House of Commons Library

Research Briefing

By Patrick Brione

27 September 2022

Key Employment Rights

Contributing Authors
Doug Pyper

Disclaimer
The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing 'Legal help: where to go and how to pay' for further information about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Feedback
Every effort is made to ensure that the information contained in these publicly available briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

Contents

Summary

Current statutory employment rights in the UK stem from a variety of legislation, mostly a series of Acts and Regulations passed in the 1990s and early 2000s – chief among which is the Employment Rights Act 1996. Other key pieces of legislation are the Equality Act 2010, the Employment Relations Act 1999 and the Trade Union and Labour Relations (Consolidation) Act 1992.

The enforcement of most rights relies on affected employees to bring a claim before an employment tribunal. Three of the most common rights about which tribunal cases are brought relate to unfair dismissal, unauthorised deduction from wages and working time.

Unfair dismissal

Part 10 of the Employment Rights Act 1996 provides employees with the right not to be unfairly dismissed. In most cases the employee must have two years' continuous service with their employer to qualify to bring a claim.

Broadly, it is for the employer to show that the dismissal was for a potentially fair reason (capability or qualifications, conduct, redundancy, statutory restriction of employment or some other substantial reason justifying dismissal). Once the employer has shown that (which it often easily does), the fairness of the dismissal depends on whether, in the circumstances, the employer had acted reasonably in treating the reason as sufficient for dismissing the employee.

In assessing this, tribunals will look to whether the employer's conduct in dismissing the employee fell within the range of reasonable responses to the reason for dismissal. The tribunal will also assess whether the employer followed a fair procedure, often by reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

There are many types of dismissal deemed automatically unfair. For example, dismissal for union membership, for asserting statutory rights or for family-leave related reasons. Many, although not all, of these reasons are set out in Part 10 of the Employment Rights Act 1996 and are discussed in more detail in other sections of this paper.

Deduction from wages

Section 13(1) of the Employment Rights Act 1996 provides that an employer cannot lawfully make deductions from wages unless entitled to by the contract of employment, statute or because the worker has previously consented in writing to the deduction.

This restriction does not apply to certain deductions, including for taxes, reimbursing the employer for expenses or overpayments, or because of a worker's participation in industrial action or a statutory disciplinary proceeding.

The definition of wages used is broad, including holiday pay, statutory sickness or leave pay, bonuses and commission, but excluding expenses, pensions and redundancy pay.

If an employer makes an unauthorised deduction from wages the employee may complain to an employment tribunal. The claim must be brought within three months of the failure to pay the wages. Where a series of deductions occurs, the time limit runs from the last deduction in the series.

Working time

Subject to various qualifications discussed below, the Working Time Regulations 1998 limit average working time to 48 hours per week and eight hours per night for night workers and entitle workers to:

- a daily rest period of eleven hours in each 24-hour period;
- a weekly rest period of 24 hours in each seven-day period;
- a 20-minute rest break once daily working time exceeds six hours; and
- 5.6 weeks' annual leave

These implement EU law on working time consolidated in Directive 2003/88/EC (the 'Working Time Directive'). The Regulations set limits on weekly working time and night work, and provide rights to rest periods and breaks. Since the UK's departure from the European Union, these regulations form part of retained EU law.

"Working time" is defined under the Regulations as including any period during which the worker is working, at the employer's disposal and carrying out their activity or duties, or undertaking certain types of work-related training. Employment contracts or collective/workforce agreements may specify additional types of working time for the purposes of the Regulations.

These regulations do not apply to certain seafarers, transport workers or emergency services.

The 48 hour weekly working limit does not apply where an employer has obtained a worker's agreement in writing to "opt-out" of it. This may relate to a specific period or apply indefinitely. Unless the agreement provides otherwise, it is terminable by the worker if they give at least seven days' written notice (any otherwise agreed notice period cannot exceed three months). Workers cannot be subjected to detriment or dismissal for refusing to enter into or continue such an opt-out – any such dismissal is automatically unfair.

The Government has published guidance on calculating working time, including information on which hours count as working time.

Other issues

In addition to these three issues, this briefing also includes discussion of other key employment law issues such as:

- Agency Workers
- Bullying
- Disciplinary and grievance
- Equality and discrimination
- Family-related leave
- Flexible working
- Holiday
- Industrial action
- National Minimum Wage
- Redundancy
- Statement of initial employment particulars
- Statutory Sick Pay
- Transfer of undertakings & protection of employment
- Variation of contract
- Whistleblowing

1 Introduction

Some of the rights are available only to "**employees**", and some to "**workers**". The difference between these two categories of individual is complex and beyond the scope of this briefing (it is discussed in the Library briefing on Employment status).[1] Where relevant, the summary boxes in the sections of this paper highlight whether a right is available to employees or workers.

Some rights have **qualifying periods**. For example, the right not to be unfairly dismissed is available only to employees who have at least two years qualifying service, with some exceptions for cases of automatically unfair reasons for dismissal.

In most cases the primary means of enforcing an employment right is by the workers themselves bringing a claim before an employment tribunal. There is a **strict three-month** time limit for doing this which is waived only in exceptional circumstances. Only for a small number of rights, such as payment of the National Minimum Wage, is there any state-led enforcement.

1.1 Northern Ireland

This paper covers employment law as it applies across Great Britain (England, Scotland and Wales). Employment law in Northern Ireland is a devolved matter; while in practice most employment rights in Northern Ireland are similar to those in Great Britain, devolution has led to divergence in some areas.

This paper should therefore not be taken as an accurate guide to the law as it applies in Northern Ireland – for questions about employment rights in Northern Ireland please refer to guidance on Key differences in employment law between NI and GB from the Labour Relations Agency of Northern Ireland. Alternatively MPs and their staff can contact the House of Commons Library with a bespoke request.

1.2 Further information

Two general other sources of advice are worth highlighting:

[1] Employment status, Commons Library Briefing, CBP-8045

- the Advisory, Conciliation and Arbitration Service is the principal statutory body charged with providing guidance on employment law; it operates a free helpline for both employers and employees; and

- the Equality Advisory and Support Service (EASS) can advise workers on the application of the Equality Act 2010 – see their About us page for an overview of the assistance EASS provides, and their contact details to get in touch.

2 Agency Workers

Summary

After 12 weeks agency workers become entitled to the same basic terms of employment as permanent workers.

2.1 Rights after 12 weeks

Once an agency worker has been on assignment in the same role for the same hirer for a period of 12 continuous calendar weeks they become entitled to the same basic terms of employment as if they had been directly recruited by the hirer. The right is provided by the Agency Workers Regulations 2010 (SI 2010/93), which implement EU Directive 2008/104/EC.

The basic working and employment conditions for these purposes are the "relevant terms and conditions" [2] that the hirer would normally include in a contract for a comparable employee (defined as an employee under the supervision and direction of the hirer; engaged in the same or broadly similar work; and, if possible, who works or is based at the same establishment as the agency worker).

Regulations 5 and 6 provide that "relevant terms and conditions" means those relating to:

- pay;
- the duration of working time;
- night work;
- rest periods;
- rest breaks; and
- annual leave.[3]

The right to the same pay does not include rights to all the same payments or rewards. For example, the following are excluded: occupational sick pay;

2 Agency Workers Regulations 2010, Regulation 6
3 Agency Workers Regulations 2010, Regulations 5-6

pension or retirement benefits; maternity, paternity or adoption leave; and redundancy pay.[4]

Additionally, and not subject to the 12-week qualifying period, agency workers are entitled to access the same collective facilities and amenities (e.g. canteen) as comparable workers, and have the right to be informed by the hirer of any relevant vacant posts.[5] The hirer must also give agency workers the same opportunities as comparable workers to find permanent employment with the hirer.[6]

2.2 Remedies

An agency worker may complain to an employment tribunal if an agency/hirer has infringed their rights under the Regulations. If the agency worker suspects infringement has occurred, they may request from the hirer/agency written information relating to their treatment, which must be provided within 28 days (regulation 16). Regulation 17 provides unfair dismissal rights for workers classed as "employees" who are dismissed for asserting rights under the Regulations.[7]

4 Agency Workers Regulations 2010, regulation 6(2)-(3)
5 Agency Workers Regulations 2010, regulations 12-13
6 Agency Workers Regulations 2010, regulation 13(1)
7 Agency Workers Regulations 2010, regulation 17

3 Blacklisting

Summary

A "blacklist" is a list containing details of persons who have engaged in union activities or membership, compiled to facilitate employment-related discrimination.

If an employer refuses to employ a person or subjects a worker to detriment for a reason related to a blacklist, the person/worker may complain to an employment tribunal.

If the tribunal finds the Regulations have been contravened it may order compensation of between £5,000 and £65,300.

For a full discussion of the relevant law and policy, see the Library's briefing paper on blacklisting.[8]

The Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493) prohibit the compilation, use, sale or supply of trade union blacklists.[9]

Blacklists are referred to in the Regulations as "prohibited lists", defined in regulation 3(2). Prohibited lists are those that contain details of persons who are/have been members of trade unions or who are taking part/have taken part in the activities of trade unions, which are compiled with a view to being used by employers or employment agencies to discriminate in relation to recruitment or treatment. [10]

Regulations 5-6 make it unlawful to refuse to employ a person, or subject a worker to any detriment, or for an employment agency to refuse an individual any of its services, for a reason related to a prohibited list.[11]

The general prohibition is subject to regulation 4, which identifies circumstances in which a person does not contravene the prohibition (e.g. the person does not know they are supplying a prohibited list or the list is used in relation to trade union appointments).

8 Trade unions: blacklisting, Commons Library Briefing, SN6819, February 2015
9 Employment Relations Act 1999 (Blacklists) Regulations 2010, regulation 3(1)
10 Employment Relations Act 1999 (Blacklists) Regulations 2010, regulation 3(2)
11 Employment Relations Act 1999 (Blacklists) Regulations 2010, regulations 5-6

3.1 Remedies

If an employer/agency refuses to employ a person for a discriminatory reason related to a prohibited list, that person may complain to an employment tribunal, which may order compensation of between £5,000 and £65,300, and/or recommend action to reduce the adverse effect on the complainant.[12]

An employee dismissed for a discriminatory reason related to a prohibited list may be regarded as unfairly dismissed.[13]

[12] Employment Relations Act 1999 (Blacklists) Regulations 2010, regulation 8(1)
[13] Employment Relations Act 1999 (Blacklists) Regulations 2010, regulation 12

4 Bullying

Summary

Employers must take reasonable steps to ensure the health, safety and welfare of their employees, and have a common law duty to take reasonable steps to protect them from harm.

Bullying amounting to harassment may be a criminal offence. Discriminatory harassment is unlawful under the Equality Act 2010.

There is no specific law targeted at addressing workplace bullying, but the following areas of law are relevant: health and safety; the law of negligence; criminal law; and equality law. The following summarises in turn the relevance of each.

Section 2 of the Health and Safety at Work etc. Act 1974 provides that:

> It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.[16]

Employers must assess risks to employees and take measures to safeguard their health and safety.[17] The Health and Safety Executive has published a guide for employers [PDF] on the application of the Act to violence at work.[18]

Employers also owe their employees a common law duty to take reasonable steps to protect them from foreseeable harm to their physical or mental health. An employer who negligently breaches this duty may be liable for any resulting physical or psychological injury caused to an employee.

If bullying amounts to a course of conduct constituting harassment as defined in the Protection from Harassment

Acas has published guidance on workplace bullying and harassment.

See here for guidance aimed at employees.[14]

See here for guidance aimed at managers and employers.[15]

14 Acas, If you're treated unfairly at work, [accessed 16 August 2022]
15 Acas, Handling a bullying, harassment or discrimination complaint at work, 18 November 2021
16 Health and Safety at Work etc. Act 1974, section 2
17 Management of Health and Safety at Work Regulations 1999 (SI 1999/3242)
18 HSE, Violence at work [PDF], 2006

Act 1997, the employer may be vicariously liable for that harassment if committed by an employee in the course of their employment. Harassment is not defined by the Act, but given its ordinary meaning by reference to what a reasonable person would think.

If an employee's bullying behaviour amounts to harassment under the Equality Act 2010, the employer may also be vicariously liable. Section 26 defines harassment as engaging in unwanted conduct related to a "protected characteristic" which has the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.[19] The protected characteristics are set out in section 4 of the Act and include, for example, sex, race and disability (see below section on 'Equality'). [20]

[19] Equality Act 2010, section 26
[20] Equality Act 2010, section 4

5 Criminal convictions

Summary

Prospective or current employees are not generally required to disclose details of criminal convictions provided these are "spent". There are exceptions to this for certain professions.

For a fuller discussion of the relevant law, see the Library's briefings on the Rehabilitation of Offenders Act 1974[21] and on the retention and disclosure of criminal records.[22]

If a conviction is spent under the Rehabilitation of Offenders Act 1974, an employer's question about previous convictions (e.g. at interview) may be answered on the basis that it does not relate to spent convictions.[23] If a conviction is not spent, failure to disclose details of it could provide grounds for refusing employment or a potentially fair reason for dismissing a current employee.

