessary for the performance of the employment contract or for processing a job application from a prospective employee; or
- (c) The transfer is necessary for the conclusion or performance of a contract between the employer and a third party which is entered into at the request of the employee or it is in the interests of the employee (e.g. for a contract between the employer and a company that provides certain employee benefits).

In view of the difficulties of establishing whether a particular country provides adequate protection or of showing that the data transfer is necessary for the purposes listed in (b) and (c) above, it is advisable for any company which may wish to transfer employee data outside the EEA either to obtain its employees' consent by including an appropriate clause to that effect in the employment contract or to obtain appropriate contractual undertakings from the recipient of the data. The Commission has recently approved standard contractual clauses which will be regarded as providing adequate protection.

14.6 **Code of Practice.** A Code of Practice for employers has been published by the Office of the Information Commissioner and being published on its website (see page 45). Although the Code is not legally binding, it represents the views of the Information Commissioner on what organisations must do to ensure compliance with the Data Protection Act 1998. Part 1 deals with Recruitment and Selection, Part 2 deals with Records Management, Part 3 deals with Monitoring at Work and Part 4 deals with Medical Records. Part 2 of the Code deals variously with advertising, applications, verifying information provided by job applicants, short-listing, interviews, pre-employment vetting and retention of records. Some of the key recommendations are:-

- (a) only seeking personal information that is relevant to the recruitment process;

- (b) informing individuals responding to adverts, or recruitment agencies on behalf of applicants, how the information provided will be used (unless this is self-evident);
- (c) ensuring an applicant's consent is obtained where verification of information provided by them will involve obtaining information from a third party;
- (d) ensuring that any information recorded and retained following an interview can be justified as relevant to and necessary for the process;
- (e) explaining to applicants if pre-employment vetting is to be undertaken, and only using vetting where not to do so would present particular risks to the employer or to others, and there is no practical alternative; and
- (f) once the recruitment process is complete, only retaining information that is relevant to on-going employment and, in the case of unsuccessful applicants, advising them if there is an intention to keep their names on file for future vacancies and giving them the opportunity to have them removed.

15. DISCIPLINARY AND GRIEVANCE PROCEDURES

- 15.1 **ACAS Code of Practice.** The Code of Practice on Disciplinary and Grievance Procedures prepared by the Advisory Conciliation & Arbitration Service aims to give practical guidance on how disciplinary and grievance issues should be dealt with. The Code is not legally binding and a breach of the Code in itself does not render an employer liable to legal proceedings. However, the provisions of the Code are admissible and may be taken into account if they are relevant to any proceedings before an Employment Tribunal. Therefore, it is good practice for employers to adhere to the Code when dealing with disciplinary and grievance issues and this may help to avoid unfair dismissal liability. The Code recommends that all employers should draw up disciplinary rules together with a procedure for dealing with disciplinary issues. The disciplinary procedure should allow the worker to be provided with details of the allegations that have been made against them in advance of any disciplinary hearing and to be given the opportunity of challenging the allegations and evidence before a decision is taken. The Code also recommends that workers should be given a right of appeal against any decisions taken. The Code was revised when the statutory dismissal and disciplinary procedures and grievance procedures were introduced on 1st October 2004.
- 15.2 **The right to be accompanied.** All workers have the right to be accompanied by a colleague of their choice or by a trade union official when required or invited to attend certain disciplinary or grievance hearings. However, the right does not apply to meetings that are purely investigation meetings. The employee may be accompanied by a trade union official even if the employer does not recognise a trade union for collective bargaining purposes. If the person whom the worker wishes to accompany them is unavailable at the date set for the hearing, the worker is entitled to ask that the hearing be postponed to another reasonable date within five days of the date originally set. The accompanying person may consult with the employee and address the hearing, but may not answer questions on the employee's behalf.
- 15.3 **Statutory dismissal and disciplinary procedures and grievance procedures.** From 1st October 2004 all employers and employees have been obliged to follow statutory dismissal and disciplinary procedures (SDDPs) and grievance procedures (SGPs). The Employment Act 2002 details standard and modified SDDPs and SGPs. The Employment Act 2002 (Dispute Resolution) Regulations 2004 specify when these procedures apply. In summary, the standard SDDP requires employers to (i) give employees a statement of its grounds of action and invite the employee to a meeting, (ii) hold the meeting and inform the employee of the outcome and of the right to appeal and (iii) if the employee notifies the employer that they wish to appeal, hold an appeal meeting. The modified SDDP, which applies in a limited category of gross misconduct cases, requires employers to set out in writing the alleged misconduct, the reason why the employer thinks the employee is guilty of it and the right of

appeal. The right of appeal also applies to the modified SDDP. There are, in a similar fashion, standard and modified SGPs. The standard SGP requires (i) the employee to set out the grievance in writing (ii) the employer to invite the employee to a meeting and (iii) if the employee notifies the employer that they wish to appeal, to hold an appeal meeting. Under the modified SGP, which applies in certain cases where the employee is no longer employed, (i) the employee must set out both the grievance and the reason for it, and (ii) the employer must set out its response in writing.

- (a) **Failure by employer to adhere to the applicable SDDP or SGP.** Where an employer dismisses an employee but the applicable SDDP has not been completed (at the fault of the employer), the dismissal will be automatically unfair. In addition, where an employee has brought any of a wide range of employment claims in circumstances where the employer has failed to follow the applicable SDDP or SGP, the Employment Tribunal must usually increase the amount of compensation payable to the employee. The standard increase will be 10%, although Tribunals will have the power to increase the award by less (down to no increase at all) or more (up to a 50% increase but with 40% the likely maximum). The Employment Act 2002 envisaged that SDDPs and SGPs would be implied into all contracts, with the result that an employer who fails to follow them would also be in breach of contract. However, this provision has not yet been implemented.
- (b) **Failure by employee to adhere to the applicable SDDP or SGP.** Until an employee has complied with the first step of the applicable SGP, they will be prevented from bringing any of a wide range of employment claims. If the applicable SDDP or SGP has not been completed at the fault of the employee, Tribunals will have to decrease any compensatory award, evaluated in the same way as any increased award described above.

16. MONITORING/SURVEILLANCE

There is no right to privacy under UK common law. However, in recent years legislation has been introduced which has given employees some protection against unwarranted infringements of their privacy. In particular, the legislation introduces limitations on an employer's ability to carry out monitoring of its employees' email, internet and telephone use.

- 16.1 **Privacy Rights.** The Human Rights Act 1998 ("HRA") came into force on 2nd October 2000 and is designed to give effect to the rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The HRA makes it unlawful for public authorities in the UK to act in a way which is incompatible with the Convention rights unless they are required to do so under primary legislation. Although the HRA is not directly enforceable against private sector employers, it will have an indirect effect on employers in the private sector because the courts and Employment Tribunals will have to take the provisions of the HRA into account when reaching their decisions. In addition, the HRA requires the courts to interpret all legislation so as to be compatible with the European Convention so far as it is possible to do so. Among the rights protected by the HRA is the right to respect for private and family life, home and correspondence. This right could be infringed if an employer carries out monitoring or surveillance of its employees without giving prior warning that this may take place. Therefore, if an employee is dismissed as a result of evidence obtained through covert monitoring or surveillance, they may be able to argue that the Employment Tribunal should uphold their claim for unfair dismissal, and/or that this evidence should be inadmissible, on the grounds that rights under the HRA were infringed.
- 16.2 **Interception of Communications.** The Regulation of Investigatory Powers Act 2000 ("the Act") introduced both criminal and civil liability for "unlawful interception" of a communication on a telecommunications system (which may include a communication by telephone, fax, email or internet). However, the Act provides that employers will be able lawfully to intercept and monitor communications if there are reasonable grounds for believing that both the sender and the intended recipient consent to it or if the interception is authorised by the Telecommunications (Lawful Business Practice)(Interception of Communications) Regulations

2000. These Regulations allow an employer to intercept, monitor and (in limited situations) record communications relevant to the employer's business for certain specified purposes such as to investigate or detect unauthorised use of the system by employees. However, to take advantage of this exemption, the employer must make "all reasonable efforts" to inform potential users of the system that interceptions may be made. Therefore, any employer who is likely to carry out any form of email, internet or telephone monitoring should warn its employees that this may take place. Such a warning is commonly included in a document setting out the employer's policy on email, internet and telephone use.

- 16.3 **Data Protection Act 1998.** Although monitoring may be lawful under the legislation referred to above, employers will still need to comply with the provisions of the Data Protection Act 1998 when carrying out any monitoring. The Information Commissioner has published a Code of Practice setting out guidelines on the standards which employers should adopt to avoid breaching any of the principles set out in the Data Protection Act. The Code is available on the website of the Information Commissioner's Office (see page 45). The Code recommends that employers refrain from carrying out monitoring or surveillance unless it is necessary to achieve a specific business purpose and that, in making this assessment, they should consult with employee representatives. Personal information should only be used for the purposes for which it was collected unless it would be in the employee's interests to use it otherwise, or if it reveals information that no reasonable employer could be expected to ignore. The Code also recommends telling workers what monitoring is taking place and why (and reminding them of this periodically) unless covert monitoring is justified. It is recommended that covert monitoring should be limited to situations where criminal activity is suspected and the employer concludes that overt monitoring would prejudice the investigation.

