COLMAN COYLE
Solicitors

An overview of Employment Law in England & Wales

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Sources of Employment Law in England & Wales

There are 3 main sources of Employment Law in England & Wales; the Common Law, Statute and European Law (European Directive and decisions of the European Court of Justice). Obviously when Brexit is implemented, Law will no longer be sourced from Europe but it is expected that the UK will opt to retain European sourced legislation in Domestic Law.

Common Law

All employees work under a contract of employment with their employer. This forms the legal basis of the employment relationship. The contract of employment need not be but is usually recorded in writing. Certain mandatory statutory employment protection rights will apply regardless of the contract provided the employee is based in England or Wales. Additionally, the law of Tort will govern matters such as an employer's liability for acts of its employees and liability for workplace accidents.

Statute

Some of the main employment statutes are:

a) Health and Safety at Work Act 1974;
b) Trade Union and Labour Relation (Consolidation) Act 1992;
c) Employment Tribunal Act 1996;
d) Employment Rights Act 1996;
e) Public Interest Disclosure Act 1998;
f) Data Protection Act 1998;
g) National Minimum Wage Act 1998;
h) Human Rights Act 1998;
i) Employment Relations Act 1999;
j) Employment Act 2002;
k) Employment Relations Act 2004;
l) Equality Act 2010.

Different Types of Work in England & Wales

There are three main categories of work in the UK:

a) Self employed or independent contractors;
b) Agency workers or temps; and
c) Employees.

Each category has different employment protection rights.

Self Employed/ Independent Contractors

A self employed or independent contractor is in business on their own account and responsible for making their own decisions as to how the job is performed. In this case, the employer is freed from most statutory protection legislation including the right not to be unfairly dismissed but not the right to be discriminated against. If an employee is an independent contractor rather than an employee, this needs to be made clear in the contract. It is also important that the relationship is performed in accordance with the contract. An independent contractor is expected not to be controlled by the "end user" and must have freedom in how they perform their duties or else the Employment Tribunal could find that they are actually an employee rather than an independent contractor.

Agency Workers

This is where workers are employed or engaged by an employment agency which then supplies their services to the hirer. Although the hirer will still owe statutory duties (e.g. not to discriminate and health and safety duties), it will not owe the agency worker many of the employment protection rights enjoyed by employees. Agency workers are usually used for temporary engagements but sometimes those engagements can last several months or even years. It is possible that in a lengthy engagement of an agency worker that they could have become an employee if a Court of Tribunal finds evidence of an employment relationship subsisting between

the parties. In these cases, agency workers may be able to claim employment rights. Therefore, agency workers should only be used for temporary and very short term assignments if possible.

Employees

The majority of workers in England & Wales are employees of the company to which they provide their services. Statutory employment protection legislation applies to all employees. As long as they satisfy the relevant qualifying conditions, employees have greater statutory employment rights than independent contractors and agency workers. After having been employed for 2 years, an employee will benefit from the right not to be unfairly dismissed.

Workers

This is a relatively new concept in English law and derives from European Law. Broadly, a worker is someone who works under an employment contract *or some other contract under which they agree to provide services personally.* This means that for certain statutory purposes, an independent contractor may qualify as a worker. Workers have fewer rights than employees benefit from, for example, rights relating to the number of hours they work (Working Time Regulations), the amount of annual leave they can take and the amount they are paid.

Employment disputes in England & Wales

There are three forums which can decide legal disputes between an employee/worker etc. and whoever "employs" them; Employment Tribunals, the Common Law Courts (High Court or County Court) and the arbitration scheme operated by the advisory conciliation and arbitration service "ACAS"

Employment Tribunals

These are specialist employment Courts. They deal mainly with the claims brought under employment protection legislation such as unfair dismissal and discrimination. They also have jurisdictions to hear contractual claims subject to a maximum of £25,000 provided the claim arises from or is outstanding on the termination of the employment. Employment Tribunals are

comprised of three members; an Employment Judge (who is usually a solicitor with experience in Employment Law); and two Lay Members, one with a trade union background and one with a HR/Management background.

High Court/ County Court

An employee, who wishes to bring a contract claim such as unpaid notice pay or bonus, can pursue it in the common law courts, either the High Court or County Court instead of an Employment Tribunal. Usually, a successful party can recover their costs from the unsuccessful party in the Courts which they cannot do as a matter of course in the Employment Tribunal.

ACAS Arbitration Scheme

This is a voluntary scheme intended to provide a quick and cost effective alternative to the Employment Tribunal. It is only available for the resolution straight forward unfair dismissal complaints. Both parties must agree to opt for the scheme.