Aside from a range of serious offences, convictions become spent after the end of the applicable rehabilitation period.[24] The Government has published guidance on rehabilitation periods and the 1974 Act.[25]

The serious offences that never become spent are:

- a sentence of imprisonment or custody for life;
- a sentence of imprisonment, youth custody, detention in a young offender institution or corrective training for a term exceeding 48 months;
- a sentence of preventive detention;
- a sentence of detention during Her Majesty's pleasure or for life under specified Acts (certain young offenders convicted of grave crimes or children convicted on indictment); and

21 The Rehabilitation of Offenders Act 1974, Commons Library Briefing, SN1841, February 2021
22 The retention and disclosure of criminal records, Commons Library Briefing, SN6441, February 2021
23 Rehabilitation of Offenders Act 1974, section 4(2)(b)
24 Rehabilitation of Offenders Act 1974, section 5(2)
25 MoJ, Guidance on the Rehabilitation of Offenders Act 1974 and Exceptions Order 1975, November 2020

- a sentence of imprisonment or detention for public protection, or an extended sentence for certain violent or sexual offences.[26]

5.1 Exceptions

The 1974 Act's provisions excusing disclosure of spent convictions do not apply to a number of professions or types of work specified in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023), as amended. The excepted positions generally involve positions of trust, e.g. doctors, lawyers and accountants. In Scotland the 1974 Act functions slightly differently and exceptions are instead governed by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (SI 2013/50)

Safeguarding of vulnerable groups

Work with children or vulnerable adults is treated as an exception where it meets the definition of "regulated activity" under the Safeguarding Vulnerable Groups Act 2006 in England & Wales or the Protection of Vulnerable Groups (Scotland) Act 2007 in Scotland (e.g. regular unsupervised teaching of children or personal care for vulnerable adults). Certain offences legally prevent a person from work in regulated activity.[27]

A regulated activity provider must ensure that a person is not barred from the activity in question before permitting them to engage in it.[28] They do this by applying for an enhanced Disclosure and Barring Service (DBS) check, which checks the barred lists and reveals details of spent and unspent convictions, together with non-conviction information, held by the local police and considered to be relevant to the role (e.g. allegations of abuse).

5.2 Disclosure and Barring Service checks

If an employer applies for a DBS check it will ask the job applicant to complete a form and provide proof of identity, then send the completed form to the DBS; the DBS will send the certificate to the job applicant; and the employer can then ask to see it. The DBS eligibility guidance on Gov.uk provides a detailed overview of the process and which occupations are eligible for basic, standard or enhanced DBS checks.[29]

---

26 Rehabilitation of Offenders Act 1974, section 5(1)

27 See: DBS referrals guide: A table of relevant offences in England, Wales, Scotland and Northern Ireland, September 2014

28 Safeguarding Vulnerable Groups Act 2006, section 34ZA(1)

29 DBS eligibility guidance, Gov.uk, 17 September 2018

6 Deduction from wages

Summary

If an employer makes an unauthorised deduction from a worker's wages, the worker may complain to an employment tribunal.

The tribunal can order repayment and the employer will lose the right to make the deduction in an authorised manner.

Where an employer has made a series of deductions from wages, the worker's ability to claim backdated pay is in most cases limited to two years' pay.

Section 13(1) of the Employment Rights Act 1996 provides that an employer cannot lawfully make deductions from wages unless entitled to by the contract of employment, statute or because the worker has previously consented in writing to the deduction.

Section 13 does not apply to a deduction if:

- its purpose is to reimburse the employer in respect of an overpayment of wages or expenses;
- it is in consequence of statutory disciplinary proceedings;
- the deduction is pursuant to the employer's statutory requirement to pay a public authority (e.g. tax);
- the deduction is for payment to third parties (e.g. trade unions) where the worker has agreed to this in writing or contractually;
- the deduction is made by the employer on account of the worker's participation in a strike or other industrial action; or
- the purpose of the deduction is the satisfaction of an order of a court or tribunal, provided the worker has agreed to this in writing.[30]

[30] Employment Rights Act 1996, section 14

6.1 Definition of wages

Section 27 of the 1996 Act defines "wages" for these purposes. The definition includes:

- any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise;
- statutory sick pay;
- maternity, paternity, adoption, shared parental or parental bereavement pay;
- a guarantee payment;
- payments for carrying out trade union duties;
- remuneration on suspension on medical or maternity grounds, ending the supply of an agency worker on maternity grounds;
- any sum payable in pursuance of an order for reinstatement or re-engagement;
- any sum payable in pursuance of a tribunal's order for the continuation of a contract of employment; and
- remuneration under a protective award.[31]

The definition excludes:

- advances as loans or advancement of wages;
- expenses;
- payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;
- payment referable to the worker's redundancy; and
- any payment to the worker otherwise than in his capacity as a worker.[32]

6.2 Remedies

If an employer makes an unauthorised deduction from wages the employee may complain to an employment tribunal. The claim must be brought within

31 Employment Rights Act 1996, section 27(1)
32 Employment Rights Act 1996, section 27(2)

three months of the failure to pay the wages. Where a series of deductions occurs, the time limit runs from the last deduction in the series.

If the claim is well-founded the tribunal will order repayment. Any amount owing to the employer in respect of the matter in relation to which the wrongful deduction was made will be treated as reduced by the amount it was ordered to repay. This means that, if the employer makes the deduction in contravention of the Act, it repays the deduction and loses the right to make it again in compliance with the Act (e.g. by obtaining written consent).[33]

6.3 Two-year limit on back pay claims

The Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) came into force on 8 January 2014, ostensibly to limit potential holiday pay claims following the Employment Appeal Tribunal's decision in *Bear Scotland Ltd & Ors -v- Fulton & Ors* [2014],[34] in which the Tribunal held that non-guaranteed overtime is part of normal remuneration for the purposes of calculating holiday pay. The Regulations also affect unlawful deduction from wages claims, limiting most claims to two years of back pay where a series of deductions has occurred.[35]

33 Employment Rights Act 1996, section 25(4), (5)

34 *Bear Scotland Ltd and Others v Mr David Fulton and Others*: UKEATS/0047/13/BI

35 Regulation 2, inserting a new subsection (4A) into section 24 of the Employment Rights Act 1996

7 Disciplinary and grievance

Summary

Workers have a statutory right to be accompanied to disciplinary and grievance hearings. Although there are no prescriptive legislative requirements as to disciplinary and grievance procedures, ACAS has produced a statutory Code of Practice which sets out minimum standards employers should follow. A failure to follow this does not itself open employers to legal claims, but employment tribunals can take this into account when deciding cases such as discrimination or unfair dismissal.

Employers often operate disciplinary and grievance procedures although these may be non-contractual. In some cases, the procedures form part of the contract of employment: the contract may state this expressly or the Tribunal may regard the procedures as incorporated into the contract, even if the contract does not expressly provide for this.[36]

While there was once a set of legislative requirements for disciplinary and grievance procedures, these were repealed in 2008.[37] Employers are now free to set their own procedures, subject to the following important provisions:

- workers have a statutory right to be accompanied to disciplinary and grievance hearings; and
- ACAS has issued a statutory Code of Practice which tribunals can take into account when determining relevant cases.

Each of these are discussed below.

7.1 The right to be accompanied

Under section 10 of the Employment Relations Act 1999, a worker has a right to be accompanied to a disciplinary or grievance hearing where the worker:

36 For example, see *Hussain v Surrey and Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB)

37 The requirements were enacted under the Employment Act 2002, and later repealed by the Employment Act 2008

- is required or invited to attend the meeting; and
- reasonably requests to be accompanied at the hearing.

A disciplinary hearing is a hearing which could result in:

- a formal warning;
- the taking of some other disciplinary action; or
- a confirmation of either of the above (i.e. at an appeal hearing).

A grievance hearing is one which concerns the performance of a duty by an employer in relation to a worker. [38]

Where the right applies, the employer must permit the worker to be accompanied by a companion of their choice who is either a trade union official or another of the employer's workers.

If the companion is not available at the time proposed for the hearing by the employer, and the worker proposes an alternative, reasonable time, within five days of that proposed by the employer, the employer must postpone the hearing to the time proposed by the worker.

The companion is entitled to put the worker's case, sum it up and respond to any view expressed during the hearing. They are not entitled to answer questions on the worker's behalf, address the hearing contrary to the worker's wishes, or contribute in a way that prevents others from doing so. [39]

Investigatory meeting

As part of a disciplinary or grievance process, an employer may hold an investigatory meeting, to establish facts prior to any disciplinary hearing. Unlike with disciplinary or grievance hearings, there is no statutory right to be accompanied to investigatory meetings (although the employer's own procedure may provide for this).

Contractual right to be accompanied

In addition to the statutory right to be accompanied, a contract of employment may provide additional rights (e.g. a right to be accompanied by someone who is neither a co-worker nor a union official). In rare cases, a court may hold that an employee has a right to be accompanied by someone who is neither a co-worker nor a union official.[40]

---

38 Employment Relations Act 1999, section 13

39 Employment Relations Act 1999, section 10

40 This may occur where a refusal to permit a person would breach the employer's contractual obligation not to act in a manner that destroys the relationship of trust and confidence between the

7.2 ACAS Code of Practice

Although there are no longer any detailed requirements set out in legislation around disciplinary and grievance procedures, there is a Code of Practice produced by ACAS: the Code of Practice on Disciplinary and Grievance Procedures.[41]

While a failure to follow the Code does not itself open employers to legal claims, it has indirect legal effect, as it is issued under statutory authority, and employment tribunals take account of it where relevant. In most types of employment case, where a tribunal finds that an employer or employee has unreasonably failed to comply with the Code, they have the power to increase or decrease respectively awards of compensation by up to 25%.[42] [43] In summary, the Code sets out guidance on the following:

- establishing the facts of the case;
- informing employees and allowing them time to prepare;
- the means by which employees may set out their cases (e.g. presenting evidence and calling witnesses);
- the right to be accompanied;
- appropriate action; and
- appeal hearings.[44]

7.3 Dismissal

If an employee is dismissed following a disciplinary process, and the employee sues for unfair dismissal, the Tribunal will look at whether the employer followed its own disciplinary procedures when considering the procedural fairness of the dismissal, as well as whether or not it followed the ACAS Code of Practice.

parties. For example, in *Stevens v University of Birmingham* [2015] EWHC 2300 (QB) the High Court held that a clinical member of academic staff was entitled to be accompanied by a medically qualified representative from the Medical Protection Society, who was not a union official.

41 Acas Code of Practice on disciplinary and grievance procedures, 11 March 2015

42 Trade Union and Labour Relations (Consolidation) Act 1992, section 199

43 Trade Union and Labour Relations (Consolidation) Act 1992, section 207A

44 Acas Code of Practice on disciplinary and grievance procedures, 11 March 2015

8 Equality and discrimination

Summary

Part 5 of the Equality Act 2010 prohibits discrimination, harassment and victimisation at work.

The Act is detailed and accompanied by a substantial body of case law; the following provides only an outline of the main concepts. For an authoritative explanation of the Act's employment provisions, see the Equality and Human Rights Commission's Employment Statutory Code of Practice.[45]

8.1 Protected characteristics

The Equality Act 2010 is the principal equality statute, having repealed and replaced earlier equality legislation. It prohibits discrimination in relation to the following "protected characteristics":

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.[46]

Sections 5-12 provide individual definitions of these characteristics.

[45] EHRC, Equality Act 2010 Code of Practice, Employment Statutory Code of Practice, 2011

[46] Equality Act 2010, section 4

8.2 Direct and indirect discrimination

The Equality Act 2010 identifies two types of discrimination: direct and indirect.

Direct discrimination occurs when a person, because of a protected characteristic, treats another less favourably than they would treat those without the characteristic.[47]

Indirect discrimination occurs when a person applies a "provision, criterion or practice" which, although applied to persons with different protected characteristics (e.g. males and females) puts one group of persons at a particular disadvantage (e.g. disadvantages females but not males). Indirect discrimination does not apply to pregnancy and maternity. [48] The Act's explanatory notes provide an example of indirect discrimination:

> A woman is forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs. This would put women (who are shown to be more likely to be responsible for childcare) at a disadvantage, and the employer will have indirectly discriminated against the woman unless the practice can be justified.[49]

Indirect discrimination (and direct discrimination based on age only) may be lawful if shown to be a proportionate means of achieving a legitimate aim.[50] One example of such a potential justification is given by Citizens Advice:

> The fire service requires all job applicants to take a number of physical tests. This could be indirect discrimination because of age, as older people are less likely to pass the tests than younger applicants. But the fire service can probably justify this. Fire fighting is a job which requires great physical capability. The reason for the test is to make sure candidates are fit enough to do the job and ensure the proper functioning of the fire service. This is a legitimate aim. Making candidates take physical tests is a proportionate way of achieving this aim.[51]

An employer must not directly or indirectly discriminate against prospective employees:

- in the arrangements they make for deciding whom to offer employment;
- as to the terms on which they offers the person employment; or
- by not offering that person employment.

---

47 Equality Act 2010, Section 13
48 Equality Act 2010, Section 19
49 Equality Act 2010 Explanatory Notes, para 81
50 Equality Act 2010, Section 19(2)(d)
51 Citizens Advice, Justifying discrimination [accessed 26 September 2022]

An employer must not directly or indirectly discriminate against a current employee:

- as to the terms of employment;
- in the way they afford access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- by dismissing them; or
- by subjecting them to any other detriment.[52]

8.3 Harassment and victimisation

The Act also prohibits harassment and victimisation.

Harassment is defined as engaging in unwanted conduct related to a protected characteristic, which has the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.[53]

Victimisation is defined as subjecting an individual to detriment because they have done a "protected act" (or in the belief that they have done so). The protected acts are:

- bringing proceedings under the Act;
- giving evidence or information in connection with proceedings under the Act (false evidence or allegations are not protected if given or made in bad faith);
- doing any other thing for the purposes of or in connection with the Act; and
- making an allegation that a person has contravened the Act.
- An employer must not victimise prospective or current employees in any of the ways mentioned above in the discussion of direct and indirect discrimination.[54]

52 Equality Act 2010, Section 39
53 Equality Act 2010, Section 26
54 Equality Act 2010, Section 27

8.4 Post-employment

The Equality Act 2010's protections apply after the employment has ended provided the discrimination/harassment/victimisation "arises out of and is closely connected to a relationship which used to exist between" the parties (e.g. an employment relationship). An example of this might be the provision of a negative employment reference.[55]

8.5 Equal pay

In addition to the general prohibition of discrimination, the Act deals specifically in Part 5 Chapter 3 with equality of terms between men and women.