17. HEALTH AND SAFETY

- 17.1 **Duty to take care for safety of employees.** An employer is under a duty to take reasonable care for the safety of its employees. (This duty arises at common law and under the Health and Safety at Work Act 1974). Employers are also liable for the acts of their employees if these are committed in the course of their employment. The employer's duty is usually expressed as the obligation to:-

- (a) provide a safe place of work;
- (b) provide a safe means of access to the place of work;
- (c) provide a safe system of work;
- (d) provide adequate equipment and materials;
- (e) employ competent fellow employees; and
- (f) protect employees from unnecessary risk of injury.

The application of the general duty to a wide range of specific situations (covering, for example, electricity at work, computer screens, and use of alcohol and drugs) is set out in an extensive body of regulations.

- 17.2 **Stress claims.** It has been clear for some time now that an employer's duty to take reasonable care for the safety of its employees extends to preventing psychological, as well as physical, harm. However, recent cases have indicated that an employer will not be liable to a particular employee unless there are warning signs, such as the fact that (i) the employee is being overworked or is showing signs of stress in comparison to other employees in a similar position, (ii) the employee has previously suffered psychological injury, such as a breakdown, as a result of overwork or (iii) the employee has uncharacteristically been absent

from work for prolonged periods. If these warning signs do exist, employers should consider (i) giving the employee a sabbatical or transferring them to other work, (ii) redistributing the work or providing extra help and/or (iii) providing confidential counselling or buddying or mentoring services.

17.3 **Health and Safety Policy Statement.** Employers employing 5 or more employees must prepare (and revise where necessary) a written statement detailing their policy on health and safety at work and the arrangements for giving effect to it. The policy must be brought to the notice of all employees by displaying it on an accessible notice board. Employees must also be given information on health, safety and welfare in the form of posters and leaflets published by the Health and Safety Executive.

17.4 **Consultation with employees.** Employers are obliged to consult with employees on health and safety matters. This consultation should be with union representatives or, in the case of non-unionised workers, with employees directly or with their elected representatives. This is dealt with in more detail on page 27.

18. **WHISTLEBLOWING**

18.1 **Right not to suffer detriment or be unfairly dismissed.** Since the Public Interest Disclosure Act 1998 ("the Act") came into force in July 1999, employees (and certain other workers) have had the right to disclose information about alleged wrongdoings. Provided the disclosure qualifies as a "protected disclosure", then the employee has the right not to suffer any detriment as a result of making the disclosure. If the employee were dismissed, the dismissal would be automatically unfair.

18.2 **Qualifying disclosures.** To qualify as a "protected disclosure", the information disclosed must, in the reasonable belief of the worker making the disclosure, fall within one of a number of categories of wrongdoing listed in the Act. The disclosure must also be made to one of the people listed in the Act, although the disclosure can be made to another person if other requirements are satisfied.

(a) **Information that can be disclosed.** The information to which the Act applies includes the fact that (i) a criminal offence has been, is being or is likely to be committed, (ii) a person has failed, is failing or is likely to fail to comply with a legal obligation to which they are subject, (iii) the health and safety of any individual has been or is likely to be endangered, (iv) a miscarriage of justice has occurred, is occurring or is likely to occur, or (v) information indicative of any of the listed wrongdoings has been, is being or is likely to be concealed. A recent Employment Appeal Tribunal has interpreted the wrongdoing of failing to comply with a legal obligation widely, finding that it covered breaches of the employment contract. Therefore, if an employee discloses (in accordance with the other requirements of the Act) a breach of their employment contract, then they will be protected from suffering a detriment or being unfairly dismissed.

(b) **Person to whom the information must be disclosed.** The categories listed in the Act include (i) the individual's employer, or, where the conduct relates to another person or to matters for which a person other than the employer is responsible, that other person (ii) the individual's legal adviser in the course of obtaining legal advice and (iii) a large number of public bodies listed in the Public Interest Disclosure (Prescribed Persons) Order 1999 (as amended), such as the Health and Safety Executive in relation to health and safety matters, HMRC in relation to tax and similar matters, and the Pensions Regulator in relation to pension scheme matters. The disclosure can also be made to other individuals if: the worker believes they will be subjected to a detriment if they make a disclosure to their employer or to one of the bodies listed in the Order; or where there is no applicable public body listed in the Order to whom the worker can make the disclosure and they believe that the wrongdoing will be concealed if the disclosure is made to the employer; or the worker has previously made the same disclosure to their employer or to one of the bodies

listed in the Order. Where a worker makes a disclosure on this basis, it must be made in good faith and not for the purposes of personal gain, they must reasonably believe that the information and the allegations are correct and it must be reasonable for the disclosure to be made. Finally, where the wrongdoing is of an “exceptionally serious nature”, the worker can also make a disclosure to other individuals, provided that the disclosure is made in good faith and not for the purposes of personal gain, the worker reasonably believes that the information and the allegations are correct, and that it is reasonable for the disclosure to be made.

19. THE PROTECTION FROM HARASSMENT ACT 1997 ('the Act')

The Act was introduced in 1997 originally to deal with stalkers. It makes it an offence for anyone to pursue a "course of conduct" which causes another person harassment, alarm or distress in circumstances where a reasonable person would feel harassed. "Course of conduct" excludes one off incidents; in order for the Act to apply there must be two or more incidents.

- 19.1 **Liability.** If convicted in the criminal courts of an offence under the Act, a harasser could face imprisonment, a fine and/or a restraining order. A person subject to harassment can also bring a claim in the civil courts for economic losses resulting from the harassment and money to compensate for anxiety caused by the harassment. They can also apply for an injunction to restrain the harasser from pursuing any conduct which amounts to harassment.
- 19.3 **Vicarious Liability.** Employers can be held vicariously liable for acts committed by employees in the course of their employment. An employer will only be liable for civil acts and not criminal acts.
- 19.4 **Impact of the Act on the workplace.** A recent Court of Appeal case determined that the Act is applicable in the workplace. Where one employee is harassing or bullying another, and those acts are closely connected with the harasser's ordinary work duties (e.g. a manager bullying a member of their team when issuing instructions or reviewing work), a 'blameless' employer could be held vicariously liable for those acts and be liable to pay compensation.

E. TERMINATION OF EMPLOYMENT

1. OVERVIEW

Dismissal can give rise to a number of different claims under UK law. The principal claims that may arise on termination of employment are (i) wrongful dismissal; (ii) unfair dismissal; (iii) a claim for a redundancy payment; (iv) a claim arising out of a failure to give written reasons for dismissal; and (v) a claim for discrimination on the grounds of sex, race, disability, sexual orientation, religion or belief .

2. WRONGFUL DISMISSAL

- 2.1 **Nature of claim.** An employee will be able to bring a claim for breach of contract (commonly known as “wrongful dismissal”) if their employer terminates their employment without either giving the appropriate period of notice specified in their contract of employment or making a payment in lieu of notice. Alternatively, a claim for wrongful dismissal may be brought if the employee is employed under a fixed term contract which is terminated prior to the expiry of the fixed term. This type of claim may be brought in either the common law courts (the High Court or County Court) or the Employment Tribunal. The Employment Tribunal can only make awards of compensation for breach of contract of up to £25,000. There is no limit in the common law courts.

- 2.2 **Defences.** The only defences available to the employer are either (a) that proper notice of termination (or payment in lieu) has been given, or (b) that the employer was entitled to dismiss the employee without any notice. The circumstances in which the employer is entitled to terminate without giving notice are sometimes set out in the contract of employment. If not, the employer will need to show that the employee's behaviour amounted to a fundamental breach of their obligations under the contract. Generally, it will be necessary to show that the employee was guilty of gross misconduct or gross negligence.
- 2.3 **Compensation.** If an employee is successful in a wrongful dismissal claim, they will be entitled to compensation equal to the net value of the salary and benefits which they would have received had they been given their full period of notice. However, the employee will be under a common law duty to "mitigate their loss". This means that they must take reasonable steps to look for alternative employment. If they are successful in finding other work during the period which would have represented their notice period (or the unexpired portion of their fixed term contract), then they must give credit to their former employer for any earnings received during that period. If they fail to take reasonable steps to mitigate their loss, the Court may reduce their compensation accordingly.
- 2.4 **Damages for failure to follow disciplinary procedure.** An employee may be entitled to claim additional compensation if the employer fails to follow a contractual disciplinary procedure before dismissing for misconduct or poor performance. If the employer dismisses the employee without following the disciplinary procedure the employee may claim additional compensation equal to the value of their salary and benefits during the period which would have elapsed had the procedure been followed. To succeed with such a claim the employee will need to establish that the disciplinary procedure forms part of their contractual terms. Therefore, it is currently possible to avoid liability for claims of this type by including a statement in the disciplinary procedure to the effect that it is not contractually binding.
- 2.5 **Damages for failure to follow the Statutory Dismissal and Disciplinary Procedure (SDDP).** The employee may decide to bring a wrongful dismissal claim in the Employment Tribunal instead of the common law courts. Consequently, if the employer has failed to follow the SDDP in respect of the dismissal (where no payment in lieu of notice has been made and the employer is not entitled to dismiss without notice), the employee's compensation could be increased by between 10-50%. If the employee has failed to comply with the SDDP, any compensation awarded may be correspondingly reduced (see page 41).
- 2.6 **Garden Leave.** As an alternative to dismissing an employee without notice, an employer may want to put the employee on garden leave. In this situation, the employer requires the employee not to attend work during their notice period, but to remain "on call". However, unless there is an express clause in the employee's contract, an employer may not be able to force the employee to go on garden leave. Recent caselaw has indicated that, in the absence of an express general power to suspend the employee, an employer may be under an implied duty to provide an employee with work if there is work to do and the employee is willing to do it, and if other factors, such as the need for the employee to practise their skills in order to maintain them, point towards this.