Rights during employment

Overview

The parties to an employment contract are entitled to agree such terms as they want. However, legislation has been introduced which requires employees to observe certain minimum requirements. In particular, regulations regulate the number of hours employees can be asked to work and provide for the 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. Also, legislation guarantees a minimum hourly rate for all workers aged 16 and over.

Maximum working hours

The Working Time Regulations 1998 state that employers must take all reasonable steps to ensure that workers do not work more than an average of 48 hours in each week. Employers must retain records for 2 years to show compliance with these provisions. Workers may opt out of the 48 hour

weekly limit by written agreement with their employers. This can be included in the employment contract.

National Minimum Wage

Most employees are entitled to a minimum gross hourly wage. The rate is usually increased annually. The current national minimum wage is £4.05 per hour for employees under 18; £5.60 for employees aged 18 – 20, £7.05 per hour for employees aged 21 – 24 and £7.50 per hour for employees aged 25 and over.

Itemised pay statements

All employees must be provided with an itemised pay statement at or before payment is made setting out the gross amount of wages, the amounts of any deductions (such as for tax and national insurance contributions) and the net wages payable.

Deductions from wages

Subject to certain exceptions (such as where 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 of the worker has given their prior written consent to the deductions.

Automatic pension enrolment

Employers are required to automatically enrol most of their employees into workplace pension schemes.

Retirement

There is no default retirement age. Any dismissal because of age will constitute direct age discrimination under the Equality Act 2010. Employees are entitled to work beyond their 65th birthday as normal and employment can only be terminated if there is a sound and fair reason for doing so.

Holidays

Employees and agency workers have a statutory right to a minimum of 5.6 weeks annual paid holiday. Public and bank holidays may count towards this entitlement.

Sick pay

All employees are entitled to receive statutory sick pay for days in which they are unable to work due to sickness. The rules are complex buy usually there is a maximum entitlement of 28 weeks of statutory sick pay in any period of incapacity for work. Employees are not entitled to receive statutory sick pay for the first 3 days of any period of absence. An employer may, if they wish, operate a contractual sick pay scheme whereby employees are paid their full salary for a specified number of days sickness absence per year.

Maternity Leave

This area of law is extremely complex. Broadly, all pregnant employees are entitled to 26 weeks ordinary maternity leave which can be taken at any time from 11th week before the expected week of child birth followed by a further 26 weeks additional maternity leave which must start immediately after the end of ordinary maternity leave. All contractual benefits and non contractual benefits connected with the employment (except wages or salary), continue to be payable throughout both ordinary and additional maternity leave. As far as pay is concerned, employees who have at least 26 weeks continuous services up to the qualifying week are entitled to statutory maternity pay. For the first 6 weeks this is paid at 90% of the employee's normal weekly pay and the remaining 33 weeks are paid at a flat rate which is set by the government and which varies from year to year. A pregnant employee also has the right to return to her old job on completing maternity leave.

Paternity Leave

Again, this is complex but broadly speaking, employees of 26 weeks service and over, who are expected to have responsibility for the child's upbringing and are the biological father or the

mother's husband or partner (or in the case of adoption, the spouse or partner of the adopter) have the right to take paternity leave.

Flexible Working

All employees have the right to request flexible working. Employees must have worked for the same employer for at least 26 weeks to be eligible. Employers must deal with requests in a "reasonable manner". Generally speaking, an employer can only refuse requests for flexible working if there is a business reason for doing so. The reason must be from the following list.

a) The burden of additional cost;
b) An inability to reorganise work amongst existing staff;
c) An inability to recruit additional staff;
d) A detrimental impact on quality;
e) The detrimental impact on performance;
f) The detrimental effect on ability to meet customer demand;
g) Insufficient work for the periods the employee proposed to work;
h) A planned structural change to the business.