In relation to equal pay, section 66 is the most important. It provides that, if the contractual terms of a person's work are less favourable than those of a comparator of the opposite sex, the terms are modified so as not to be less favourable.

Section 77 makes unenforceable any term in a contract that tries to to prevent employees from making a 'relevant pay disclosure', defined as follows:

> A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic.[56]

The provision was designed to prevent confidentiality clauses from stopping employees finding out about pay inequalities.

8.6 Disability

For a more complete discussion of how the Equality Act 2010 applies to disability discrimination and legal duties to consider the needs of disabled people, see the Library briefing on Disability discrimination.[57]

Discrimination arising from disability

Section 15 of the 2010 Act prohibits treating a disabled worker unfavourably because of something arising in consequence of their disability (rather than

55 Equality Act 2010, Section 108
56 Equality Act 2010, Section 77
57 Disability discrimination, Commons Library Briefing CPB-9601, 26 November 2020

simply for having a disability). For example, dismissing a worker with multiple sclerosis for taking extended disability-related sick leave.

An employer does not contravene this prohibition if they can show that they did not know, and could not reasonably have been expected to know, that the employee had the disability. Nor do they contravene it if they can show that the treatment was a proportionate means of achieving a legitimate aim.[58]

Reasonable adjustments

Broadly, an employer is under a statutory duty to take such steps as are reasonable in the circumstances to:

- avoid putting disabled persons at a substantial disadvantage where a provision, criterion or practice would put them at that disadvantage compared with non-disabled persons;
- remove, alter or provide means of avoiding physical features (e.g. stairs) where that feature puts a disabled person at a substantial disadvantage compared with non-disabled persons; or
- provide an auxiliary aid where a disabled person would, but for the provision of that aid, be put at a substantial disadvantage in comparison with persons who are not disabled.[59]
- A "substantial" disadvantage is one that is "more than minor or trivial".[60]

58 Equality Act 2010, section 15
59 Equality Act 2010, sections 20-21 & Schedule 8
60 Equality Act 2010, section 212

9 Facility time

Summary

"Facility time" is time off from a person's normal work to undertake trade union duties, learning development or activities. There is a statutory right to paid time off for trade union "duties" or training and to unpaid time off for union "activities".

Sections 168-173 of the Trade Union and Labour Relations (Consolidation) Act 1992 provide statutory rights to time off for union duties and activities. Representatives of recognised unions are entitled to paid time off to carry out specified trade union duties.[61] The duties are set out in section 168 as being "any duties … as such an official, concerned with":

- collective bargaining negotiations with the employer;
- the performance on behalf of employees of functions related to or connected with collective bargaining which the employer has agreed may be performed by the union;
- receipt of information from and consultation by the employer concerning redundancies;
- negotiations about - or the performance on behalf of employees of functions connected with – agreements to vary employees' contractual terms where there is a transfer of an undertaking, and the transferor is subject to insolvency proceedings; and
- undergoing industrial relations training, approved by the TUC or his union and related to performance of the above duties.

Union learning representatives are also entitled to paid time off for the following purposes in relation to union members:

- analysing learning or training needs;
- providing information and advice about learning or training matters;

[61] Trade Union and Labour Relations (Consolidation) Act 1992, section 169

- arranging learning or training;
- promoting the value of learning or training; and
- consulting the employer about carrying on any such activities in relation to such members of the trade union.[62]
- Employers are also required to permit employees to take a reasonable amount of unpaid time off to take part in certain union activities.[63] These might include, for example, attending union meetings, participating in union elections or attending conferences.

The amount of paid time off for both duties and activities is qualified by the following:

> The amount of time off which an employee is to be permitted to take … and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provision of a Code of Practice issued by ACAS or the Secretary of State.[64]

The current ACAS Code of Practice on Time Off for Trade Union Duties and Activities has been in force since 1 January 2010.[65] Employment tribunals can take a failure to follow the Code of Practice into account when deciding relevant cases.

62 Trade Union and Labour Relations (Consolidation) Act 1992, section 168A
63 Trade Union and Labour Relations (Consolidation) Act 1992, section 170
64 Trade Union and Labour Relations (Consolidation) Act 1992, sections 168(3) & 168A(8)
65 Acas, Acas Code of Practice on time off for trade union duties and activities, 1 January 2010

10 Family-related leave

Summary

Those classed as employees may be entitled to maternity leave, which lasts for up to 52 weeks; maternity pay lasts for up to 39 weeks.

The right to adoption leave/pay operates in largely the same way as maternity leave/pay.

Fathers or one part of an adoptive couple (or one parent in a surrogacy arrangement) may be entitled to paternity leave of 1-2 weeks.

A mother or primary adopter may curtail her maternity/adoption leave and pay and transfer to Shared Parental Leave and Shared Parental Pay. The remaining balance of leave and pay can then be shared in blocks between the parents.

Employees with one year's continuous service may be entitled to 18 weeks' unpaid parental leave in respect of each child under 18, up to four weeks of which may be taken per year.

Pregnant women are entitled to paid time off for ante-natal care; prospective fathers (or someone in a 'qualifying relationship' with a pregnant woman/her expected child) are entitled to unpaid time off.

10.1 Maternity leave and pay

The right to maternity leave is set out in Part 8 of the Employment Rights Act 1996 and Part 2 of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312).

Maternity leave is a 'day one' right in that all eligible employees are entitled to it irrespective of how long they have worked for their employer. There are three types: compulsory maternity leave, ordinary maternity leave and additional maternity leave:

- Compulsory maternity leave lasts for two weeks from the date of childbirth (four weeks in the case of factory workers), during which the employer must not permit the mother to work.[66]
- Ordinary maternity leave lasts for 26 weeks, inclusive of the period of compulsory maternity leave.
- Additional maternity leave commences on the day after the last day of ordinary maternity leave, and lasts for 26 weeks.[67]

The distinction between ordinary and additional maternity leave relates to the employee's right to return to the same job. If the employee returns to work during ordinary maternity leave she is entitled to the same job, with the same terms and conditions. If she returns to work during additional maternity leave she is entitled to return to the same job or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is appropriate for her to do in the circumstances.[68]

In order to qualify for statutory maternity pay (SMP) the worker must have worked for the same employer for 26 weeks as at the 15th week before the expected week of childbirth, earn £123 per week (or an average of £123 per week if the hours vary from week to week), notify her employer at least 28 days before she wants the payments to start and have given her employer proof that she is pregnant.

SMP is paid for up to 39 weeks:

- for the first six weeks it is paid at a weekly rate of 90 per cent of average weekly earnings (the "enhanced rate"); and
- for the next 33 weeks it is 90 per cent of average weekly earnings or £156.66, whichever is lower (the "flat rate").

10.2 Maternity Allowance

Maternity Allowance is available to individuals that do not qualify for SMP (e.g. the self-employed or recently unemployed). Maternity Allowance is paid for up to 39 weeks at the flat rate, although the amount an individual will receive depends on their eligibility.[69]

66 Employment Rights Act 1996, section 72; Public Health Act 1936, section 205
67 Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312), regulation 7(4)
68 Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312), regulation 18(2)
69 Maternity Allowance, Gov.uk [accessed 16 September 2022]

10.3 Maternity suspension

Under regulations 3 and 16 of the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) employers are required to assess work-related risks posed to new or expectant mothers. If an employer is unable to avoid an identified risk it must either alter the employee's working conditions or hours of work, or, if it is not reasonable to do that or doing that would not avoid the risk, suspend the employee on full pay for as long as it is necessary to avoid the risk.[70]

10.4 Adoption leave and pay

The right to adoption leave is set out in Part 8 of the Employment Rights Act 1996 and Part 3 of the Paternity and Adoption Leave Regulations 2002 (SI 2002/2788).

Adoptive parents (or parents in a surrogacy arrangement) may nominate one parent to be the 'primary adopter', who may be entitled to adoption leave. The other parent may be entitled to paternity leave.

The operation of adoption leave and pay is now in line with maternity leave and pay, as set out above.

The right to adoption leave and pay is available to parents of a newly placed child, not those adopting a child they are fostering (e.g. through an adoption order).[71] This is because the leave (as with maternity and paternity leave) is designed to "provide time for the adoptive child and parent to adjust to their new relationships".[72]

10.5 Paternity leave and pay

The right to paternity leave is set out in Part 8 of the Employment Rights Act 1996 and Part 2 of the Paternity and Adoption Leave Regulations 2002 (SI 2002/2788).

Paternity leave lasts for one or two weeks, at the parent's choice, which must be taken in one go within the first 56 days of the child's arrival.

---

70 Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), regulations 3 and 16

71 See: Paternity and Adoption Leave Regulations 2002 (SI 2002/2788), regulations 15 and 17

72 Employment Act 2002 Explanatory Notes , para 24

To qualify for paternity leave an individual must have been employed with the same employer for not less than 26 weeks as at the end of the 15th week before the expected week of the child's birth.[73]

Paternity leave is available to both men and women, provided the individual in question is parenting a child and is the partner of the mother or adopter. The rights to paternity leave apply to the member of an adopting couple who is not eligible for adoption leave and pay (i.e. not the "primary" adopter).

Formerly, there were two types: ordinary paternity leave (one or two weeks) and additional paternity leave (up to 26 weeks), although the latter was abolished for parents of children due after 5 April 2015, and replaced by Shared Parental Leave and Shared Parental Pay (see below).

Paternity pay is paid at the flat rate of £156.66 or 90 per cent of average weekly earnings, whichever is lower. In order to qualify for paternity pay the individual must earn at least £123 per week before tax.[74]

10.6 Shared Parental Leave and Pay

The Children and Families Act 2014 amended Part 8 of the Employment Rights Act 1996, creating rights to Shared Parental Leave (SPL) and Shared Parental Pay (SPP).[76] A substantial body of regulations made under the Act implement the scheme.[77]

SPL and SPP become available if the mother or primary adopter choses to shorten their period of maternity or adoption leave and pay (excluding the period of compulsory maternity leave, which cannot be shortened). The unused balance from the 52 weeks' leave and 39 weeks' pay can then be shared in blocks between the parents. The parents can take the blocks of leave at different times or concurrently, although must provide their employers with eight weeks' notice before beginning a block.

A mother claiming Maternity Allowance (see 10.2 above), such as a self-employed or recently unemployed mother,

The Department for Business, Energy and Industrial Strategy has published a technical guide to SPL and SPP for employers.[75]

[73] Paternity and Adoption Leave Regulations 2002 (SI 2002/2788), regulation 4

[74] See Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822); Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002 (SI 2002/2818)

[75] BEIS, Shared parental leave and pay: employers' technical guide, 27 April 2020

[76] Employment Rights Act 1996, ss.75E-75K

[77] Principally, the following regulations: Shared Parental Leave Regulations 2014 (SI 2014/3050); Statutory Shared Parental Pay (General) Regulations 2014 (SI 2014/3051); Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014 (SI 2014/3052); Maternity Allowance (Curtailment) Regulations 2014 (SI 2014/3053); Statutory Maternity Pay and Statutory Adoption Pay (Curtailment) Regulations 2014 (SI 2014/3054).

may create a right for her partner to access SPL/SPP by curtailing her Maternity Allowance.

10.7 Parental leave

The right to unpaid parental leave, separate from the other forms of leave discussed above, is provided in Part 8 of the Employment Rights Act 1996 and Part 3 of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312).

An employee with at least one year's continuous service may be eligible for unpaid parental leave if they have parental responsibility for a child.[78] The employee will be entitled to up eighteen weeks' leave in respect of any individual child to take at any time up to the child's 18th birthday.[79] The leave may be taken in one-week blocks, up to a maximum of four weeks per year.[80]

10.8 Ante-natal care

The right to time off in respect of ante-natal care is provided in Part 6 of the Employment Rights Act 1996.

A pregnant employee/agency worker is entitled to paid time off to attend an ante-natal care appointment made on the advice of a registered medical practitioner, midwife or registered nurse.[81] Remuneration is paid at the appropriate hourly rate, determined either by dividing a week's pay by the number of normal working hours in a week, or by reference to the method in section 56 of the Employment Rights Act 1996.

The Children and Families Act 2014 amended the Employment Rights Act 1996, introducing a right to unpaid time off to accompany a pregnant woman "when she attends by appointment at any place for the purpose of receiving ante-natal care".[82] Employees/agency workers with a "qualifying relationship" with the expectant mother or child are entitled to a maximum of two periods of time off, each limited to six and a half hours. Qualifying relationships include, for example, spouses, prospective fathers and persons in enduring family relationships with pregnant women (e.g. partners).[83]

78 Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312), regulation 13
79 Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312), regulations 14-15
80 Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312), Schedule 2, paras 7-8
81 Employment Rights Act 1996, sections 55 and 57ZA
82 Employment Rights Act 1996, section 57ZE
83 Employment Rights Act 1996, section 57ZE(7)

10.9 Time off for dependants

Section 57A of the Employment Rights Act 1996 provides employees with the right to a reasonable amount of unpaid time off to "take action" which is "necessary":

> (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
>
> (b) to make arrangements for the provision of care for a dependant who is ill or injured,
>
> (c) in consequence of the death of a dependant,
>
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
>
> (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him[84]

In order for this right to time off to apply, the employee must tell their employer the reason for the absence as soon as reasonably practicable; if this is before the absence, the employer must be told how long the employee expects to be absent.