3. UNFAIR DISMISSAL

- 3.1 **Entitlement to claim.** In most circumstances only employees with one or more years' continuous employment with the same or an associated employer are entitled to bring claims for unfair dismissal. Until the Age Discrimination legislation came into force the employee had to be under normal retirement age at the date of dismissal. The employee's "normal retirement age" was ascertained from the reasonable expectation of the group of employees holding the same position as the employee at the date of dismissal and if there was no normal retirement age for that group of employees, 65 was the default age. However there is now no restriction. In addition, an employee with less than one year's service will be able to bring an unfair dismissal claim if the dismissal is for a reason related to the employee's trade union membership/activities, is connected with pregnancy or maternity leave, is for a health and safety reason, is because the employee has brought a

statutory claim against the employer (such as a claim for unlawful deduction of wages) or has made a protected disclosure.

3.2 **Constructive dismissal.** Only employees who have been dismissed are entitled to bring a claim for unfair dismissal. However, if an employee resigns in response to a fundamental breach of their contract of employment by their employer they will still be treated as having been dismissed. This is known as constructive dismissal. To establish a constructive dismissal, the employee will need to show that the employer has committed a serious breach of contract, that they resigned in response to that breach and that they did not waive the breach by delaying too long before resigning. Common examples of situations which could give rise to a claim for constructive dismissal are where an employer unilaterally reduces an employee's remuneration package or changes their status.

3.3 **Potentially fair reasons for dismissal.** To defend a claim for unfair dismissal successfully the employer will need to show not only that it had a fair reason for the dismissal but also that it followed a fair procedure before carrying it out. Dismissal procedures are examined at page 26. As to the reason for dismissal, the legislation provides that there are only 5 potentially fair reasons, as follows:-

- (a) Misconduct;
- (b) Poor performance / ill health;
- (c) Redundancy;
- (d) Because it would be illegal to continue to employ the individual in his current capacity (e.g. if a driver is disqualified from driving);
- (e) Some other substantial reason justifying dismissal (e.g. if an employee refuses to accept a necessary change to their terms and conditions of employment).

3.4 **Remedies.** If an unfair dismissal claim succeeds, the Tribunal has a choice of remedies. First, it can order the employer to reinstate the employee to their old position or re-engage them in a comparable position. Such an order will also require the employer to pay the employee's lost earnings between the date of dismissal and the date when the order is complied with. However, in practice, reinstatement/re-engagement orders are rarely made and will only be made where the employee wants it, compliance with the order by the employer is practicable and there was no substantive contributory fault by the employee. Where no re-engagement/reinstatement order is made then a Tribunal will award compensation as follows:

- (a) **Basic Award** – this is calculated in the same way as a statutory redundancy payment and is based on the employee's age, salary and length of service. It is currently subject to a maximum of £9,900;
- (b) **Compensatory Award** – this will be such amount as the Tribunal considers "just and equitable" having regard to the loss suffered by the employee as a consequence of the dismissal. In practice, it is calculated to equate to the employee's loss of earnings arising out of the dismissal (including the value of any loss of benefits). If the employee has not found another job by the time of the Tribunal hearing, the Tribunal will calculate the compensatory award by estimating how long it will take the employee to find another job at a similar salary. The current maximum compensatory award that can be made for most unfair dismissal cases is £63,000 and may include a sum in respect of loss of statutory rights, generally £250. This maximum amount is reviewed each year by the Government with reference to the Retail Prices Index.

- (c) **Additional Award** – in the rare cases where a reinstatement / re-engagement order is made and the employer unreasonably fails to comply with it, the Tribunal can award additional compensation of between 26 and 52 weeks' pay. For these purposes, a "week's pay" is currently capped at £330.
- (d) **Deductions from Compensation.** There are a number of grounds on which the Tribunal may reduce the amount of compensation awarded for unfair dismissal. For example, if the Tribunal considers that the employee was partly to blame for their dismissal, it may reduce the basic and compensatory awards by such proportion as it considers "just and equitable". In appropriate circumstances (such as where the Tribunal is satisfied that the employee was guilty of gross misconduct but the employer failed to follow a fair dismissal procedure) the reduction may be as much as 100%. In addition, if the dismissal is found to be unfair only on procedural grounds, and the Tribunal concludes that there was a chance that the dismissal would have taken place even if a fair procedure had been followed, it may reduce the compensatory award to reflect this. For example, if it considers that there was a 50% chance that the employee would have been dismissed in any event, the compensatory award may be reduced by a similar percentage. A failure to follow an applicable SDDP (or a relevant SGP) on the employer's part could lead to the compensatory award being increased by between 10- 50% (subject to the maximum compensatory award), or reduced by between 10-50% if the failure is on the employee's part. In *Metrobus v Cook* decided in February 2007 the EAT held a 40% uplift was appropriate where a large employer blatantly failed to comply with the minimum procedure.

4. DISMISSAL PROCEDURES

A dismissal can be found to have been unfair purely on the grounds that it was handled unfairly (e.g. because the employer's dismissal procedures were not implemented correctly). Therefore, before dismissing an employee who is eligible to bring a claim for unfair dismissal, it is important that an appropriate dismissal procedure is followed - simply following the SDDP does not necessarily make an unfair dismissal fair. The appropriate procedure will depend on the reason for dismissal. However, it is important to bear in mind that an employee who is unable to bring a claim for unfair dismissal (for example, because they have less than one year's service) may still bring a claim for damages for breach of contract if the employer fails to follow a contractual disciplinary procedure before dismissing. In addition, if an employer has failed to comply with the SDDP, and the employee has more than one years' continuous service, the dismissal will be automatically unfair. In these circumstances, Tribunals will also usually increase the amount of compensation awarded to the employee.

- 4.1 **Misconduct.** If an employer is to dismiss an employee fairly on grounds of misconduct, it must operate a fair disciplinary procedure. This will always involve inviting the employee to a disciplinary interview and giving them an opportunity of answering the allegations made against them. The employee should be given advance notice of the disciplinary hearing and details of the allegations against them as well as the opportunity of being accompanied by either a fellow employee of his choice or a trade union representative. It may be appropriate to suspend the employee from work prior to the disciplinary hearing while an investigation into the allegations against them is carried out, any such suspension will normally be paid. It will be unfair to dismiss an employee for a first offence, unless the incident is serious enough to constitute gross misconduct. In all other cases employees should normally be given warnings before dismissal. There is no specific legal requirement that a certain number of warnings must be given prior to dismissal, but it is common in the UK for employers to have the following stages to a disciplinary procedure – (i) oral warning; (ii) first written warning; (iii) final written warning; (iv) dismissal. Finally, all employees should be given the right to appeal against any disciplinary sanction.
- 4.2 **Poor Performance.** The ACAS Code of Practice recommends that an employee should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been

given. Unless the employee has been guilty of gross negligence (in which case it may be fair to dismiss without any prior warnings) the employer will be expected to follow a procedure similar to the one described in paragraph 4.1 above whereby the employee is given a series of warnings explaining the respects in which their performance is unsatisfactory, the improvement required and the time within which the improvement must be made. The consequences of failing to achieve the required standards within that timeframe should also be made clear. If appropriate, the employee should be given reasonable assistance (such as additional training) to help them achieve the required improvements. Consideration should also be given to whether the employee should be transferred to an alternative position. The employee should be given the opportunity of being accompanied by a fellow employee of their choice or a trade union representative at any meeting which could result in the giving of a formal warning.

- 4.3 **Sickness.** Before dismissing an employee for long-term sickness absence, the employer should investigate the current medical position by either sending the employee to a company nominated doctor or by obtaining a report from the employee's own doctor. If this reveals that the employee will be unable to return to work within a reasonable period of time it may be fair for the employer to dismiss. What is "reasonable" in this context will depend on the nature of the business and the employee's position. For example, a small business will generally not be expected to tolerate as much sickness absence as might a larger organisation. However, before carrying out the dismissal, the employer should consult with the employee regarding the likelihood of the employee returning to work, the employer's intention to dismiss and any alternatives to dismissal (e.g. it may be possible for the employee to return on a part-time basis or carry out different duties). Particular care should be taken if the employee's condition is sufficiently serious to bring them within the definition of a person with a "disability" under the Disability Discrimination Act 1995. In these circumstances, the employer will be under an obligation to make a "reasonable adjustment" to accommodate the employee's disability.
- 4.4 **Redundancy.** A dismissal on the grounds of redundancy may be found to be unfair either as a result of the manner in which employees were selected for redundancy or as a result of the procedure by which the redundancies were put into effect. Dealing with each of these in turn:-
- (a) **Selection** – redundancy selection will be automatically unfair if it is related to certain specified impermissible reasons (e.g. trade union activity, health and safety reasons, maternity related reasons or reasons related to the employee's activities as an employee representative). In any event, to avoid unfair dismissal liability the employer will need to show that its selection criteria were fair and were reasonably applied in the particular circumstances. Selection based purely on the subjective judgment of a manager about who should be made redundant is unlikely to be considered a fair method of selection. Although it is permissible to take performance into account, it is important that this is used in conjunction with other objective criteria (such as length of service, attendance record, disciplinary record and qualifications). It is also important that the criteria used do not operate in a way which is directly or indirectly discriminatory against employees on grounds of their sex, race, disability, religion or belief. For example, in some circumstances, the selection of part-time employees ahead of full-time employees for redundancy may constitute indirect sex discrimination. Ideally, the selection criteria to be used should be agreed with the employees affected or their representatives before the selection process is carried out.
 - (b) **Procedure** – the employer should give as much advance warning of the impending redundancies as is reasonable in the circumstances, and then consult with the individual employees and their representatives (if appropriate). Consideration should be given as to whether employees should be given the opportunity of volunteering for redundancy. It is important that no redundancies are confirmed until this period of consultation has been completed. During the period of consultation, the employer should hold meetings with the individuals affected to explain the basis for their

selection, to allow the employees to challenge their selection and to investigate the possibility of offering the otherwise redundant employees any suitable available vacancies either within the company or within other group companies. The length of the consultation period will depend on the nature of the redundancy exercise and the number of employees affected. As a general rule of thumb, the period of consultation should last between 2 and 4 weeks, with at least 2 meetings taking place with each individual during that period.