Disciplinary and Grievance Procedures

When conducting disciplinaries and grievances, employers and employees must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If an employer reasonably fails to comply with the code the Tribunal will have the power to increase any awards it makes by up to 25%. The Code recommends that all employers should draw up their own disciplinary rules together with a procedure for dealing with grievances. It says that employees should be provided with details of the allegations that have been made against them in advance of any disciplinary hearing and should be given the opportunity to challenge the allegations and evidence before a decision is taken. The code also recommends that an employee should be given a right of appeal against any decision taken. There is also a statutory right to invite employees to be accompanied by a workplace colleague or trade union representative to any disciplinary hearing. If an employee is dismissed without the employer having reasonable grounds for doing so, then he or she will

have a claim for unfair dismissal which can be brought before an Employment Tribunal if there is more than 2 years continuous service with the employer. This is a massive topic in its own right with a complex amount of case law. Broadly speaking, an employee who is found to be unfairly dismissed will be entitled to receive compensation from the Employment Tribunal. This compensation is comprised of a "basic award" which is current maximum amount of £14,370 (dependant on the employee's age and length of service) and a compensatory award which is currently capped at £78,962. These amounts increase annually. In addition, if there is some "aggravating factor" in the dismissal (such as discrimination), then the cap of £78,962 on the unfair dismissal compensatory award is lifted but the Tribunal can award more if it considers it just to do so. An employee who has been discriminated against is also entitled to an award for injury to feelings (more on this later).

Health and Safety of Employees

An employer is under a duty to take reasonable care for the safety of its employees. The employer's obligation is to provide a safe place of work, a safe means of access to the place of work, a safe system of work, adequate equipment and materials, employ competent fellow employees and protect employees from unnecessary risk of injury. This duty to take reasonable care also extends to preventing psychological as well as physical harm. That means an employer must take reasonable precaution to protect employees against stress and other types of psychological injury in the workplace.

Termination of Employment

The ties in with the paragraph above on unfair dismissal because if an employee's employment is not terminated fairly, then they will have a claim of unfair dismissal. Employees who have been employed for more than 2 years have a right to make a claim of unfair 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 that it also followed a fair procedure before carrying it out (i.e. the ACAS code on dismissals). There are only 5 potentially fair reasons for dismissal:

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

Particular difficulties are caused in respect of dismissals for poor performances and sickness.

In the case of poor performance, the ACAS Code of Practice recommends that an employee should not normally be dismissed because of failure to perform to the required standard unless warnings and an opportunity to improve had been given. An exception to this is where the employee has been guilty of a gross negligence.

In respect of 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 the medical evidence 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.

With respects to dismissals on the grounds of redundancy, these may still 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 which the redundancies were put into effect. For instance, redundancy selection will be automatically unfair if it is related to certain specified impermissible reasons (such as trade union activity, health and safety reasons, maternity related reasons or on the grounds of discrimination). To avoid unfair dismissal liability, the employer will need to show that its selection criteria were fair and were reasonably applied. In terms of procedure, an employer should give as much advance warning of any pending redundancies as is reasonable and then consult with the

original employee about the proposed redundancy. Consideration should be given as to whether employees should be allowed the opportunity of volunteering for a redundancy. It is important that no redundancies are confirmed until the period of consultation has been completed. During the consultation, the employer should hold meetings with the individuals affected to explain the basis for their redundancy and to allow the employee to challenge the redundancy and to investigate the possibility of offering any suitable alternative vacancies if such exist. It is also important to note that if an employer proposes to make 20 or more employees redundant at the same establishment within a period of 90 days or less, then there is a statutory obligation to collectively consult with representatives of the employee's affected and minimal timescales that must be observed.

If an employee is redundant then they will be entitled to a statutory redundancy payment up to a current maximum of £14,370 dependant on the employee's age and length of service.

Settling employees' claims on termination

If an employee is offered a payment to terminate their employment which is more than their statutory and contractual entitlement on the termination, it is advisable for the employer to make the offer conditional on the employee waiving all claims that they may have against the employer. To be binding, the employer and the employee have to enter into a settlement agreement which is then signed by a solicitor on behalf of the employee.

Discrimination

This is a massive topic. The Equality Act 2010 states that it is unlawful to discriminate against employees or workers who share "key characteristics". These key characteristics (known as "protected characteristics") state that it is unlawful to directly or indirectly discriminate on the basis of race, sex, disability, sexual orientation, religion or belief, age, against fixed term employees and against part-time workers.

This is a massive and highly complex topic in its own right. Many Employment Tribunal claims involve allegations of discrimination as well as unfair dismissal.

Business Transfers

The Transfer of undertakings (Protection of Employment Regulation 2006 "TUPE") contains far reaching rules of the protection of the employee's rights on the transfer of business. In the event that a business or undertaking this transferred from one party to another, then the employees will transfer automatically together with associated liabilities. TUPE gives rise to certain obligations to inform and consult and to provide employment information for which there are penalties for non-compliance. Employees are also given enhanced protection in the event that they are dismissed or an attempt to vary their terms and conditions on a business transfer.

If you require further information on the topics mentioned please contact our Company Commercial department

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