The right is to "take action" and therefore it does not apply in circumstances where action is unnecessary (e.g. bereavement leave – see part 10.10 below).

Section 57A(3) defines "dependant" as a spouse/civil partner, child, parent or a person in the same household (other than the employee's lodger, tenant, boarder or employee).

For subsections (a) and (b) above, the definition of dependant includes any person who reasonably relies on the employee for assistance when they fall ill or are injured/assaulted, or who relies on the employee to arrange care in the event of illness or injury. For subsection (d), "dependant" includes any person who reasonably relies on the employee to make arrangements for the provision of care.[85]

Remedies

Section 57B of the Employment Rights Act 1996 entitles an employee to complain to an employment tribunal if their employer has unreasonably refused permission for time off under section 57A. If the complaint is well-founded, the tribunal must make a declaration to that effect and may order such compensation as it considers just and equitable, having regard to the

84 Employment Rights Act 1996, section 57A

85 Employment Rights Act 1996, section 57A(4)-(5)

employer's default and any loss sustained by the employee attributable to the refusal.

10.10 Bereavement leave and pay

Regulations passed under powers granted by the Parental Bereavement (Leave and Pay) Act 2018 created new entitlements to parental bereavement leave and parental bereavement pay.[86] These rights came into force on 6 April 2020 in Great Britain. They apply where a child dies before they turn 18 or where someone pregnant suffers a stillbirth after 24 weeks of pregnancy.

Parental bereavement leave and pay are available to employees who are the baby's biological or adoptive parents or the partner of such a parent. Parental bereavement leave is available to all such employees from day one of employment. Parental bereavement pay is available to employees who have been in continuous employment for 26 weeks with their employer and earn at least £123 per week on average before tax.[87]

Eligible parents can take up to two weeks of leave for each child who has died or was stillborn, starting anytime from the date of the death or stillbirth and finishing within 56 weeks of the date of the death of stillbirth. It can be taken in blocks of one week at a time. Employees must notify their employer of their intention to take leave and complete a declaration to claim statutory parental bereavement pay. Statutory bereavement pay is paid at a rate of £156.66 a week or 90% of average weekly earnings (whichever is lower).[88]

86 Specifically the Parental Bereavement Leave Regulations 2020 and the Statutory Parental Bereavement Pay (General) Regulations 2020

87 Statutory Parental Bereavement Pay and Leave, Gov.uk [accessed 15 August 2022]

88 As above

11 Fixed-term employees

Summary

The law protects fixed-term employees from being treated less favourably than comparable permanent employees and, in certain circumstances, entitles them to permanent contracts after four years.

A fixed-term employee is one who works under a fixed-term contract, defined in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) as an employment contract that terminates:

- on expiry of a specific term;
- on completion of a specific task; or
- on the occurrence or non-occurrence of any other specific event (other than attaining the employer's retirement age).

Fixed-term employees must not be treated – because they are fixed-term employees - less favourably than comparable permanent employees:

- as regards the terms of their contracts; or
- by being subjected to detriment by any act or deliberate omission of their employers.[89]

This includes, in particular, a right not to be treated less favourably in terms of qualifying periods relating to conditions of service, training opportunities and opportunities to secure permanent employment.

An employee will be a "comparable permanent employee" in relation to the fixed-term employee if, at the time of the alleged less favourable treatment, both employees are employed by the same employer and engaged in the same or broadly similar work (having regard, where relevant, to respective skills and qualifications).[90]

The right applies only if the employer is unable to justify the less favourable treatment on objective grounds. One of the ways in which an employer can objectively justify less favourable treatment is if the terms of the fixed-term

89 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 3(1)
90 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 2

employee's contract are, taken as a whole, at least as favourable as those of a comparable permanent employee's.[91]

A fixed-term employee is entitled to receive, within 21 days, a written statement of reasons for any less favourable treatment.[92]

11.1 Successive fixed-term contracts

Where, for a period of four or more years, an employee is employed under a long fixed-term contract which is renewed, or successive fixed-term contracts, the employee will become a permanent employee. However, this will not occur if the employer can objectively justify the use of the fixed-term contract.[93] One such justification might be another legal requirement, such as in a case where teachers were employed at a European school for a maximum of nine years as allowed by Regulations for Members of the Seconded Staff of the European Schools 1996 – the Supreme Court held that the use of fixed term contracts beyond four years was objectively justified in this case.[94]

An employee who considers that, by virtue of this right, they are a permanent employee, may request in writing a written statement confirming this or setting out reasons why the contract remains fixed-term. The employer must provide this within 21 days of the request.[95]

11.2 Protection from dismissal

The Regulations set out a range of reasons for which dismissal will be regarded as unfair. The usual qualifying period for unfair dismissal does not apply to such cases.

The unfair reasons for dismissal are set out in regulation 6(3); broadly, they concern dismissal because the employee has asserted or refused to forgo rights conferred by the Regulations.

11.3 Remedies

A fixed-term employee may complain to an employment tribunal if they are treated less favourably than a comparable permanent employee or dismissed

91 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 4
92 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 5
93 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 8
94 *Duncombe and others (Respondents) v Secretary of State for Children, Schools and Families (Appellant)*, UKSC 2010/0025
95 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 9

for one of the above reasons. Any such complaint will be subject to the usual three-month time limit, which may be waived if the tribunal considers it just and equitable to do so.

If the tribunal finds a claim well-founded it may:

- make a declaration as to the employer and employee's respective rights;
- award such compensation as it feels is just and equitable (although compensation for "injury to feelings" is unavailable); and
- recommend that the employer acts, within a specific period, to remove or reduce the adverse effect of the matter complained of.

If the employer fails, without reasonable justification, to comply with one of the tribunal's recommendations, the tribunal may increase the amount of compensation.[96]

[96] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regulation 13

12 Flexible working

Summary

An employee with 26 weeks' continuous employment has the right to request flexible working; a change to their hours, times or location of work (e.g. reducing working time, working from home or working compressed hours).

For a full discussion of the relevant law and policy, see the Library's briefing paper on flexible working.[97]

The right to request flexible working and have it considered is provided by the Flexible Working Regulations 2014 (SI 2014/1398).

To benefit from the Regulations, the flexible working application must be in writing; state whether the employee has previously made any such application to the employer and, if so, when; and be dated.

The employer must deal with the request in a reasonable manner and respond within three months, unless a longer period is agreed by the employer and employee. The employer may only refuse the application because of one or more valid reasons from the following list:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work; or
- planned structural changes.

[97] Flexible Working, Commons Library Briefing, SN1086, March 2015

The employer may treat the employee's application as withdrawn if the employee without good reason fails to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose.

Acas has a Code of Practice on flexible working requests, which employment tribunals can penalise employers for not following.[98]

12.1 Remedies

If the employer fails to comply with its obligations, the employee may present a complaint to an employment tribunal. The tribunal may make an order for reconsideration of the application and award compensation of such amount as it considers just and equitable, not exceeding eight weeks' pay. A week's pay is subject to the statutory maximum set annually by regulations. The most recently prescribed limits are:

Date	Maximum amount of one week's pay
6 April 2022 – 5 April 2023	£ 571
6 April 2021 – 5 April 2022	£ 544
6 April 2020 – 5 April 2021	£ 538

Source: The Employment Rights (Increase of Limits) Orders 2020, 2021, 2022

[98] Code of Practice on handling in a reasonable manner requests to work flexibly, Acas, 30 June 2014

13 Holiday

Summary

Workers are entitled to 5.6 weeks' annual leave during the leave year. The leave must be paid at the worker's normal rate of remuneration, factoring in, where relevant, overtime and commission payments.

There is no statutory right to leave on bank/public holidays; a worker's right, or lack thereof, to leave on these days derives from their contract. For further information on bank holidays and employment, see the Library's briefing paper on the subject.[99]

Under the Working Time Regulations 1998 (SI 1998/1833) workers are entitled to 5.6 weeks paid annual leave. For those working five days per week, this amounts to 28 days' paid leave, inclusive of public holidays (5.6 x 5 = 28).[100] Part-time workers are also entitled to 5.6 weeks' leave. For example, working three days per week entitles one to 16.8 days' leave (5.6 x 3 = 16.8).

The Gov.uk website provides a holiday entitlement calculator

The statutory entitlement does not increase beyond 28 days for those working more than five days per week. Contracts of employment may, of course, allow longer periods of leave.

The "leave year" for the purposes of the Regulations is that specified in either the contract of employment or other relevant written agreement. If no dates are specified, the leave year begins on the date employment commenced (unless it commenced prior to 1 October 1998, in which case the leave year begins on 1 October).[101]

Statutory annual leave must be paid at the worker's normal rate of remuneration. The question of how to calculate this has been a source of repeated litigation both domestically and at the European Court of Justice. Broadly, the uncertainty stemmed from the difficulty in squaring the method used under the 1998 Regulations to calculate pay with that required by the EU Directive they implement.[102] Case law has now confirmed that workers are

99 Bank and public holidays, Commons Library Briefing, SN6170, March 2015

100 Working Time Regulations 1998, regulations 13-13A

101 Working Time Regulations 1998, regulation 13(3)

102 Council Directive 93/104/EC. Under regulation 16 holiday pay is calculated using the method set out in sections 221-224 of the Employment Rights Act 1996, which provide that a week's pay includes

entitled to remuneration reflecting the overtime they would normally work and commission they would normally earn. In the latter case, this may require payment following the period of leave, representing commission that would have been earned had the worker not been on leave.

Annual leave accrues during sickness absence and up to four weeks of the 5.6 week entitlement can be carried over into the next leave year if absence prevents the worker from taking leave. If a worker falls ill while on annual leave, they may bring an end to the leave and take it later.

13.1 Bank and public holidays

Strictly, "bank holidays" are those fixed by statute - the Banking and Financial Dealings Act 1971 - as days when financial dealings may be suspended. The term "bank" holiday is used interchangeably with "public" holiday. For all practical purposes there is no difference. There is, however, an academic difference between bank holidays derived from statute and public holidays at common law (such as Christmas Day in England and Wales). Schedule 1 to the Act stipulates those days which are to be bank holidays in England and Wales, Scotland, and Northern Ireland. The Act also gives Her Majesty the power to appoint additional days as bank holidays by Royal Proclamation, as happened for example with the additional bank holiday to celebrate the Platinum Jubilee on 3 June 2022.[103]

A worker's right, or lack thereof, to leave on these days derives only from their employment contract. The 5.6 week statutory holiday entitlement for all workers is inclusive of bank holidays, but does not have to be taken on those days specifically. An employer may require a worker to attend work on a bank holiday if entitled to do so by either their contract of employment or industry custom. In industries where it is customary to get bank holidays off, and absent any contractual term specifying employees can be asked to work those days, there is some case law suggesting that employees could be entitled to paid leave as an implied contractual term.[104]

There are typically eight bank/public holidays a year in England and Wales, nine in Scotland and ten in Northern Ireland:

overtime only if it is both compulsory and guaranteed (i.e. excludes voluntary overtime). This gave rise to a challenge to the Regulations' compliance with the Directive, case law on which had established that workers must be paid their "normal" rate of remuneration.

103 Banking and Financial Dealings Act 1971, Section 1(3)

104 See e.g. *Tucker v British Leyland Motor Corporation Ltd* [1978] IRLR 493; *Campbell & Smith Construction Group Ltd v John Alexander Greenwood* [2001] IRLR 588

England and Wales	Scotland	Northern Ireland
New Year's Day [2]	New Year's Day [1]	New Year's Day [2]
	2 January [1]	
		St Patrick's Day [1]
Good Friday [3]	Good Friday [1]	Good Friday [3]
Easter Monday [1]		Easter Monday [1]
First Monday in May [2]	First Monday in May [2]	First Monday in May [2]
Last Monday in May [1]	Last Monday in May [1]	Last Monday in May [1]
		Battle of the Boyne (Orangemen's Day) [4]
	First Monday in August [1]	
Last Monday in August [1]		Last Monday in August [1]
	St Andrew's Day [1]	
Christmas Day [3]	Christmas Day [1]	Christmas Day [3]
Boxing Day [1]	Boxing Day [1]	Boxing Day [1]

Sources:

(1) Banking and Financial Dealings Act 1971, Schedule 1

(2) Royal Proclamations under 1971 Act

(3) Common law public holiday

(4) Proclaimed by the Secretary of State for Northern Ireland

14 Illegal working

Summary

Employers may be liable in civil or criminal law if they employ a person in breach of immigration restrictions. If a person works in breach of immigration conditions they will be committing a criminal offence. For further information, see the Library's briefing paper on the subject.[105]

Employers' legal responsibilities to prevent illegal working are set out in the Immigration, Asylum and Nationality Act 2006, as amended by the Immigration Act 2016, together with related regulations. Section 15 of the Act provides for the imposition of a civil penalty where a person employs an illegal worker. "Illegal worker" is not an expressly defined statutory term, but is used as shorthand to describe employees who lack immigration permission:

> It is contrary to this section to employ an adult subject to immigration control if—
>
> (a) he has not been granted leave to enter or remain in the United Kingdom, or
>
> (b) his leave to enter or remain in the United Kingdom—
>
> (i) is invalid,
>
> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
>
> (iii) is subject to a condition preventing him from accepting the employment.[106]

Employing an illegal worker contrary to section 15 carries a maximum penalty of £20,000 per illegal worker.[107] An employer will have a statutory excuse against paying the penalty if it can show it has carried out the necessary document checks.[108] But if the employer knows that the employee does not

105 Employers' duties to prevent illegal working, Commons Library Briefing SN06706, February 2015
106 Immigration, Asylum and Nationality Act 2006, section 15
107 Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014, SI 2014/1262
108 Immigration, Asylum and Nationality Act 2006, section 15

have the right to work, it will not have a statutory excuse (regardless of whether it conducted any document checks).