The employer must follow the SDDP, as a minimum, for redundancies of less than 20 employees. In the event that the employer proposes to make 20 or more employees redundant at the same establishment within a period of 90 days or less, there are additional statutory obligations to consult with representatives of the employees affected and minimum timescales must be observed.

5. REDUNDANCY PAYMENTS

5.1 **Redundancy Situation.** An employee will be deemed to be dismissed due to redundancy if the dismissal is because the employer closes the business at the location where the employee is employed (known as a “place of work redundancy”) or if it is because the employer needs fewer employees to carry out work of a particular kind (known as a “type of work redundancy”).

5.2 **Statutory Redundancy Payment.** An employee who is dismissed because of redundancy is entitled to receive either the period of notice of termination set out in their contract of employment or a payment in lieu of notice. In addition, if they have more than two complete years’ service at the date of dismissal they will also be entitled to a statutory redundancy payment. Statutory redundancy payments are calculated on a sliding scale based on the employee’s age, length of continuous service and salary. The payment is worked out as a specified multiple of a week’s gross pay for each complete year of service, as follows:

| <u>For each complete year of service when an employee is aged</u> | <u>Multiplier of a week’s pay</u> |
|---|-----------------------------------|
| 18-21 | ½ |
| 22 to 40 | 1 |
| 41 to 65 | 1½ |

For the purposes of calculating statutory redundancy payments the amount of a week’s pay is currently capped at £280 (although this is reviewed each year by the Government). In addition, only a maximum of 20 years’ service can be taken into account. Therefore, the maximum payment is currently £8,400. Statutory redundancy payments may be paid without deducting tax provided that, taken together with other compensation paid in respect of the termination, the total payments to any one employee do not exceed £30,000.

5.3 **Enhanced Redundancy Payments.** Some employers operate enhanced redundancy payment schemes under which redundant employees receive payments in excess of the normal statutory redundancy payments. The calculation of such enhanced redundancy payments will vary from employer to employer.

6. WRITTEN REASONS FOR DISMISSAL

An employee with one or more year’s continuous employment with the same or an associated employer is entitled to ask their employer to provide written reasons for dismissal. These written reasons have to be delivered within 14 days of the request and must be both adequate and accurate. A female employee (regardless of length of service) who is dismissed at any time whilst she is pregnant or on statutory maternity leave should be given written reasons for her dismissal automatically even though she may not have asked for them. The same right is

held by any employee dismissed during ordinary or additional adoption leave. Failure to comply with this requirement renders the employer liable to pay compensation of two weeks' pay.

7. SETTLING EMPLOYEES' CLAIMS ON TERMINATION

If an employee is offered a payment which is more than their statutory and contractual entitlement on the termination of their employment, it is advisable for the employer to make the offer conditional on the employee waiving all claims that they may have arising out of the termination of their employment. Although it is possible for an employee to waive any contractual claims that they may have by simply signing an acknowledgment confirming that they are accepting the termination payment in full and final settlement of any claims, the legislation provides that it is not possible to waive statutory claims (such as a claim for unfair dismissal) in this way. Instead, the only way in which statutory claims may be waived is if the waiver is contained in one of the following types of agreement.

7.1 Compromise Agreements. This is the most common type of agreement entered into when an employee is offered an ex gratia payment on the termination of employment. A recent Court of Appeal decision gave important guidance on the use and effect of compromise agreements. The case held that in order to be effective in settling statutory complaints, the compromise agreement should contain a brief factual description as to the circumstances leading up to the compromise agreement, and also refer to the specific claims being compromised. Further, the waiver in this type of agreement will only be effective if the agreement complies with certain statutory requirements. The most important requirement is that the employee must take advice on the terms and effect of the agreement from an independent legal adviser (who must be identified in the agreement). In addition to the waiver of claims, it is possible to include a variety of other provisions such as a term requiring the employee to maintain confidentiality about the severance terms; a term prohibiting the employee from making critical or derogatory statements about the employer; a term requiring the employer to provide a reference in respect of the employee; and terms imposing restrictions on the activities which the employee can pursue after the termination of employment.

7.2 ACAS Agreements. As an alternative to entering into a compromise agreement, it is possible to negotiate a settlement with the employee using a conciliation officer employed by the Advisory Conciliation and Arbitration Service ("ACAS") who may then record the settlement in an agreement known as a COT3 Agreement. In practice, it is unusual for an ACAS conciliation officer to get involved in settlement negotiations unless the employee actually commences Employment Tribunal proceedings. Therefore, these types of agreement are generally only used if a settlement is achieved after an employee has brought proceedings.

8. ENFORCING POST TERMINATION RESTRICTIONS

Following the termination of employment, there may be circumstances where an employer wants to enforce an ex-employee's post termination restrictions. In order for this to be possible, the obligations must be enforceable in principle and the employer must not have committed any serious breaches of the employee's contract. (If the employer has committed a serious breach of the employee's contract, then the employee will no longer be bound by their obligations under the contract). Often the most effective way of enforcing post-termination restrictions will be for the employer to seek an injunction restraining the employee from breaching the restrictions. In deciding whether to grant an injunction, the court will consider (i) whether there is a triable issue (are the restrictions, in principle, enforceable and does the employee appear to be breaching them?) and (ii) whether the balance of convenience is in favour of granting an injunction (will the employer suffer more harm if the injunction is not granted than the employee will if it is granted).

F. DISCRIMINATION

1. OVERVIEW

The UK now has comprehensive anti-discrimination legislation, which will also soon include age discrimination. The Sex Discrimination Act 1975, The Race Relations Act 1976 and the Disability Discrimination Acts 1995 and 2005 prohibit discrimination on the grounds of sex, race and disability respectively. In addition, the Equal Pay Act 1970 (as amended) provides that an employee can claim equal pay with a comparable employee of the opposite sex. Regulations were also introduced in 2000 prohibiting discrimination against part-time workers and in October 2002 prohibiting discrimination against workers employed on fixed term contracts. Further regulations in December 2003 prevent discrimination on the grounds of both sexual orientation and religion or belief. Legislation to prevent discrimination on the grounds of age will come into force in 2006. The Government has also progressed its plans to set up a single new Commission for Equality and Human Rights. It is anticipated that this will now be up and running in 2007, replacing the existing separate commissions for equal opportunities, racial equality and disability by 2009.

2. SEX DISCRIMINATION

- 2.1 **Direct Discrimination.** The Sex Discrimination Act 1975 prohibits discrimination on the grounds of sex, marital status and the fact that someone has undergone or is intending to undergo gender reassignment. The legislation applies to employees, agency workers and independent contractors (as long as they contract personally to carry out the work) and it forbids discrimination at every stage of the relationship, from the very beginning when vacancies are first advertised, through to dismissal. Since July 2003 it may also apply to certain acts occurring after the employment relationship comes to an end (for example the provision of references). Sexual harassment is now for the first time expressly defined in the legislation as unwanted conduct which, on the grounds of sex, violates dignity or creates a hostile or offensive environment, regardless of whether the conduct itself is of a sexual nature. The motive and intention of the discriminator is irrelevant. However, the legislation does not prohibit certain forms of discrimination where being a man or woman is a “genuine occupational qualification” for the job in question. For example, discrimination will be permitted if the job needs to be carried out by a person of a particular sex to preserve decency or privacy or because the job requires a person of a particular sex to give it authenticity (e.g. an actress or model). An employer is liable for acts of sex discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring.
- 2.2 **Indirect discrimination.** It is also unlawful for employers to indirectly discriminate on the grounds of sex by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular sex or marital status. This prohibition, which was amended by Regulations in October 2001, now extends beyond written rules and regulations to unjustified “practices”. In practice, indirect sex discrimination is most likely to occur if an employer refuses to allow a working mother to work on a part time basis (on the basis that a considerably smaller proportion of women are able to work full time as a result of child care commitments). Unless the employer is able to show objective justification for the requirement or condition, it may be found liable for indirect discrimination. This is in addition to any liability under the Flexible Working Regulations (see page 16) and may be so even if any of the business reasons in those regulations apply.
- 2.3 **Victimisation.** The legislation also prohibits an employer from treating any person less favourably because that person has raised a discrimination complaint in good faith or has assisted another in doing so. For example, dismissing an employee who has brought a discrimination claim or who gives evidence at an Employment Tribunal in support of a discrimination claim brought by a colleague will amount to unlawful victimisation.