In addition to potential civil liability, section 21 of the 2006 Act makes it a criminal offence to employ someone while knowing, or having reasonable cause to believe, that the employee is an illegal worker. The maximum sentence on indictment is five years' imprisonment and/or an unlimited fine.[109]

A person who works while disqualified from working because of their immigration status and knows or has reasonable cause to believe they are disqualified from working due to their immigration status also commits an offence.[110] This offence is punishable on summary conviction by an unlimited fine or up to six months' imprisonment A Magistrates' Court may commit an illegal worker to a Crown Court with a view to confiscating gains under the Proceeds of Crime Act 2002. It is separately an offence to knowingly breach a condition of leave, which includes restrictions on work.[111]

[109] Immigration, Asylum and Nationality Act 2006, section 21

[110] Immigration Act 1971, section 24B

[111] Immigration Act 1971, section 24(1)(b)(ii)

15 Industrial action

Summary

Employees do not enjoy a general "right" to strike. Rather, unions have statutory immunity from the common law consequences of industrial action, provided statutory criteria are met. Employees participating in immune strikes are protected from dismissal.

Under the common law, an individual who goes on strike is generally in breach of their contract of employment. A trade union that organises a strike, in the absence of legal protections discussed below, will almost certainly commit a tort (a civil wrong) such as inducement of a breach of contract or conspiracy to do an unlawful act. The remedies for torts are primarily damages and injunctions.

A series of Acts of Parliament, starting in 1906, and currently consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), as recently amended by the Trade Union Act 2016, granted unions and union officials immunity from liability for these torts. There is, therefore, a freedom to strike only in cases for which immunity is granted by statute, rather than any more general right to strike except where constrained by statute.

To benefit from statutory immunity the strike must, among other things, be "in contemplation or furtherance of a trade dispute"[112] and be authorised by a properly conducted strike ballot (strikes solely for political reasons will not be protected). A union's failure to comply with the (many and detailed) statutory prerequisites for immunity may provide grounds for an employer to seek an injunction to prevent the strike.

15.1 Strike ballots

The statutory provisions governing industrial action ballots and notices are contained in TULRCA, sections 226 to 235.

For the union to be protected from liability it must conduct a secret postal ballot of "all the members of the trade union who it is reasonable at the time

[112] Trade Union and Labour Relations (Consolidation) Act 1992, section 219(1)

of the ballot for the union to believe will be induced by the union to take part" in the strike, and no others.[113] Minor and accidental errors will be disregarded. The voting paper must contain at least one of two questions:

- "a question … which requires the person answering it to say, by answering "Yes" or "No", whether he is prepared to take part or, as the case may be, to continue to take part **in a strike**.
- "a question … which requires the person answering it to say, by answering "Yes" or "No", whether he is prepared to take part or, as the case may be, to continue to take part in industrial **action short of a strike**".[114]

In order for the vote to grant immunity in the case of industrial action, the following must be satisfied:

- a majority of those who vote must vote in favour of the action;
- at least 50% of those entitled to vote in the ballot must have turned out to vote; and
- if the majority of those who vote are normally engaged in the provision of "important public services", at least 40% of those entitled to vote must vote in favour of the action.[115]

15.2 Protection from dismissal

Under TULRCA, section 238A (inserted by Schedule 5 to the Employment Relations Act 1999) an employee dismissed for participation in statutorily immune industrial action will be regarded as unfairly dismissed, providing one of the following is true:

- the employee is dismissed within 12 weeks beginning with the first day on which the employee starts to take the action;
- the employee is dismissed after 12 weeks, but the employee had stopped taking action before the end of that period;
- the employee is dismissed after 12 weeks, the employee had not stopped taking the action before the end of that period, but the employer had not taken such procedural steps as would have been reasonable for the purposes of resolving the dispute.

In all the above cases, the 12 week period is extended to reflect any period during which the employee is locked out by their employer.

[113] Trade Union and Labour Relations (Consolidation) Act 1992, section 227
[114] Trade Union and Labour Relations (Consolidation) Act 1992, section 229
[115] Trade Union and Labour Relations (Consolidation) Act 1992, section 226

Outside of the above protection, under section 238, a tribunal cannot determine an unfair dismissal case relating to a statutorily immune strike, so long as the employer dismissed all the employees participating in the strike and has not re-engaged any of them within three months, beginning with the date of the dismissal (if any employees were re-engaged, an employee not re-engaged will be able to bring a claim).[116]

By contrast, the employer may dismiss any employee for participating in certain unofficial industrial action (e.g. action not authorised or endorsed by the employee's union) and the employee will have no right to complain of unfair dismissal.[117]

[116] Trade Union and Labour Relations (Consolidation) Act 1992, section 238

[117] Trade Union and Labour Relations (Consolidation) Act 1992, section 237

16 Insolvency

Summary

Employees who are owed money when their employers become insolvent are entitled to reclaim certain debts from the government Insolvency Service and, where relevant, HMRC. They may also be able to recover money as preferential creditors of their employers.

For a full discussion of the relevant law, see the Library's briefing paper on employee rights on insolvency.[118]

The Employment Rights Act 1996 and Insolvency Act 1986 provide a number of avenues via which an employee might seek payment of debts owed to them by an insolvent employer. The avenues fall into two broad categories.

First, the Secretary of State must pay certain debts to employees, effected via the Redundancy Payments Service. Aside from in the case of unpaid redundancy pay, the Redundancy Payments Service will only pay these debts if the employer has become formally insolvent.

Second, employees may seek payment from the company's assets through insolvency proceedings or via administrators.

The Gov.uk website provides a collection of forms and guidance for those wishing to make claims through the Insolvency Service

The options open to the employee may be summarised as follows:

- The Employment Rights Act 1996 requires the Secretary of State to pay certain debts owed to employees, including arrears of pay and unpaid redundancy pay. This is paid out from the National Insurance Fund via the Redundancy Payments Service.[119]
- Statutory payments such as statutory sick pay and maternity, paternity or adoption pay may be covered by HMRC.
- The State may also cover unpaid employer's contributions for employees who belongs to occupational pension schemes, and, under the Pensions

[118] Employment rights and insolvency, Commons Library Briefing SN651, April 2020

[119] Certain categories of employee are excluded. The rights are not available to merchant seamen, share fishermen, employees of the Crown or parliamentary staff.

Act 2004, pension schemes may be protected by the Pension Protection Fund.

- If an employer is put into administration, employees may have claims against the administrator/administrative receiver.
- If the employer is put into liquidation, employees may have claims against the insolvent estate.
- Employees are treated as preferential creditors under the Insolvency Act 1986 in respect of unpaid wages owed in the four months prior to the insolvency order (subject to an £800 limit), and in respect of the total amount of unpaid holiday pay.[120]

[120] Insolvency Act 1986, Schedule 6 and the Insolvency (England and Wales) Rules 2016

17 National Minimum Wage

Summary

The national minimum wage (NMW) applies to most workers and involves annually updated minimum hourly rates of pay. The national living wage is the name given to the higher minimum wage applying only to those aged 23 and over. See the Library briefing on the National Minimum Wage: rates and enforcement for more information.[121]

The framework of the NMW is set out by the National Minimum Wage Act 1998 and supplemented by various regulations which were consolidated in the National Minimum Wage Regulations 2015 (SI 2015/621). The NMW rates are provided in regulations made by the Secretary of State with parliamentary approval, based on annual recommendations made by the Low Pay Commission (LPC).[122] The rates are updated every April. The rates from April 2022 are:

	23 and over	21 to 22	18 to 20	Under 18	Apprentice
April 2022	£ 9.50	£ 9.18	£ 6.83	£ 4.81	£ 4.81

Source: The National Minimum Wage: rates and enforcement, Commons Library Briefing SN06898, April 2018

The apprentice rate applies to apprentices under 19, in their first year of level 2 or 3 apprenticeships; all other apprentices are entitled to the NMW rate for their age. Both this and the under 18 rate should be read bearing in mind that only those over compulsory school age (i.e. over 16) are entitled to the NMW.

[121] The National Minimum Wage: rates and enforcement, Commons Library Briefing SN06898, April 2018

[122] National Minimum Wage Regulations 1999 (SI 1999/584), as amended

17.1 Enforcement

The right to be paid the NMW takes effect as part of a worker's contract; if underpaid, the worker may enforce the right either in an employment tribunal or the civil courts.

HMRC also enforces the NMW and can issue notices of underpayment to underpaying employers. A notice of underpayment must require the employer to pay to the Secretary of State a specified financial penalty within a 28-day period. The penalty is currently set at 200% of the total arrears owed to all workers to whom the notice relates, subject to a maximum of £20,000 per worker.[123] The penalty is discounted for prompt payment: the employer need only pay 50% of the penalty if it is paid within 14 days, beginning with the day the notice was served.

Employees can complain to HMRC about NMW underpayment, by using this complaint form.

The Department for Business, Energy and Industrial Strategy has an enforcement policy for NMW.[124]

There is an associated system of naming and shaming employers that breach NMW law, which is designed to deter employers from underpaying workers. Under this system, employers issued with a notice of underpayment for arrears of at least £500 are named via a Department for Business, Energy and Industrial Strategy press notice.

In the most serious cases of (for example) refusal or wilful neglect to pay the NMW, there is the possibility of criminal enforcement under section 31 of the 1998 Act, with the potential for an unlimited fine.

Acas guidance on the NMW makes clear that workers who have been underpaid the minimum wage must choose either to complain to HMRC or bring an employment tribunal claim, but not both, saying "They cannot take the same issue through 2 legal processes."[125]

123 National Minimum Wage (Amendment) Regulations 2016 (SI 2016/68)

124 National Minimum Wage: policy on enforcement, prosecutions and naming employers who break National Minimum Wage law, BEIS, 15 June 2022

125 National Minimum Wage entitlement: If an employer does not pay minimum wage, Acas, 1 April 2022

18 Notice

Summary

Employers are required to provide employees with details of contractual notice periods.

The Employment Rights Act 1996 sets out statutory minimum periods of notice. Employees are normally entitled to pay for time worked during their notice.

Employees may waive their right to notice or accept payment in lieu of notice.

In certain circumstances, the conduct of an employee may entitle the employer to dismiss them without notice.

18.1 Terms of notice periods

Section 1(4)(e) of the Employment Rights Act 1996 provides that the statement of initial employment terms the employer must give to the employee within two months of beginning employment must include details of "the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment".[126]

18.2 Minimum notice periods

Although contracts of employment usually specify a period of notice, the notice in fact given by an employer to an employee must not fall below the statutory minimum period of notice. Section 86(1) of the Employment Rights Act 1996 provides the following minimum notice periods:

- one week's notice for employment exceeding one month but less than two years;

[126] See below section 24 of this briefing entitled 'Statement of initial employment particulars'

- one week's notice for each year of continuous employment if the employee's period of continuous employment is between two and twelve years; and
- twelve weeks' notice for employment of twelve years or more.[127]

Section 86(2) provides that an employee who has been employed for one month or more must provide their employer with at least one week's notice.[128] As with notice provided by the employer, the contract of employment may (and often does) stipulate that the employee must give a longer period of notice.

18.3 Pay during notice

Employees are normally entitled to pay for time worked during their notice, including pay for any part of normal working hours for which the employee is:

- ready, willing and able to work but no work is provided for them by the employer;
- incapable of work because of sickness or injury;
- absent from work wholly or partly because of pregnancy or childbirth, or on adoption leave, shared parental leave, parental leave or paternity leave; or
- absent from work in accordance with the terms of their employment relating to holidays.[129]

An employee may waive their right to notice or accept payment in lieu of notice ('PILON'). The contract may provide for this possibility; if it does not, preventing the employee from working out the notice period may constitute a breach of contract, although the payment in lieu of notice will often provide adequate compensation for the employee.

18.4 Dismissal without notice

In some cases it will be lawful to dismiss an employee without notice. This will usually be the case where the employee commits a repudiatory breach of contract; that is, a breach that is sufficiently serious to entitle the employer to treat the contract as at an end.

127 Employment Rights Act 1996, section 86(1)
128 Employment Rights Act 1996, section 86(2)
129 Employment Rights Act 1996, section 88

Summary dismissal (i.e. dismissal without notice) is usually a response to gross misconduct. There is no definitive list of conduct falling within this description; it will depend on the circumstances of the employment. However, there are some types of behaviour generally considered to be gross misconduct:

- theft or fraud
- physical violence or bullying
- deliberate and serious damage to property
- serious misuse of an organisation's property or name
- deliberately accessing internet sites containing pornographic, offensive or obscene material
- serious insubordination
- unlawful discrimination or harassment
- bringing the organisation into serious disrepute
- serious incapability at work brought on by alcohol or illegal drugs
- causing loss, damage or injury through serious negligence
- a serious breach of health and safety rules
- a serious breach of confidence.[130]

If the conduct is sufficiently serious to end the contract, the employer will not be in breach of contract by summarily dismissing the employee. In some cases the contract may define types of conduct which the employer regards as gross misconduct.