- 2.4 **Positive discrimination.** In general, acts of positive sex discrimination are unlawful under UK law. However, positive discrimination by an employer in favour of men or women in affording access to training or in giving encouragement to apply for particular work is permitted if, at any time within the preceding 12 months, there were either no persons of the sex in question doing that work or the number of persons of that sex doing the work was comparatively small.
- 2.5 **Remedies.** Claims for sex discrimination may be made to an Employment Tribunal up to 3 months after the date of the alleged discriminatory act. Unlike claims for unfair dismissal, an individual does not need to have a minimum period of qualifying service to be eligible to bring a claim and if the complaint relates to the recruitment process it can be made by someone who has never actually been employed. In deciding whether to bring a claim, an individual may issue a questionnaire in the prescribed form. Provided certain time limits are complied with, the questionnaire and the employer's responses, may be admissible in evidence before an Employment Tribunal. Once an individual has shown that apparently discriminatory conduct has taken place, the employer must provide an adequate explanation for it. If it does not do so, the Employment Tribunal must uphold the claim of discrimination (unless, in the case of indirect discrimination, the employer can justify the conduct). If a claim is upheld, the Tribunal may make an award of compensation, a declaration of the claimant's rights and/or make a recommendation that the employer takes action to eliminate the discriminatory practice in question. Any award of compensation will cover not only the financial losses caused by the discrimination but also an award for "injury to feelings" which, in exceptional cases, may include aggravated damages. There is no upper limit on the amount of damages that can be awarded, although the Court of Appeal has issued guidelines on the amount which should be awarded for injury to feelings, which should not normally exceed £25,000. The Equal Opportunities Commission also has powers to carry out formal investigations into allegations of discriminatory practices and may issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period.

3. **EQUAL PAY**

- 3.1 **Equal Pay Claims.** The Equal Pay Act 1970 (as amended) provides for equal pay between men and women in the same employment by giving the woman (or man) the right to equality in the terms of their contract of employment where they are employed on like work to that of an employee of the opposite sex, or work rated as equivalent to them or work of equal value to them. The employer can defeat a claim under the Equal Pay Act by proving that the difference between the contractual terms is genuinely due to a material factor other than sex. Details of new procedures for equal value claims are available from the Women and Equality Unit at the DTI.
- 3.2 **Remedies.** An individual is able to bring an equal pay claim to an Employment Tribunal at any time up to 6 months after leaving the employment to which the claim relates. If the claim is successful, equal pay is achieved by raising the pay of the claimant to that of the relevant comparator. This means that any beneficial term which is in the comparator's contract but is missing from the claimant's contract is to be treated as if it is in their contract and/or any term in the claimant's contract which is less favourable than the same term in the comparator's contract is improved so that it is as good. The Tribunal also has power to award compensation for the financial losses suffered by a claimant in the 6 years preceding the date on which the claim is lodged. Employees can use the questionnaire procedure introduced in 2003 to assist them in deciding whether or not they do have a valid claim.

4. **RACE DISCRIMINATION**

- 4.1 **Direct Discrimination.** The Race Relations Act 1976 prohibits discrimination on the grounds of colour, race, nationality or ethnic or national origin. The main provisions of the legislation mirror the corresponding provisions of the Sex Discrimination Act 1975. In particular, the Race Relations Act 1976 contains very similar provisions prohibiting direct discrimination, indirect discrimination, discrimination by way of victimisation and positive discrimination. The "genuine occupational qualification" defence is also available in prescribed circumstances

such as where a person of a particular racial group is required to carry out a job for reasons of authenticity. In July 2003, the Race Relations Act was amended to clarify the definition of racial harassment, which occurs where, on grounds of race or ethnic or national origin, a person engages in unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. An employer is liable for acts of race discrimination carried out by its employees in the course of their employment unless it can show that it took such steps as were reasonably practicable to prevent the discrimination occurring. In practice this means Equal Opportunities/Diversity Training for all staff.

- 4.2 **Indirect Discrimination.** In July 2003, a new definition of indirect discrimination was introduced, which mirrors that contained in the Sex Discrimination Act 1975, and which will apply in many employment situations. It is unlawful for an employer to discriminate indirectly by applying an unjustified provision, criterion or practice which has a disproportionate adverse impact on persons of a particular race or ethnic or national origin when compared to other persons. For example, it may be indirectly discriminatory to insist that a job applicant must be a fluent Japanese speaker unless it can be demonstrated that this is an important requirement of the job (on the basis that a considerably smaller proportion of non-Japanese people will be able to satisfy the requirement of being fluent in Japanese).
- 4.3 **Remedies.** The procedure for bringing a claim for race discrimination and the remedies that are available are very similar to those applicable to sex discrimination (i.e. a declaratory order, an award of compensation or a recommendation that remedial action is taken). In addition, the Commission for Racial Equality has power to carry out investigations into alleged discriminatory practices and to issue a non-discrimination notice requiring an employer to cease the discriminatory practice within a specified period.

5. **DISABILITY DISCRIMINATION**

- 5.1 **Definition of disability.** As of 1st October 2004 the Disability Discrimination Act 1995 (Amendment) Regulations 2003 abolished the small employer's exemption so that it is unlawful for any employer to discriminate against current or prospective workers for a reason related to a past or present disability. A person will have a disability for the purposes of the legislation if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out day to day activities. The effect of an impairment will generally be regarded as "long term" if its effect has lasted or is likely to last for at least 12 months. The impairment must also affect one or more of a number of specified physical or mental faculties (such as mobility, manual dexterity, co-ordination etc). The Government has issued a guidance paper on the matters to be taken into account when determining whether a particular condition falls within the scope of the DDA. Two important changes to the law took effect on 5th December 2005. Firstly people with mental impairments may find it easier to bring claims as their impairment will no longer have to be "clinically well recognized". Secondly, people living with HIV, MS or most forms of cancer will be automatically protected without the need to show any effect on their day to day activities.
- 5.2 **Employers' duties.** The DDA imposes a duty on employers not to treat disabled workers or job applicants less favourably for a reason related to their disability. In certain cases the employer can defend the position if the less favourable treatment is justified. In addition, employers must make reasonable adjustments to their premises or employment arrangements if they substantially disadvantage a disabled worker or job applicant, unless the employer does not know, and cannot reasonably be expected to know, that the worker/applicant is disabled. The sort of adjustments that an employer may be expected to make include making alterations to premises, allocating certain duties to other employees, altering working hours, allowing additional absence for treatment and acquiring or making changes to equipment to accommodate the specific needs of the disabled worker. To determine whether it is reasonable to make a particular adjustment a number of factors can be taken into account including how much the adjustment will cost, the financial resources of

the employer, how easy it is to make the adjustment and how much it will improve the situation.

- 5.3 **Remedies.** The remedies available for disability discrimination are the same as those for sex and race discrimination (see paragraphs 2.5 and 4.3 above). In addition, the Disability Rights Commission has a variety of powers including the power to undertake formal investigations and issue non-discrimination notices. They have also issued a Code of Practice which reflects the law as at 1st October 2004. Copies can be downloaded from their website <http://www.drc-gb.org>.

6. **SEXUAL ORIENTATION DISCRIMINATION**

- 6.1 **Employers' duties.** When the Employment Equality (Sexual Orientation) Regulations 2003 came into force on 1 December 2003, it became unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of their sexual orientation, that is, the fact that they are heterosexual, homosexual or bisexual. Direct and indirect discrimination is defined in similar terms as under the sex and race legislation considered above. It is now also unlawful to subject an employee to harassment or victimisation due to their sexual orientation, or perceived sexual orientation, and in certain circumstances these obligations continue once the employment relationship has ended. There are very limited exceptions contained in the Regulations for cases where there is a genuine occupational requirement for the employee to be of a particular sexual orientation in order to perform the work. ACAS has published useful guidance on the Regulations on its website (see page 45).

- 6.2 **Remedies.** Claims for discrimination or harassment on the grounds of sexual orientation can be made to an Employment Tribunal up to 3 months from the date of the alleged discriminatory act. As with other anti-discrimination legislation, no minimum period of service is required before a claim can be made and remedies are very similar to those applicable for sex discrimination. The Regulations also provide for a questionnaire procedure which may be used by an employee before deciding whether to bring a claim.

7. **DISCRIMINATION ON THE GROUNDS OF RELIGION OR BELIEF**

- 7.1 **Definition of Religion or Belief.** From 2 December 2003, the Employment Equality (Religion or Belief) Regulations 2003 made it unlawful for an employer to discriminate, directly or indirectly, against any worker or job applicant on the grounds of religion or belief. Religion or belief for the purposes of the legislation means any religion, religious belief or similar philosophical belief. This does not include any philosophical or political belief (unless it is similar to religious belief). Case law will develop the definition of what types of belief are, or are not, protected by the Regulations. As with sexual orientation, employees are also protected from being subjected to harassment or victimisation, and continue to enjoy certain protection after the employment relationship ends. Discrimination may be permissible in certain limited circumstances, where there is a genuine occupational requirement for the job to be performed by an employee with a particular religion or belief. ACAS has published useful guidance on the Regulations on its website (see page 45).

- 7.2 **Remedies.** The procedure for bringing claims (including the ability to issue a questionnaire in deciding whether to bring proceedings) and the remedies available are similar to those available for complaints of sexual orientation discrimination.

8. **PART TIME WORKERS**

- 8.1 **Employers' duties.** Part-time workers have a right not to be treated less favourably than comparable full-time workers unless the treatment can be justified on objective grounds. In particular, part-timers should receive the same pay and benefits (such as pension, sick pay, maternity pay, parental leave, holidays and share options) as comparable full-timers, calculated on a pro-rata basis, unless there is objective justification for the different treatment. An individual who previously worked full-time who returns part-time after a period of absence

of less than 12 months (such as sickness or maternity leave) should not be treated less favourably (e.g. in terms of rate of pay and benefits) than they were treated before the period of absence. These Regulations do not give an individual a right to demand part-time work, although an unjustified refusal to allow a woman to work part-time may amount to indirect sex discrimination (see paragraph 2.2 above). Applications for part-time work can, however, be made under the Flexible Working legislation.