If the employee qualifies for unfair dismissal rights (i.e. has worked continuously for two years) their contractual rights will coexist with the statutory right not to be unfairly dismissed. While summary dismissal in response to gross misconduct might not breach the contract, the dismissal might nonetheless be unfair, particularly if the employer fails to follow a fair dismissal procedure (see below section 28 of this briefing on unfair dismissal).

[130] Advisory, Conciliation and Arbitration Service, Discipline and grievances at work: the Acas guide, July 2020, p52

19 Part-time workers

Summary

Part-time workers have the right not to be treated by their employers less favourably than comparable full-time workers.

Specific rights are provided for part-time workers by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), as amended, which implement Directive 97/81/EC, as extended to the UK by Directive 98/23/EC. The Regulations simply define a part-time worker as one who is "not identifiable as a full-time worker", taking into account the "custom and practice of the employer".[131] The Regulations provide the following right to part-time workers from the first day of work:

> the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
>
> (a)as regards the terms of his contract; or
>
> (b)by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.[132]

Importantly, the right applies only if the reason for the less favourable treatment is the fact the worker is a part-time worker and the employer cannot justify the treatment on objective grounds.[133] The worker has the right to receive, within 21 days, a written statement of reasons for any less favourable treatment.[134]

A worker is a "comparable full-time worker" in relation to a part-time worker if, as at the time of the alleged treatment, both workers are:

- employed by the same employer under the same type of contract; and
- engaged in the same/broadly similar work, having regard, where relevant, to similarities in qualifications, skills and experience.

131 The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regulation 2(2)
132 The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regulation 5
133 As above
134 The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regulation 6

The full-time worker must work/be based at the same establishment as the part-time worker, unless there is no such full-time worker there who satisfies the above requirements, in which case the comparison will be with one at a different establishment who does.[135] There are exceptions to this need to find a comparable full-time worker: the treatment of workers becoming part-time/returning to work part-time after absence is compared against their treatment in their previous full-time role.

19.1 Protection from dismissal

If a part-time employee (as contrasted with a worker; see the Library briefing on Employment Status[136] for an overview of the distinction) is dismissed for relying on the Regulations against their employer in one of a number of ways specified in regulation 7(3) (e.g. bringing proceedings under the Regulations) the dismissal will be automatically unfair. Similarly, part-time workers have the right not to be subjected to any detriment for relying on the Regulations in a way mentioned in regulation 7(3).[137]

[135] The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regulation 2(4)

[136] Employment status, Commons Library Briefing CBP 8045, 28 March, 2018

[137] The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regulation 7

20 Redundancy

Summary

Employees with two or more years' continuous service with their employer may be entitled to statutory redundancy pay if dismissed due to redundancy.

Broadly, an employee will be regarded as dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

> (a) the fact that his employer has ceased or intends to cease—
>
> 1. (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> 2. (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> 3. (i) for employees to carry out work of a particular kind, or
>
> 4. (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.[138]

Multiple of one week's pay (subject to statutory maximum)	Age band
1.5	41 and over
1	22 to 40
0.5	Under 22

[138] Employment Rights Act 1996, section 139

Source: Employment Rights Act 1996, section 162(2)

Redundancy pay is the sum of a week's pay or multiple thereof for each full year of the employee's period of continuous employment, reckoned backwards from the date of dismissal. The relevant multiple for any given year of employment is determined by the age reached by the employee during that year:

The Gov.uk website provides a redundancy pay calculator[139]

The maximum length of service for calculating pay is capped at 20 years. A week's pay is subject to the statutory limit in force at the time of the dismissal. The limit is set annually by regulations. The most recently prescribed limits are:

Date	Maximum amount of one week's pay
6 April 2022 – 5 April 2023	£ 571
6 April 2021 – 5 April 2022	£ 544
6 April 2020 – 5 April 2021	£ 538

Source: The Employment Rights (Increase of Limits) Orders 2020, 2021, 2022

Thus, the current maximum available redundancy payment would be payable to an employee with at least 20 years' service since they reached the age of 41: 20 x (1.5 x £538) = £16,140.

20.1 Consultation and information requirements

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within 90 days or fewer, the employer must consult appropriate representatives of the employees who may be affected by the dismissals or connected measures.[140]

139 Calculate your statutory redundancy pay, Gov.uk, [accessed 15 August 2022]

140 The entity to which the workers made redundant are assigned to carry out their duties (e.g. a shop) – see *USDAW and Wilson* [2015] EUECJ C-80/14, 52

The representatives must be provided with certain information in writing, including the reasons for the proposals and the numbers and description of employees whom it is proposed to dismiss as redundant.

If the employer proposes to dismiss 100 or more employees the consultation must begin at least 45 days before the first dismissal; in other cases the minimum period is 30 days.[141]

Protective award

Where an employer has failed to comply with the consultation and information requirements, employees or their representatives may have grounds to present a complaint to an employment tribunal.

If the tribunal finds the complaint well-founded it may make a protective award, payable to employees who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and in respect of whose dismissal the employer has failed to comply with the requirements. Importantly, the award is payable only in respect of employees who prove their claim in the tribunal, or whose union does so on their behalf. The maximum award is 90 days' gross pay to each of these employees.[142]

20.2 Notification of Secretary of State

Under Section 193 of the Trade Union and Labour Relations (Consolidation) Act 1992, an employer proposing to dismiss as redundant 20 or more employees at one establishment within 90 days or fewer, must also notify the Secretary of State, in writing, of the proposal. In practice this is done via the Insolvency Service by completing Form HR1. If the employer proposes to dismiss 100 or more employees the notification must be given at least 45 days before the first dismissal; in other cases the minimum period is 30 days.[143]

An employer who fails to comply with this requirement commits an offence punishable by an unlimited fine.[144]

141 Trade Union and Labour Relations (Consolidation) Act 1992, section 188
142 As above
143 Trade Union and Labour Relations (Consolidation) Act 1992, section 193
144 Trade Union and Labour Relations (Consolidation) Act 1992, section 194

21 References

Summary

An employer that provides a reference must take reasonable care to ensure it conveys a fair impression.

In some cases, the data protection law entitles persons to obtain copies of references from recipients, but not from authors.

There is no statutory requirement for an employer to provide a reference in respect of an ex-employee, but in particular cases there may be a contractual or other obligation to do so.

If an employer does decide to provide a reference it must take reasonable care to ensure it conveys a fair impression, bearing in mind that "a number of discrete statements may be factually accurate, but nevertheless may in the round give an unfair or potentially unfair impression to the reader".[145]

Any allegation of misconduct must have a reasonable basis. If an employer alludes in a reference to an employee's misconduct, yet has not carried out an investigation to substantiate this and does not have reasonable grounds for believing in the misconduct, it is possible the employer will be liable in negligence.

These principles apply equally to written and verbal references. The only issue presented by the fact a reference is conveyed verbally is that it is more difficult to prove what was said.

The remedies available in a court claim based on negligence would be monetary damages for financial loss caused by the negligent reference and potentially an injunction against its future use.

21.1 Access to references

Section 7 of the Data Protection Act 1998 gives individuals the right of access to personal data which is held on them. This entitles a worker to obtain a copy of their reference from the recipient but not the authoring employer (due

[145] *Cox v Sun Alliance Life Ltd* [2001] EWCA Civ 649, para 81

to an exemption in the Act), provided it is reasonable in the circumstances for the recipient to disclose the information. If the authoring employer marked the reference as being confidential, the recipient must nonetheless assess whether it is reasonable to disclose the material.

The Information Commissioner's Office (the body charged with monitoring and enforcing the Act) has produced guidance on access to employment references as part of their employment practices code [PDF].[146]

[146] ICO, The employment practices code, November 2011

22 Retirement age

Summary

The Coalition Government abolished the Default Retirement Age of 65 as of 1 October 2011.

Compulsory retirement of employees is now unlawful age discrimination unless it can be justified as being a proportionate means of achieving a legitimate aim.

For a fuller discussion, see the Library's briefing paper Employment Retirement Age.[147]

The Employment Equality (Age) Regulations 2006 (SI 2006/1031) made compulsory retirement ages unlawful unless they could be justified. However, that was subject to a national Default Retirement Age of 65, which allowed compulsory retirement of workers over that age. The Default Retirement Age was abolished in October 2011, with the coming into force of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069).[148]

Under the Equality Act 2010, a policy of compulsory retirement constitutes direct age discrimination unless it can be justified as being a proportionate means of achieving a legitimate aim.[149]

The courts have recognised a number of potentially legitimate aims for compulsory retirement, including:

- promoting access to employment for younger people;
- the efficient planning of the departure and recruitment of staff;
- sharing out employment opportunities fairly between the generations;
- ensuring a mix of generations of staff, to promote the exchange of experience and ideas;

147 Employment: Retirement Age, Commons Library Briefing, February 2013
148 Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069)
149 Equality Act 2010, section 13(2)

- avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job, which may be humiliating for the employee concerned; and
- avoiding disputes about the employee's fitness for work over a certain age.[150]

In order to demonstrate that a policy is proportionate an employer must show that it is "necessary". A policy will not be necessary if less discriminatory means of achieving the aim are available. The justification must also be relevant to the circumstances of the employer in question. It must also be introduced in the least discriminatory way reasonably possible. For example, if it is possible to stagger the introduction of a retirement age, so as to mitigate its negative effects, it is likely that its immediate introduction would be disproportionate.[151]

[150] See: *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, para 50

[151] *European Commission v Hungary* [2012] EUECJ C-286/12, para 73

23 Lay-offs and right to guarantee payments for workless days

Summary

Employment contracts may allow employers to put employees on lay-off or short-time working when there is insufficient work to do.

If an employee is not provided with work by their employer they may be entitled to a guarantee payment of up to £31 per workless day, for up to five days in any three-month period.

When employers have insufficient work available for employees, they may sometimes in exceptional circumstances consider lay-offs – sending employees home temporarily with no work to do, or short-time working – reducing employees usual working hours. This is not the same as redundancy or dismissal. Acas has a guidance page on Lay-offs and short-time working.[152]

Part III of the Employment Rights Act 1996 entitles qualifying employees to guarantee payments from their employer if they are not provided with work in specified circumstances. Section 28 identifies these circumstances:

> Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of—
>
> 5. a diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or
>
> 6. any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is employed to do,
>
> 7. the employee is entitled to be paid by his employer an amount in respect of that day.[153]

Section 29(1) provides that an employee will not be entitled to a guarantee payment unless they have been continuously employed for at least one month ending with the day before the workless day.

[152] Acas, Lay-offs and short-time working, 6 April 2022

[153] Employment Rights Act 1996, section 28

The right to a guarantee payment does not affect rights to contractual remuneration. If an employment contract doesn't contain a clause allowing the employer to reduce the pay of employees through lay-off or short-time working, they may still be contractually entitled to full pay even when there is no work provided. Contractual remuneration for any workless day counts towards the obligation to pay a guarantee payment in respect of that day.[154]

23.1 Exclusions from the right to guarantee payment

Employees are not entitled to guarantee payments if the failure to provide work is in consequence of industrial action; if the employee has unreasonably refused alternative work; or if they do not comply with the reasonable requirements of their employer to ensure that they are available to work.[155]

23.2 Calculation of guarantee payment

The amount of a guarantee payment payable to an employee in respect of any day is the sum produced by multiplying the number of normal working hours on the day by the "guaranteed hourly rate". The guaranteed hourly rate is the amount of one week's pay divided by the number of normal working hours in a week.[156] The amount of a guarantee payment payable to an employee in respect of any day is capped at £31.[157] The amount of days for which this can be claimed is five days in any three-month period on which the employee would normally work, meaning the total claimable for the three month period would be £155.[158]

23.3 Complaints to employment tribunals

An employee may present a complaint to an employment tribunal that their employer has failed to pay the whole or any part of a guarantee payment to which the employee is entitled. The complaint must be made within the usual three-month time limit, beginning with the day on which the employee was unpaid.[159]

154 Employment Rights Act 1996, section 32
155 Employment Rights Act 1996, section 29(3)-(5)
156 Employment Rights Act 1996, Section 30
157 Employment Rights Act 1996, Section 31(1); Employment Rights (Increase of Limits) Order 2022 (SI 2022/182)
158 Employment Rights Act 1996, Section 31(2)-(3)
159 Employment Rights Act 1996, Section 34

24 Statement of initial employment particulars

Summary

All workers have a statutory right to a written statement of the basic terms of their employment. The statement must be provided on or before the worker's first day of work.

Section 1 of the Employment Rights Act 1996 provides all workers with a right to a written statement of particulars of employment, with the exception of certain categories of mariners.[160] The statement must contain the basic terms of the employment as listed in section 1 of the 1996 Act; for example, the job description, rate of remuneration, hours and place of work, holiday entitlement and notice periods.[161]

For those starting work prior to April 2020, this right was only available to employees (not workers) and only to those with two months service. Any workers starting work after April 2020 are entitled to this statement with no minimum service requirements.

The statement must be given to the employee on or before their first day of work and all terms contained within the statement must comply with other aspects of employment law (e.g. rates of remuneration must be listed at or above the minimum wage).[162]

If there is a change in any of the terms detailed in the statement, the employer must give the employee a written statement containing details of the change no later than one month after the change.[163]

24.1 Remedies

If the employer fails to provide or provides inadequate particulars the employee may require a reference to be made to an employment tribunal,

160 Employment Rights Act 1996, section 199
161 Employment Rights Act 1996, section 1
162 As above
163 Employment Rights Act 1996, section 4

which will determine what particulars ought to have been included or referred to.[164]

If an employer breaches the requirement to provide a statement of particulars or changes, an employment tribunal may compensate the employee for this, but only in tribunal proceedings relating to matters specified in Schedule 5 to the Employment Relations Act 2002 (for example, unfair dismissal or discrimination claims). Thus, there is no freestanding right to claim compensation for failure to provide particulars.