- 8.2 **What is part-time?** The legislation does not specify that an individual must work less than a certain number of hours per week to qualify for protection. Instead, the Regulations provide that a part-time employee is anyone who is not a full-time worker, having regard to the employer's custom and practice in relation to workers employed under the same type of contract.
- 8.3 **Remedies.** If a part-time employee considers that they may have been treated less favourably, they may request that the employer provides a written statement within 21 days giving reasons for the treatment. In addition, a part-timer who considers that their employer has acted in breach of the Regulations may present a claim to an Employment Tribunal. If an individual succeeds with a claim, the Employment Tribunal may make a declaration as to the rights of the employee and/or recommend that the employer take remedial action and/or make an award of compensation. Any award of compensation will be what the Employment Tribunal considers "just and equitable" having regard to the infringement and the loss suffered by the individual (such as expenses incurred in consequence of the infringement and the value of any benefit the individual has lost as a result of the infringement). There is no limit to the compensation that may be awarded.

9. **FIXED TERM WORKERS**

- 9.1 **Employers' duties.** Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, fixed-term employees have a right not to be treated less favourably than comparable permanent employees unless the treatment can be justified on objective grounds. The Regulations closely follow those protecting part-time workers described above, and require employers to offer fixed-term employees (i) pay and pensions at least as favourable as that of permanent employees; (ii) equal training opportunities; and (iii) access to employment benefits after the same period of employment as permanent employees. However, unlike the rules applicable to part-time workers, these Regulations specifically provide that a less favourable term in a fixed-term employee's contract will be justified if the overall package is no less favourable. In addition, employers must inform fixed-term employees of any available vacancies to enable them to apply for permanent positions. The Regulations also prevent fixed-term employees (on contracts signed extended or renewed after the Regulations came into force on 1 October 2002) from waiving their right to a redundancy payment.
- 9.2 **Who is a fixed-term employee?** Unlike the regulations protecting part-time workers, these Regulations apply only to employees. Agency workers are specifically excluded. A fixed-term employee is an employee whose contract of employment is for a specific term or which terminates upon the completion of a specified task or upon the occurrence (or non-occurrence) of a specific event. The Regulations provide that an employee will normally be considered a permanent employee after they have been continuously employed on successive fixed-term contracts for four years.
- 9.3 **Who is a comparable permanent employee?** A comparable permanent employee is an individual employed at the same establishment to do broadly similar work as the fixed-term employee. If there is no employee doing similar work at the same establishment, the fixed-term employee may compare themselves to such an employee at another of the employer's establishments.
- 9.4 **Remedies.** As with the Part-Time Workers Regulations, if a fixed-term worker considers that they may have been treated less favourably than a permanent employee, they may request

that their employer provide a written statement within 21 days giving reasons for the treatment. In addition they may present a claim to an Employment Tribunal. If an individual succeeds with a claim the Employment Tribunal may make a declaration as to the rights of the employee and/or recommend that the employer takes remedial action and/or make an award of compensation. Any award of compensation should be what the Tribunal considers "just and equitable" having regard to the infringement and the loss suffered by the individual. There is no limit on the compensation that may be awarded.

10. **AGE DISCRIMINATION**

- 10.1 **When did the law change?** The new laws came into force on 1st October 2006.
- 10.2 **How does the new law work?** The legislation sets a default retirement age of 65, provides employees with a statutory right to apply to stay on beyond that age, abolishes the upper age limit for claiming unfair dismissal and limits the provision of service related pay and benefits. The way in which statutory redundancy pay (and therefore also Employment Tribunal basic awards) are calculated has also been changed.
- 10.3 **Where can I get more information?** Let me know if you would like more information, but summaries of legislation are available on various websites including www.ageconcern.org.uk and the DTI website.

G. **BUSINESS TRANSFERS**

1. **OVERVIEW**

The Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE") contain far-reaching rules for the protection of employees' rights on the transfer of a business. The purpose of TUPE is to give effect to the UK's obligations under EC law to implement EC Council Directive 77/187 (otherwise known as the "Acquired Rights Directive") which is designed to provide protection to employees when the business in which they work is sold or transferred.

The Government introduced a change to TUPE in April 2006, the key elements of which are highlighted in this section.

2. **APPLICATION OF TUPE**

- 2.1 **When does TUPE apply?** TUPE applies to the transfer of a business (or an identifiable part of a business) which is situated in the UK immediately before the transfer.
- 2.2 A TUPE transfer can occur in a wide variety of situations. In practice, the most common situations will be when the assets of a business (or part of a business) are sold or when particular functions (such as catering, security, maintenance, cleaning or distribution) are either outsourced or brought back in-house. TUPE may also apply to second generation contracting out (i.e. when a contract is moved from one contractor to another). TUPE will not apply if the transfer takes the form of a transfer of shares.
- 2.3 **Factors to consider.** In deciding whether there has been a transfer of a business for the purposes of TUPE, the key question is whether the undertaking retains its identity in the hands of the transferee. In answering that question, all the factual circumstances must be considered, but particularly relevant factors include:-
- (a) Whether tangible assets (such as buildings and moveable property) are transferred;
 - (b) The value of intangible assets at the time of the transfer;
 - (c) Whether the majority of the workforce are taken over by the new employer;

- (d) Whether customers are transferred;
- (e) The degree of similarity between the activities carried on before and after the transfer; and
- (f) The period of time (if any) for which the activities of the business are suspended (e.g. where the business is closed for a refit).

The importance of the various factors depends on the nature of the business. For example, the most important factor in relation to labour intensive businesses (such as security firms) will be whether the majority of the workforce has been taken over. In asset intensive businesses (such as bus companies), the key factor will be whether the assets are transferred. In either case, the courts will carefully consider the reason why any assets or staff have not transferred and in particular whether the parties are attempting to circumvent TUPE.

As part of the changes introduced in April 2006, the Government amended TUPE to make it clear that it will apply where there is a “service provision change”, namely where services are contracted out by the client, there is a change of contractor providing services to a particular client or services are brought back in-house. TUPE will only apply in these circumstances, however, if there is an organised grouping the principal purpose of which is to carry out the service activities in question on behalf of the client. The Government is considering whether or not the service provision change provisions will apply to professional services business, such as accountancy firms.

3. EFFECT OF TUPE

3.1 Automatic Transfer of Employment. Where TUPE applies to the transfer of an undertaking from A to B the following implications arise:-

- (a) Individuals who are employed by A immediately before the transfer and who are assigned to the business (or part of the business) that is being transferred will automatically become employees of B from the time of the transfer on the same terms and conditions (save in relation to occupational pension arrangements) that they previously enjoyed with A;
- (b) The exclusion in relation to occupational pension arrangements has limited application and will not apply to matters such as early retirement benefits payable on redundancy which are covered by the terms of the pension scheme. With certain exceptions (such as criminal liabilities), B will inherit A’s rights, powers, duties and liabilities in relation to the transferring individuals (including any liability for personal injury, together with the benefit of the transferor’s employers’ liability compulsory insurance). This means that anything done or omitted to be done by A in relation to those individuals (such as a failure to pay wages) is treated as having been done by B;
- (c) Collective agreements made by or on behalf of A with a trade union recognised by A are inherited by B;
- (d) A and B must inform representatives of their employees who will be affected by the transfer of certain specified matters and, if necessary, consult with the representatives – see paragraph 4.1 below; and
- (e) The dismissal of any employee (whether before or after the transfer) for a reason connected with the transfer may be regarded as automatically unfair (see paragraph 3.2 below).

- 3.2 **Dismissals on a transfer of an undertaking.** TUPE provides that any dismissal (whether by the transferor or the transferee) for a reason which is connected to the transfer will be automatically unfair unless the dismissal is for an “economic, technical or organisational reason entailing changes in the workforce” (“an ETO reason”).
- 3.3 A genuine redundancy situation will generally qualify as an ETO reason, although it should be noted that the dismissal may still be regarded as unfair under the standard unfair dismissal regime .
- 3.4 **Objecting to the transfer.** Employees have a right to object to the transfer of their employment under TUPE by informing either the transferor or transferee. If they do exercise this right then their employment is treated as ending automatically by operation of law and they are not treated as having been dismissed by either the transferor or transferee (and will not therefore be entitled to any notice or severance pay).
- 3.5 **Variation of terms and conditions.** It is common for employers to want to harmonise the terms and conditions of any employees who transfer to them under TUPE with those of its existing workforce. However, such changes are likely to be rendered void where the principal reason for them is the TUPE transfer, unless the employer first terminates the employment and then offers to reemploy on the new terms (which is likely to be unpalatable to employers in most cases).
- 3.6 In practice, it is generally better to delay making any form of material or controversial changes to terms and conditions until there is some appropriate and intervening event, such as a promotion or salary review, which can be put forward as the reason for the change (instead of the TUPE transfer). Even then, it is advisable for employers to proceed with caution as changes have been rendered void even though they were introduced a number of years after a TUPE transfer.
- 3.7 As part of the changes to TUPE it is now clear that changes to contractual terms will not be rendered void where there is an economic, technical or organisational reason entailing changes to the workforce, although it is unclear precisely what is meant by this wording in this context (as opposed to dismissals – see paragraph 3.2). “Permitted variations” are allowed for in insolvency situations – see paragraph 6.4.
- 3.8 **Restrictions on contracting out.** Any agreement to exclude or limit the application of TUPE is invalid.
- 3.9 **Contractual arrangements between the transferor and transferee.** The parties usually enter into an agreement to deal with staff and liabilities which will transfer under TUPE. Normally, the transferor is rendered liable for acts and omissions up to the transfer and the transferee for acts and omissions which arise after the transfer. This will not always be appropriate in situations involving a change of contractor, however, particularly where there is no contractual relationship between the incoming and outgoing contractor. In those circumstances, the incoming contractor will often attempt to render the ultimate client for the services liable for acts and omissions up to transfer.