In such a claim, if the tribunal finds a breach of the right to a statement of particulars or changes, it must make an award (even if no award is otherwise made in the main claim) of two weeks' pay, but can increase this to four weeks' pay. If the tribunal makes an award in the main claim it must increase the value of that award by two weeks' pay, but can increase this to four weeks' pay. A week's pay for these purposes is subject to the statutory limit (£538 as of April 2022).[165]

[164] Employment Rights Act 1996, section 11

[165] Employment Act 2002, section 38

25 Statutory Sick Pay

Summary

A qualifying employee is entitled to Statutory Sick Pay (SSP) if they have been ill for four or more consecutive days, provided they notify their employer within a prescribed deadline.

For SSP purposes, agency workers may fall within the definition of "employee".

SSP is capped at 28 weeks at a time, paid at a weekly rate of £99.35.

Since 6 April 2014 employers have been unable to recover from the State amounts paid in SSP.

For more information see the Library briefing on Statutory Sick Pay.[166]

Statutory Sick Pay (SSP) was introduced by the Social Security and Housing Benefits Act 1982. The principal legislation underpinning SSP is the Statutory Sick Pay (General) Regulations 1982 (SI 1982/194).

The current SSP rate as of April 2022 is £99.35 per week. SSP is available to qualifying employees that have been ill for four or more consecutive days (including non-working days) and earn at least £123 a week on average (pre-tax).[167] The employee cannot claim for the first three days of illness.

SSP is essentially a form of social security employers are required to pay. This means SSP uses a different definition of "employee" from that used in the Employment Rights Act 1996.[168] An important effect of this is that it entitles some agency workers to SSP.

The employee's period of entitlement to SSP is capped at 28 weeks' SSP within a single period of incapacity for work. Periods of incapacity for work of four or more consecutive days, separated by not more than eight weeks, are linked for the purposes of applying the 28-week cap.[169] The cap is financial and

166 Statutory Sick Pay, Commons Library Briefing, 27 May 2022

167 This is known as the 'lower earnings limit' – Social Security Contributions and Benefits Act 1992, section 5(1)

168 It uses a definition supplied by the Social Security Contributions and Benefits Act 1992, supplemented by the Income Tax (Earnings and Pensions) Act 2003; Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689)

169 Social Security Contributions and Benefits Act 1992, section 152(3)-(4)

applies once the amount of SSP paid reaches an amount equal to 28 times the weekly rate.

An employer can withhold payment of SSP if not notified of any day of incapacity for work within either the deadline it prescribes or seven days if no deadline is prescribed.

25.1 Employers' right to recover SSP

Since 6 April 2014 employers have been unable to recover amounts paid in SSP.[170] Prior to that the Statutory Sick Pay Percentage Threshold Order 1995 (SI 1995/512) entitled an employer to recover any amounts paid in SSP exceeding 13% of their liability to pay National Insurance in the same income tax month. The 1995 Order replaced from 6 April 1995 small employers' entitlement to 100% reimbursement of SSP.

[170] Statutory Sick Pay Percentage Threshold (Revocations, Transitional and Saving Provisions) (Great Britain and Northern Ireland) Order 2014 (SI 2014/897)

26 Suspension

Summary

There is no statutory right not to be unfairly suspended, although suspension without reasonable and proper cause might amount to a breach of one's employment contract.

There are no rigid rules prescribing when an employer may or may not suspend an employee. The matter is regulated by the contract of employment, which may set out a suspension procedure. The courts have in a number of cases held that an employer's express contractual right to suspend an employee should only be exercised on reasonable grounds.[171]

There is also implied into contracts of employment a term that the parties must not act in a manner likely to destroy or seriously damage their relationship of mutual trust and confidence. Where "there is no reasonable and proper cause for the employer's action, suspension may amount to a breach of the implied term of trust and confidence".[172] This is a fundamental term of the contract, which means that if one party breaches it the other may accept that breach as ending the contract.

In a 2012 judgment of the Court of Appeal, Lord Justice Elias said that suspension:

> should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them.[173]

If the suspension is in breach of the term of trust and confidence, the employee may accept the breach by resigning, and subsequently sue for

171 For example, see *McClory v Post Office* [1992] ICR 758; *Watson v Durham University* [2008] EWCA Civ 1266

172 *Watson v Durham University* [2008] EWCA Civ 1266, 22

173 *Crawford and Anr v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138, 71; see also *Gogay v Hertfordshire County Council* [2000] IRLR 703

constructive dismissal. Depending on the circumstances, the employee may be able to obtain an injunction to prevent or end the suspension.[174]

[174] *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106

27 Transfer of undertakings & protection of employment

Summary

In certain cases, employees are protected from being dismissed, or from having their contracts amended, where there is a change of ownership of the business for which they work, or there is a change to their work brought about by outsourcing, reassignment between contractors or insourcing activities back in-house.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (generally referred to as 'TUPE') as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16) preserve employees' terms and conditions and protect them from dismissal where a "relevant transfer" occurs.

The 2006 Regulations (which replace earlier variously amended regulations) implemented the EU Acquired Rights Directive, now consolidated in Directive 2001/23/EC, although go further than the Directive in their application to "service provision changes" (see below).

The Government has produced a detailed guide to the Regulations [PDF].[175] Acas has also published a guide to handling TUPE transfers.[176]

27.1 Relevant transfers

The Regulations apply to "relevant transfers", defined in regulation 3. A relevant transfer occurs when:

- an undertaking or business or part of an undertaking or business is transferred from one person to another; or

[175] BEIS, Employment Rights on the Transfer of an Undertaking: a guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014), [PDF] January 2014

[176] Acas, Handling TUPE: step by step for employers , 27 July 2021

- there is a service provision change.[177]

Business transfers involve the transfer of an "economic entity" (i.e. an organised grouping of persons/assets whose object is pursuit of an economic activity) which retains its identity following the transfer. Whether or not the undertaking "retains its identity" is a question of fact involving consideration of the transferred assets and workforce and whether business activities remain the same or similar after the transfer. Transfers can include buyouts or mergers of businesses or intra-group transfers.

Service provision changes are changes to activity brought about by outsourcing, reassignment between contractors or insourcing activities back in-house. Broadly, in order to constitute a service provision change the activities transferred must be fundamentally the same as those carried out by the person who has ceased to carry them out.

Additionally, there must have been, immediately before the change, an "organised grouping of employees" whose principal purpose was to carry out the activities on the client's behalf (e.g. outsourcing responsibility for cleaning an office, affecting a team of office cleaners). Regulation 3(1)(b) and 3(3) set out some additional conditions.[178]

The Acas guidance mentioned above gives the following example of a service provision change covered by the regulations:

> An organisation called DeskCo has contracted out the reception and security of their office to SecureLimited. When the contract ends, they retender the contract to Safeunit. DeskCo is the client as they are receiving the services. The reception and security staff are part of an organised grouping of employees as they provide services to meet DeskCo's needs. They'll transfer to Safeunit under TUPE. TUPE applies because the client DeskCo remains the same.[179]

27.2 Effect of the transfer

The transferor's employees whose employment would otherwise be terminated by the transfer will, upon the transfer, become employees of the transferee, and enjoy the same terms and conditions as those that had operated between them and the transferor. This will only apply to persons employed immediately before the transfer and assigned to the "organised grouping of resources or employees that is subject to a relevant transfer".[180] The transferee also inherits civil rights and liabilities associated with the

177 Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), regulation 3

178 Including that the client must intend that the activities will extend beyond single specific event or task of short-term duration, and the activities do not consist wholly or mainly of the supply of goods for the client's use

179 Acas, Handling TUPE: step by step for employers , 27 July 2021

180 Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), regulation 4(1)

contract. Certain collective agreements negotiated by transferors with trade unions also transfer.

One notable exception to the above is that pension rights relating to old-age, invalidity or survivors, do not transfer (see the Library's briefing on TUPE and Pensions).[181]

27.3 Dismissal and changes to terms

Where, before or after the transfer, any employee is dismissed, and the sole or principal reason for the dismissal is the transfer, the dismissal is automatically unfair.[182] The employee would be able to issue a claim for unfair dismissal, subject to the normal qualifying period (currently, two years' continuous employment). However, this protection does not apply:

> where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.[183]

While there is no statutory definition of what constitutes an economic, technical or organisational (ETO) reason, the aforementioned government guidance states the term is likely to include:

> (a) a reason relating to the profitability or market performance of the new employer's business (ie. an economic reason);
>
> (b) a reason relating to the nature of the equipment or production processes which the new employer operates (ie. a technical reason); or
>
> (c) a reason relating to the management or organisational structure of the new employer's business (ie. an organisational reason).[184]

27.4 Variation of contract

As with dismissals, any purported change to an employee's contract of employment will be void if the sole or principal reason for the variation is the transfer, unless:

---

181 TUPE and Pensions, Commons Library Briefing SN1665, June 2014

182 Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), regulation 7(1)

183 Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), regulation 7(2)

184 BEIS, Employment Rights on the Transfer of an Undertaking: a guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014), January 2014, p23

- the reason for the variation is an ETO reason (see above); or
- the terms of that contract permit the employer to make such a variation.[185]

[185] Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 4, as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014/16

28 Unfair dismissal

Summary

Persons classed as "employees" have the right not to be unfairly dismissed, provided (in most cases) they have two years' continuous employment with their employer.

Certain "automatically unfair" reasons for dismissal apply even with no qualifying period.

Part 10 of the Employment Rights Act 1996 provides employees with the right not to be unfairly dismissed. In most cases the employee must have two years' continuous service with their employer to qualify to bring a claim.

The test for whether a dismissal is fair is set out in section 98 of the Act and a considerable body of case law. Broadly, it is for the employer to show that the dismissal was for a potentially fair reason (capability or qualifications, conduct, redundancy, statutory restriction of employment or some other substantial reason justifying dismissal). Once the employer has shown that (which it often easily does), the fairness of the dismissal depends on whether, in the circumstances, the employer had acted reasonably in treating the reason as sufficient for dismissing the employee, a question determined "in accordance with equity and the substantial merits of the case".[186] In assessing this, tribunals will look to whether the employer's conduct in dismissing the employee fell within the range of reasonable responses to the reason for dismissal. The tribunal will also assess whether the employer followed a fair procedure, often by reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures.[187]

No qualifying period applies in respect of a range of 'automatically unfair' reasons for dismissal.[188] There are many types of dismissal deemed automatically unfair. For example, dismissal for union membership, for asserting statutory rights or for family-leave related reasons. Many, although not all, of these reasons are set out in Part 10 of the Employment Rights Act 1996 and some are discussed earlier in this paper.

186 Employment Rights Act 1996, section 98(4)

187 ACAS Code of Practice on disciplinary and grievance procedures, March 2015

188 See Employment Rights Act 1996, section 108(3)

Compensation

Compensation for unfair dismissal is normally considered under two heads: a basic award and a compensatory award.

Basic award

The basic award is calculated in broadly the same way as redundancy pay (see above). For each year of the employee's period of continuous employment, reckoned backwards from and ending on the effective date of termination, they are paid an amount based on the age reached during that year:

Multiple of one week's pay (subject to statutory maximum)	Age band
1.5	41 and over
1	22 to 40
0.5	Under 22

Source: Employment Rights Act 1996, section 162(2)

The relevant statutory maximum amount of a week's pay for calculating the basic award is that which is in force at the time of the dismissal. It is set annually by regulations. The most recently prescribed limits are:

Date	Maximum amount of one week's pay
6 April 2022 – 5 April 2023	£ 571
6 April 2021 – 5 April 2022	£ 544
6 April 2020 – 5 April 2021	£ 538

Source: The Employment Rights (Increase of Limits) Orders 2020, 2021, 2022

Compensatory award

The calculation of the compensatory award is complex and beyond the scope of this note. Broadly, it is an amount considered just and equitable awarded by a tribunal to reflect the employee's loss, including expenses incurred in consequence of the dismissal and loss of earnings.[189] The award is subject to a statutory cap. For dismissals since 29 July 2013 the maximum award is whichever is the lower of:

[189] Employment Rights Act 1996, section 123

1. the statutory cap; or
2. 52 weeks' actual gross pay at the time of the dismissal.

The most recently prescribed limits are:

Date	Cap on award
6 April 2022 – 5 April 2023	£ 93,878
6 April 2021 – 5 April 2022	£ 89,493
6 April 2020 – 5 April 2021	£ 88,519

Source: The Employment Rights (Increase of Limits) Orders 2020, 2021, 2022

29 Variation of contract

Summary

As a general principle of contract law, one party to a contract cannot unilaterally change its terms. As such, by and large, employers cannot change workers contracts without first obtaining their agreement.

One common way of avoiding this is to include in the contract from the outset a variation clause, entitling the employer to make changes to it without having to agree them each time.

A more controversial approach is to dismiss employees and then offer them reemployment on a new contract – for more information about this issue see the Library briefing on Fire and rehire practices.

Employment will generally involve the employer at some point or another seeking to change the terms and conditions under which employees work. If the employer and employee mutually consent to varying the terms of the employment contract (e.g. the employee agrees to the employer's offer of a pay rise) the new terms become binding, and some or all the old terms cease to have effect going forward. Another common means via which terms are varied is through collective bargaining, where the original contract provides for the incorporation of terms collectively agreed from time to time.