4. INFORMATION & CONSULTATION REQUIREMENTS

- 4.1 **Information to be provided.** Regulation 10 of TUPE requires the employer of any employees who are affected by a transfer (whether it is the transferor or the transferee) to provide the following information to “appropriate representatives” of the employees affected:-
- (a) The fact that the transfer is to take place, when it is to take place and the reasons for it;
 - (b) The legal, economic and social implications of the transfer for the affected employees;

- (c) The measures which it envisages taking in relation to those employees (or if no measures are envisaged, the fact that there are none); and
- (d) If the employer is the transferor, the measures which the transferee envisages that it will take in relation to those employees who will transfer to it (or if no measures are envisaged, the fact that there are none). TUPE imposes an obligation on the transferee to provide this information to the transferor.

For these purposes “appropriate representatives” are either representatives of an independent trade union recognised by the employer, or if the employer does not recognise a trade union, representatives that have been elected by employees. If there are no existing elected employee representatives with authority to receive information and be consulted on the transfer, the employer will need to conduct an election to elect representatives. The information listed above should be provided to the representatives long enough before the transfer to enable effective consultation to take place.

- 4.2 **Consultation obligations.** If the transferor envisages that it will take “measures” in connection with the transfer in relation to any of its employees affected by the transfer (e.g. redundancies or changes to terms and conditions) it must consult with the appropriate representatives in relation to those measures with a view to seeking their agreement. The transferee has a similar obligation in relation to its employees.
- 4.3 In the course of those consultations the employer must consider and reply to any representations made by the representatives, giving, if appropriate, reasons if it rejects any of them.
- 4.4 **Penalty for failing to inform and consult.** If an employer fails to comply with the obligations described above, either the representatives (or the individual employees if there are no representatives) may present a claim to an Employment Tribunal within 3 months of the transfer taking place. The amount of compensation awarded will be what the Tribunal considers “just and equitable” subject to a maximum of 13 weeks’ pay per employee affected.
- 4.5 There is a limited defence available to an employer if it can show that there were special circumstances (such as an unexpected collapse of a business) which made it not reasonably practicable to comply with its obligations.
- 4.6 Any liability arising out of a failure by the transferor to inform and consult will pass to the transferee under TUPE, although the Government proposes to change this arrangement and render both the transferor and transferee liable where the transferor is at fault.

5. OCCUPATIONAL PENSION ARRANGEMENTS

- 5.1 Even though occupational pension arrangements are excluded from the ambit of TUPE, the transferee has, from April 2005, had to provide transferring employees with pension benefits if they enjoyed such benefits with the transferor. In these circumstances, the transferee has an option as to whether to provide a defined benefit (e.g. final salary) scheme or a defined contribution (e.g. money purchase) scheme.
- 5.2 If the transferee provides a defined contribution scheme (which most transferees are likely to do), it must contribute at a rate which matches the employee’s contribution, up to a maximum of 6% of basic pay.

6. OTHER AMENDMENTS TO TUPE

- 6.1 **Employee liability information** One perhaps unexpected change to TUPE is an obligation on the transferor to notify the transferee of “employee liability information” (which includes

details of any liabilities which may transfer as well as the identity of transferring employees) in good time before the transfer.

- 6.2 A breach of the new obligation will be actionable in the High Court, with the Court being given the power to issue a written penalty notice to the transferor which requires it to pay to the transferee a sum up to £75,000 according to what is just and equitable in all the circumstances.
- 6.3 This change will increase transparency on TUPE transfers, which will be particularly helpful where there is no contractual obligation between the transferor and transferee to disclose relevant information – which is often the case where there is a change of contractors providing services to a client.
- 6.4 **Insolvency situations.** The Government has also limited the liabilities which will transfer in respect of staff formerly employed by insolvent businesses, although this limitation is likely to only apply to entitlements to statutory redundancy payments and payments under the statutory insolvency payment provisions. The new regulations also provide for “permitted variations” to be made to terms and conditions of employment where they are designed to safeguard employment opportunities by ensuring the survival of the business.

H. COLLECTIVE RIGHTS

1. OVERVIEW

The collective rights of employers have been enhanced significantly over the past few years with the introduction of compulsory recognition rights for unions and collective consultation on a transnational basis under the European Works Council Regime. Most recently, the Government has taken steps to introduce the Information and Consultation Directive which greatly improves the information provided to, and the collective bargaining rights of employees (whether or not their workplace has a recognised trade union). These rights are being introduced on a staggered basis with effect from 6 April 2005.

2. TRADE UNION RECOGNITION

- 2.1 **Compulsory Recognition rights.** The compulsory recognition rights introduced by the Employment Relations Act 1999, as updated by the Employment Relations Act 2004, and set out in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 apply as follows:
- (a) to employers which (together with associated employers) employ 21 or more workers; and
 - (b) where:
 - (i) there is no collective agreement already in force under which the union is recognised to conduct collective bargaining; and
 - (ii) there are no competing applications for recognition by other union(s), unless the unions can show that they will co-operate and act together on behalf of all workers if granted recognition.
- 2.2 A union seeking recognition must first make a written recognition request to the employer identifying the bargaining unit (i.e. the group of employees within the company for which the union is seeking recognition for collective bargaining purposes). If the parties reach agreement within 10 working days then the union is deemed to be recognised. If the employer does not accept the request but agrees to negotiate then the parties have a further 20 day period in which to reach agreement. However, if the employer either rejects or fails to respond to the recognition request (or if negotiations break down within the further 20 day period) then the union may make an application to a body called the Central Arbitration

Committee ("CAC") to decide on the appropriate bargaining unit and whether the union has the support of the majority of workers within that unit.

- 2.3 **Applications to the CAC.** If an application is made to the CAC the union will have to demonstrate that its application is "admissible" by showing that at least 10% of the individuals in the bargaining unit are union members and that at least 50% of the workers within the bargaining unit are likely to favour recognition.
- 2.4 If the criteria are fulfilled and the CAC accepts the application, it must try to assist the parties to agree the appropriate bargaining unit within 20 days. In the absence of agreement, the CAC must decide on the appropriate unit. S19B of Schedule A1 requires the CAC to take account of the need for the bargaining unit to be compatible with effective management, and other factors such as existing arrangements and the views of the employer. This now overrides a previous Court of Appeal decision stating that the union's view was in most cases determinative of the issue.
- 2.5 Exactly what happens next depends upon whether the recognized bargaining unit is the same as the proposed bargaining unit, but ultimately the CAC will issue a declaration that the union is recognized if it is satisfied that at least 50% of the individuals in the bargaining unit are members of the union. If it has reason to believe that a significant number of individuals in the bargaining unit do not want the union to conduct collective bargaining on their behalf the CAC will arrange a secret ballot in which the workers will be asked whether they want the union to be recognised.
- 2.6 If a ballot is held and union recognition is supported by a majority of workers voting and at least 40% of the workers within the bargaining unit, then the CAC will issue a declaration that the union is recognised for collective bargaining purposes.
- 2.7 Once a declaration of recognition has been made, the parties will have 30 days in which to negotiate a recognition agreement. If no agreement is reached the parties may apply to the CAC for assistance. If no agreement is reached after a further 20 days then the CAC must specify the method by which the parties will conduct collective bargaining.
- 2.8 **Rights of Trade Union officials.** An employer must allow the trade union's workplace representatives to take reasonable paid time off work to carry out their trade union duties (provided those duties are for certain specified purposes) and to undergo training in respect of those duties (provided that the training is approved by either the relevant trade union or the Trades Union Congress). If a trade union representative considers that they have been unreasonably refused paid time off they may present a claim to an Employment Tribunal.
- 2.9 **Rights of Trade Union members.** Members of a trade union recognised by their employer are entitled to take unpaid time off work during working hours to take part in trade union activities (other than industrial action). In addition, the dismissal of an employee on the grounds of being a trade union member or for taking part in trade union activities is automatically unfair. Action short of dismissal on the grounds of either trade union membership or activity will enable the employee to bring a claim for compensation to an Employment Tribunal. Employees are similarly protected from dismissal and action short of dismissal on the grounds that they are not a member of a trade union or are refusing (or proposing to refuse) to become or remain a member.
3. **CONSULTATION ON COLLECTIVE REDUNDANCIES**
- 3.1 **Consultation obligations.** Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, it must consult "appropriate representatives" of the employees concerned.

- 3.2 Appropriate representatives will be either representatives of an independent trade union recognised by the employer or, if the employer does not recognise a trade union, representatives that have been elected by the affected employees.
- 3.3 Where these obligations arise, employers are required to commence the consultation process "in good time" and, in any event, in accordance with the following timescales:-
- (a) where 100 or more employees are to be made redundant at a single establishment within 90 days or less - at least 90 days before the first dismissal takes effect; or
 - (b) where between 20 and 100 employees are to be made redundant at a single establishment within 90 days or less - at least 30 days before the first dismissal takes effect.