ACAS has produced guidance for employers on this area.[190]

In some cases, however, employers will seek to implement changes to which employees do not consent. There are several ways an employer can do this, which puts it at risk of a legal claim to a greater or lesser degree. Some common approaches are for the employer to:

- Seek agreement, but failing that impose changes and see what happens. This unilateral action could provide the basis for a breach of contract claim. If the changes were to important terms their variation might constitute a 'repudiatory breach' of the employment contract (a breach of terms so core to the agreement between the parties that its effect is to entitle one party to accept that breach as having ended the contract)

[190] Acas, Making changes to employment contracts – employer responsibilities, 13 December 2021

enabling a qualifying employee to resign and claim constructive unfair dismissal (see above).

- Terminate the existing contract and offer to reemploy the employee on a new contract (often termed 'fire-and-rehire'). Terminating a contract will constitute a dismissal and create the possibility of an unfair dismissal claim. This will be so even if the employee accepts the offer of employment on the new terms. In considering such a claim an employment tribunal would, broadly, assess whether the employer thought that it had a good business reason for the dismissal, and whether termination of the employee's contract was a reasonable response to that reason, factoring in the employee's objections to the change and the process followed by the employer in implementing it.

- Rely on a clause that entitles the employer to make changes to the contract. One common example is a mobility clause, entitling the employer to require attendance at a different place or work. The courts take a restrictive approach to such clauses and resolve any ambiguity as to their effect against parties relying on them.

The legal consequences of an attempted variation of contract are highly context-specific. An employee wanting to understand their prospects of resisting a change, or the risks of resigning in response to a unilateral variation, should seek independent legal advice, sources of which are set out in the Library briefing on Legal advice and help in employment matters.[191]

[191] Legal advice and help in employment matters, Commons Library Briefing SN02830, 9 June 2017

30 Whistleblowing

Summary

Workers that disclose information of certain kinds of malpractice at work may be protected from being subjected to detriment by their employers, provided the disclosure is made in a prescribed manner. The relevant law is explained in the Library's briefing papers on whistleblowing, which provides a full overview of whistleblowing law, and on the narrower issue of disclosures to MPs.[192]

The Public Interest Disclosure Act 1998 (PIDA) amended the Employment Rights Act 1996 to provide protection for workers that disclose information about malpractice at their workplace, or former workplace, provided certain conditions are met.

PIDA protects workers who make "protected disclosures" from being subjected to detriment by their employers.[193] It applies to most workers, with limited exceptions (it does not apply to employment in the Security Service, the Secret Intelligence Service or the Government Communications Headquarters).[194]

Section 43A of the Employment Rights Act 1996 defines protected disclosure as:

> a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

Thus, a protected disclosure is:

- a disclosure of a certain kind of information (a "qualifying disclosure");
- that is disclosed by a worker in a certain way.

Section 43B defines a "qualifying disclosure" as any disclosure of information (as distinct from allegation or opinion) which, in the reasonable belief of the

192 Whistleblowing and gagging clauses, Commons Library Briefing CBP-7442, 4 January 2016; Whistleblowing to MPs, Commons Library Briefing SN06868, 17 April 2014

193 Employment Rights Act 1996, section 47B

194 Employment Rights Act 1996, section 193

worker making the disclosure, is made in the public interest and tends to show any of the following:

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.[195]

In order to satisfy the definition of protected disclosure, the qualifying disclosure must be made in accordance with any of the sections 43C to 43H, which outline the following permitted methods of disclosure:

- disclosure to the worker's employer;
- disclosure to another responsible person, if the worker reasonably believes the information relates to that person's conduct or a matter for which they are responsible (e.g. an agency worker might raise a concern with the organisation hiring him);
- disclosure made in the course of obtaining legal advice;
- disclosure to a Minister of the Crown if the worker's employer is appointed by enactment (this protects workers in government appointed bodies who complain to the sponsoring department; e.g. a worker in an NHS Trust might disclose to the Department of Health);
- disclosure to prescribed persons (see below section 30.1);
- disclosure that meets the conditions of section 43G (see below section 30.2);
- disclosure of an exceptionally serious failure (see below section 30.3).[196]

[195] Employment Rights Act 1996, section 43B

[196] Employment Rights Act 1996, sections 43C-43H

30.1 Disclosure to prescribed persons

The prescribed persons are set out in The Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549) as amended. They are bodies responsible for the regulation of various activities, e.g. the Audit Commission; the Civil Aviation Authority; Director General of Fair Trading; the Environment Agency, etc. In order for the disclosure to be protected, the worker must reasonably believe that the information disclosed is substantially true and relates to a matter for which the prescribed person is responsible (as set out in a table in the Schedule to the Order). The Department for Business, Energy and Industrial Strategy maintains an up to date list of prescribed people and bodies.[197]

Members of Parliament are prescribed persons, disclosure to whom may be protected in relation to any matter described in the Schedule (i.e. any matter for which one of the other prescribed persons is responsible).[198]

30.2 Disclosure to non-prescribed persons

Section 43G of the Employment Rights Act 1996 provides conditions for "disclosure in other cases". It protects disclosure to persons other than those detailed above, provided certain criteria are met. It could be used, for example, to protect disclosure to the press. To benefit from this protection one of the following must apply:

- the worker reasonably believes they will be subjected to detriment if they disclose to their employer;
- where there is no relevant prescribed person, the worker reasonably believes that evidence will be concealed or destroyed if they disclose to their employer; or
- the worker has already disclosed substantially the same information to either their employer or a prescribed person.

If one of the above applies, then disclosure by the worker may be eligible for protection under the section, provided all the following conditions are met:

- they reasonably believe that the information disclosed, and any allegation contained in it, are substantially true;
- they do not make the disclosure for purposes of personal gain;

197 BEIS, Whistleblowing: list of prescribed people and bodies, Gov.uk, 27 October 2021
198 The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 (SI 2014/596)

- in all the circumstances of the case, it is reasonable for them to make the disclosure.

30.3 Disclosure of exceptionally serious failures

Section 43H of the Employment Rights Act 1996 protects disclosures of "exceptionally serious" failures, even to non-prescribed persons. It is similar to section 43G above in having the same three final conditions, although there is no requirement for the worker to have first contemplated or attempted disclosing the failure to their employer or a prescribed person. While there is no explicit restriction on who information can be disclosed to under this section, "the identity of the person to whom the disclosure is made" is an important factor in whether the disclosure meets the test of being "reasonable".[199]

The rationale behind this protection appears to be that, where a matter is exceptionally serious, it is in the public interest that its disclosure should not be delayed.

30.4 Remedies

If a worker is subjected to detriment by their employer for having made a protected disclosure that worker may enforce their rights by presenting a complaint to an employment tribunal.[200] The claim must be brought within three months of the act (or failure to act) complained of.[201] Where an employee is dismissed for having made a protected disclosure, the employee will be regarded as having been automatically unfairly dismissed.[202] There is no upper limit on the amount of financial compensation obtainable in whistleblowing-based unfair dismissal claims.[203]

30.5 NHS recruitment

On 23 May 2018 the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 (SI 2018/579) came into force, prohibiting a specified NHS employer from discriminating against a job

199 Employment Rights Act 1996, section 43G
200 Employment Rights Act 1996, section 48(1A)
201 Employment Rights Act 1996, section 48(3)
202 Employment Rights Act 1996, section 103A
203 Employment Rights Act 1996, section 124(1A)

applicant "because it appears to the NHS employer that the applicant has made a protected disclosure".[204]

30.6 Extension to office holders

In 2019, the Supreme Court held in *Gilham v Ministry of Justice* that whistleblowing protections could be extended to judicial office holders, even though they are not normally considered to have the status of workers. The Supreme Court found that denying these protections to a district judge infringed her rights to non-discrimination in the enjoyment of the right to freedom of expression under articles 14 and 10 of the European Convention on Human Rights. As a result, judicial office holders are also eligible for protection under Part IVA of the Employment Rights Act 1996.[205]

[204] Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018, regulation 3

[205] *Gilham v Ministry of Justice* [2019] UKSC 44

31 Working time

Summary

Subject to various qualifications discussed below, the Working Time Regulations 1998:

limit average working time to 48 hours per week and eight hours per night for night workers;

entitle workers to:

- a daily rest period of eleven hours in each 24-hour period;
- a weekly rest period of 24 hours in each seven-day period;
- a 20-minute rest break once daily working time exceeds six hours; and
- 5.6 weeks' annual leave (this is dealt with above, under 'Holiday')

The Working Time Regulations 1998 (SI 1998/1833), as amended, implement EU law on working time, originating with Directive 93/104/EC and consolidated in Directive 2003/88/EC (the 'Working Time Directive'). The Regulations set limits on weekly working time and night work, and provide rights to rest periods and breaks. Since the UK's departure from the European Union, these regulations form part of retained EU law.

31.1 Scope of the Regulations

"Working time" is defined under the Regulations as including any period during which the worker is working, at the employer's disposal and carrying out their activity or duties, or undertaking certain types of work-related training. Employment contracts or collective/workforce agreements may specify additional types of working time for the purposes of the Regulations.[206]

[206] Working Time Regulations 1998, regulation 2(1)

The Regulations apply to workers, including agency workers, although there are several exceptions. The Regulations either wholly or mainly do not apply to:

- merchant seafarers;
- sea-fishermen;
- work on vessels operating on inland waterways;
- mobile staff in civil aviation; and
- mobile staff in road transport.

Working time in these sectors is addressed by separate legislation, [207] and discussed in the Library briefing paper Working Time Directive: Excluded Sectors.[208] Additionally, the provisions setting limits on working time and entitling rest do not apply to "unmeasured working time", which is time that "is not measured or predetermined or can be determined by the worker himself" (e.g. managers who control their own work).

The Regulations do not apply:

> where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations[209]

The exception applies to ensure the:

> proper operation of services essential for the protection of public health, safety and order in cases the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.[210]

Thus, it does not apply to the routine operation of emergency services.

---

207 The Merchant Shipping (Hours of Work) Regulations 2002 (SI 2002/2125); The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 (SI 2004/1713); The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (SI 2003/3049); The Civil Aviation (Working Time) Regulations 2004 (SI 2004/756); The Road Transport (Working Time) Regulations 2005 (SI 2005/639)

208 Working Time Directive: Excluded Sectors, Commons Library Briefing, SNBT137, 7 October 2009

209 Working Time Regulations 1998 (SI 1998/1833), regulation 18(2)(a)

210 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* C-397/01 to C-403/01, para 55

31.2 Working time limits

Maximum weekly working time

Regulation 4 provides that, subject to a worker agreeing to opt out, "working time, including overtime … shall not exceed an average of **48 hours**". An employer must take reasonable steps to ensure this limit is complied with.

The limit does not apply where an employer has obtained a worker's agreement in writing to "opt-out" of it. This may relate to a specific period or apply indefinitely. Unless the agreement provides otherwise, it is terminable by the worker if they give at least seven days' written notice (any otherwise agreed notice period cannot exceed three months).[211] Workers cannot be subjected to detriment or dismissal for refusing to enter into or continue such an opt-out – any such dismissal is automatically unfair.

Working time is averaged over a period of 17 weeks, although this is extended to 26 weeks in certain cases, such as offshore work; security and surveillance activities; where there is a need for continuity of service or production (e.g. hospital care); where there is a foreseeable surge of activity (e.g. in agriculture); or where activities are affected by unexpected circumstances.[212] A collective or workforce agreement may in certain cases extend this to 52 weeks.[213]

The Government has published guidance on calculating working time, including information on which hours count as working time.[214]

Length of night work

A night worker's normal hours of work must not exceed an average of **eight hours** during each 24 hours, averaged across a 17-week period.[215] The employer must take reasonable steps to ensure this limit is complied with.

"Night time" for these purposes is defined by the employment contract or collective/workforce agreement (but must include the period between midnight and 5 a.m.). If no period is specified, the default is the period between 11 p.m. and 6 a.m. A "night worker" is one who normally works at least three hours during night time.[216]

211 Working Time Regulations 1998 (SI 1998/1833), regulations 4(1), 5
212 Working Time Regulations 1998 (SI 1998/1833), regulations 4(5), 21
213 Working Time Regulations 1998 (SI 1998/1833), regulation 23
214 Maximum weekly working hours, Gov.uk [accessed 27 September 2022]
215 This period may be modified by a collective or workforce agreement
216 Working Time Regulations 1998 (SI 1998/1833), regulation 2(1)

31.3 Rest

Daily rest period

Workers are entitled to a daily rest period of **eleven consecutive hours** in each 24-hour period. In the case of a shift worker, the requirement does not apply when they are changing shift and cannot take a daily rest period between the end of one shift and the start of the next one, although compensatory rest should be provided.[217]

Weekly rest period

A worker is entitled to an uninterrupted rest period of not less than **24 hours in each seven-day period**, although the employer may change this to either:

- two uninterrupted rest periods each of not less than 24 hours in each 14-day period; or
- one uninterrupted rest period of not less than 48 hours in each 14-day period.[218]

As with daily rest, the requirement is disapplied in certain cases for shift workers.

Rest breaks

Where a worker's working time exceeds six hours, they are entitled to a 20-minute break.[219] The entitlement does not multiply; a worker working 12 hours is entitled to one 20-minute break. The length of the break may be modified or excluded by a collective or workforce agreement. In order to count as a rest break, it must be an uninterrupted break which the worker knows is a break and can use as they please.[220]

217 Working Time Regulations 1998 (SI 1998/1833), regulations 22(1)(a), 24
218 Working Time Regulations 1998 (SI 1998/1833), regulation 11
219 Working Time Regulations 1998 (SI 1998/1833), regulation 12
220 See *Gallagher and others v Alpha Catering Services Ltd* [2004] EWCA Civ 1559

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below:

commonslibrary.parliament.uk

@commonslibrary