The purpose of consulting is to explore ways of (a) avoiding the redundancy dismissals; (b) reducing the numbers to be dismissed; and (c) mitigating the consequences of the dismissals.

- 3.4 **Information to be provided.** The legislation provides that, for the purposes of the consultation, the employer shall disclose in writing the following information to the appropriate representatives:-
- (a) the reasons for the redundancies;
 - (b) the numbers and descriptions of employees whom it is proposed to make redundant, and the total number of such employees employed at the establishment in question;
 - (c) the proposed method of selecting employees for redundancy; and
 - (d) the proposed method of putting the redundancies into effect, including the timescale and the proposed method of calculating the redundancy payments.

The obligations to inform and consult appropriate representatives arise in relation to each separate establishment at which redundancies are to be made. Therefore where a redundancy programme is likely to affect more than one establishment, the consultation and information obligations apply separately to each such establishment.

- 3.5 **Penalty for failure to inform and consult.** Where an employer has failed to comply with its obligations to inform and consult appropriate representatives, and cannot demonstrate that there were special circumstances justifying such non-compliance (such as an unforeseen collapse of the business), an Employment Tribunal may order the employer to pay a Protective Award in respect of every employee who has been affected by the failure. The Protective Award will be what the Tribunal considers to be just and equitable (subject to a maximum of 90 days' pay per employee affected). Recent case law has suggested that the full amount should be awarded unless there is a good reason not to do so.
- 3.6 **Obligations to notify the DTI.** Employers also have an obligation to complete a Form HR1 and send it to the Department of Trade and Industry (DTI) in advance of collective redundancies. The advance notification periods are the same as the minimum consultation periods referred to in paragraph 3.3 above.
- 3.7 While the DTI must be notified in advance about collective redundancies, there is no requirement to obtain the permission of the DTI in order for the redundancies to be put into effect. However, failure to notify the DTI is a criminal offence and may lead to a fine.

4. CONSULTATION ON BUSINESS TRANSFERS

Under the Transfer of Undertakings (Protection of Employment) Regulations 1981, an employer will be under an obligation to provide certain information to "appropriate representatives" prior to a business transfer and, in certain circumstances, will be obliged to

enter into consultation with those representatives. These obligations are dealt with in more detail on page **30**.

5. CONSULTATION ON HEALTH AND SAFETY ISSUES

- 5.1 **Health and Safety Representatives.** Recognised trade unions have the right to appoint safety representatives from amongst the workforce at a particular establishment. These representatives have wide-ranging functions relating to all health and safety matters. The trade union may also require the employer to establish a committee for the purposes of overseeing health and safety matters.
- 5.2 **Consultation with employee representatives.** If a trade union is not recognised, an employer is obliged to consult with employees directly or with their elected representatives on health and safety matters. Elected representatives are entitled to time off with pay for training and to carry out their duties and are protected against dismissal and victimisation.

6. WORKS COUNCILS

- 6.1 **European Works Councils.** The Transnational Information and Consultation of Employees Regulations 1999 (which came into force on 15 January 2000) implemented the European Works Council Directive in the UK. These Regulations provide that a multinational company which employs at least 1000 employees across the member states and at least 150 employees in each of 2 member states may be required to establish a European Works Council ("EWC") or other suitable procedures for consulting its employees about matters of transnational concern.
- 6.2 The process of establishing an EWC may be triggered by management on its own initiative or by a written request by at least 100 employees (or their representatives) from two or more member states.
- 6.3 The employees are represented in the negotiations by a "special negotiating body" ("SNB") which consists of representatives of employees from all the EEA member states in which the business has operations. The number of representatives for each member state is determined by whatever formula applies in the legislation of the member state where the business's central management is located.
- 6.4 The Regulations are principally concerned with the initial establishment of the SNB, rather than the subsequent negotiations. Details of the EWC agreements are for the most part left for agreement between the parties concerned.
- 6.5 If management refuses to negotiate within 6 months of receiving a valid request to establish an EWC, or if the parties fail to conclude an agreement on transnational information and consultation procedures within 3 years, an EWC must be set up in accordance with the statutory default model. This model sets out requirements concerning the size, establishment and operation of the EWC and list topics on which the EWC has the right to be informed and consulted (e.g. the economic and financial situation of the business, its likely development, probable employment trends, the introduction of new working methods and substantial organisational change).
- 6.6 The Regulations do not apply to employers who put an EWC agreement (which satisfies the relevant conditions) in place voluntarily prior to either 22 September 1996 or 15 December 1999, depending on whether the employer was subject to the original Directive or not.

7. NATIONAL WORKS COUNCILS

- 7.1 The Information and Consultation Directive imposes obligations on employers to inform and consult staff representatives on various aspects of their businesses and management. Non-unionised employers in the UK used not to be obliged to consult with employees on a collective level (other than in relation to collective redundancies, business transfers and health and safety issues). These new obligations apply whether or not the employer recognises a union, and are being introduced in the UK on a staggered basis as follows:

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- (a) Employers with 150 or more employees in undertaking must comply now;
 - (b) Employers with 100 or more employees in undertaking will have to comply from 6 April 2007;
 - (c) Employers with 50 or more employees in undertaking will have to comply from 6 April 2008;
- 7.2 For these purposes, an “undertaking” is “a private or public undertaking carrying on an economic activity in the UK, whether or not operating for gain”. This means most employers.
- 7.3 **Information and Consultation Agreement.** The requirement to inform and consult will not apply automatically. Unless the employer agrees to enter into an information and consultation agreement (“ICA”) voluntarily, it will be triggered only if the employer receives a valid request made by at least 10% of the employees of the undertaking (subject to a minimum of 15 and a maximum of 2500 employees).
- 7.4 Once a request has been made, the employer must, as soon as reasonably practicable, but in any event within a month, initiate negotiations for an ICA (which includes making arrangements for its employees to appoint or elect negotiating representatives).
- 7.5 Negotiations regarding the ICA must be completed within 6 months (or such longer period as may be agreed with the employee representatives).
- 7.6 A negotiated ICA (or entered into on a voluntary basis by the employer) will not be valid unless it:
- (a) sets out the circumstances in which the employer must inform and consult its employees;
 - (b) is in writing, dated and covers all the employees in the undertaking;
 - (c) is approved by 50% or more of all employees (or all the negotiating representatives);
 - (d) is signed on behalf of the employer and either:
 - (i) provides for the election of representatives to whom the undertaking must supply information and with whom the employer must consult; or
 - (ii) provides that the employer will provide information directly to its employees and consult with them directly. This criterion enables employers to avoid the appointment of representatives but instead to inform and consult employees directly via company networks, such as an intranet.
- 7.7 **The default model.** If an ICA is not concluded by the end of the 6 month period, then the standard default model will apply (unless agreement is reached during the intervening period).
- 7.8 The standard default model (which will usually form the basis of the negotiation with the employee representatives) obliges the employer to put in place one elected representative for every 50 employees and to provide the representatives with information on:
- (a) Recent and probable developments in the employer’s activities or economic situation. This includes an obligation on the employer to provide a “state of the nation” report from time to time;

- (b) Probable development of employment including threats to employment. This covers issues such as planned use of temporary workers or consultants and the possibility of redundancies; and
 - (c) Decisions likely to lead to substantial changes in work organisation or contractual relations. This covers strategic and investment decisions that could have consequences in relation to work organisation or contractual relations e.g. outsourcing arrangements or the introduction of new technology on site.
- 7.9 The information above must be given in such a time and manner that will, amongst other things, enable the representatives to conduct an adequate study, and, if necessary, prepare for consultation. In addition, representatives must be consulted about the matters referred to in paragraphs (b) and (c). In the case of information referred to in paragraph (c), the consultation must be undertaken “with a view to reaching agreement on decisions within the scope of the employer’s powers”.
- 7.10 **Complaints.** The CAC will deal with any complaints concerning a failure to comply with a negotiated agreement or the default model. If such a complaint is well founded, the CAC may make a declaration to that effect, and an order requiring the defaulting party to take appropriate action. If the employer does not do so, an application may be made to the Employment Appeal Tribunal (“EAT”) for a penalty notice to be issued. There is a maximum penalty of £75,000. The EAT does not, however, have the power to order any form of injunctive relief to prevent an employer from taking a certain course of action.

USEFUL WEBSITES

GENERAL

<http://www.dti.gov.uk/er> - *Department of Trade & Industry Employment Relations Homepage*

<http://www.tiger.gov.uk> - *TIGER (DTI Tailored Interactive Guidance on Employment Rights)*

<http://www.dwp.gov.uk> - *Department for Work and Pensions*

<http://www.opra.gov.uk> - *Occupational Pensions Regulatory Authority*

<http://www.hse.gov.uk> - *Health & Safety Executive*

<http://www.acas.org.uk> - *Advisory, Conciliation and Arbitration Service*

<http://www.hmrc.gov.uk> – *HM Revenue and Customs*

DISCRIMINATION

<http://www.eoc.org.uk> - *Equal Opportunities Commission*

<http://www.cre.gov.uk> - *Commission for Racial Equality*

<http://www.disability.gov.uk> - *Government Disability Website*

<http://www.drc-gb.org> - *Disability Rights Commission*

DATA PROTECTION

<http://www.informationcommissioner.gov.uk> - *Office of the Information Commissioner*

IMMIGRATION

<http://www.ind.homeoffice.gov.uk> - *Home Office Immigration and Nationality Directorate*

<http://www.workingintheuk.gov.uk> - *Work Permits (UK)*