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Employment 2021

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Law and Practice

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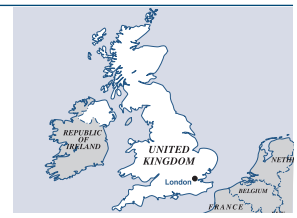

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1. INTRODUCTION

1.1 Main Changes in the Past Year

Though the anticipated Employment Bill did not form part of the Queen's Speech in May 2021, there have been a number of significant developments in the employment space over the past twelve months – notwithstanding the changes in employment law that have been implemented in connection with the pandemic.

Employment Status

On 19 February 2021, the Supreme Court handed down its long-awaited decision in Uber v Aslam and others, deciding that drivers working for Uber are workers rather than independent contractors. The Supreme Court's ruling is an important decision in providing clarification to employers, especially those operating within the gig economy, on the factors that courts will consider when determining an individual's employment status. The decision focused heavily on the degree of control exercised by Uber over services performed by the individual, in addition to the balance of power between employer and employee. Uber now classifies its drivers as workers, entitling them to the national minimum wage, paid holiday and a pension plan, however, Uber has not applied the same to its Uber Eats riders, who are classified as self-employed workers.

Whilst an important judgment, it does not necessarily mean that all independent contractors will now be deemed workers. Each subsequent case, irrespective of similarities, will need to be judged on its own specific set of facts. Deliveroo was successful its battle in R (on the application of the IWGB) v CAC and Roofoods Ltd t/a Deliveroo that found that the riders were not "workers" within the meaning of Section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992, but were independent contractors, with the right of substitution.

Overall, the legal challenges on employment status have made employers and investors take their social responsibilities more seriously (for example, Deliveroo's IPO was impacted by the controversy) and have highlighted that there is a risk that individuals engaged on a purportedly self-employed basis may turn out to be workers under UK employment law.

Harassment

In July 2021, the UK government announced the introduction of a statutory duty on employers to prevent sexual harassment in response to their consultation conducted in 2019. This new duty requires employers to demonstrate positive, proactive steps and builds upon a well-developed statutory framework regarding harassment that protects individuals on the basis of protected characteristics.

In the response to its consultation, the government has also committed to introducing workplace protections against third-party harassment – bringing customers, clients and contractors that subject an employee to harassment into the bounds of an employer's liability.

In February 2021, the Employment Appeal Tribunal found that an employer could not rely on "stale" equality and diversity training as a defence to show it had taken all reasonable steps to prevent racial harassment in Allay (UK) Ltd v Gehlen. Following this decision, employers should ensure they carry out quality training on a regular basis and if there is reason to believe that employees have forgotten the training, it should be refreshed.

Health and Safety

Sections 44 and 100 of the Employment Rights Act 1996 (ERA), relating to the protection from detriment in health and safety (H&S) cases and unfair dismissal in connection with H&S activities, have come into the spotlight during the

pandemic due to the on-going health and safety concerns surrounding the workplace.

The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 (the Regulation) came into force on 31 May 2021 and amended section 44 of the ERA. This is as a result of the successful challenge in Independent Workers Union of Great Britain v Secretary of State for Work and Pensions that held that the sole protection against detriment to employees was contrary to EU H&S directives and there was a gap in legal protection for workers, especially in the COVID-19 pandemic.

Section 44 applies to H&S cases and protects employees against suffering a detriment by their employer. Workers are now also protected on either of the following grounds:

- where the employee left, proposed to leave, or refused to return to their place of work due to a reasonable belief that attendance at work would put them in serious and imminent danger (Section 44(1)(d) of the ERA); and
- in circumstances of danger (which the employee reasonably believed to be serious and imminent) the employee took or proposed to take appropriate steps to protect themselves or other persons from the danger (Section 44(1)(e) of the ERA).

Discrimination

On 10 June 2021, the UK's Employment Appeal Tribunal (EAT) found that gender-critical beliefs – including believing that one's biological sex is immutable and not to be conflated with gender identity – did qualify for protection under the Equality Act 2010 in Maya Forstater v CGD Europe and others. In overturning the tribunal's ruling, the EAT described how Section 10 of the Equality Act must be interpreted in accordance with Articles 9 and 10 of the European Convention on Human Rights (ECHR), both of which provide a low threshold for establishing that a belief is worth of respect in a democratic society. Only the most extreme beliefs would be excluded on these grounds, such as pursing totalitarianism, advocating Nazism, or espousing violence and hatred in the gravest of forms.

Section 10 of the Equality Act is concerned with whether a person has the protected characteristic by being of the relevant belief, and not with whether a person manifests anything pursuant to that belief. Employment tribunals should therefore assess the belief in general when considering whether a belief falls within Section 10 of the Equality Act, and the EAT criticised the tribunal for making a value judgment based on its own view as to the legitimacy of Ms Forstater's belief. The EAT also highlighted that Ms Forstater's belief (labelled by her colleagues as "trans-phobic" and "exclusionary or offensive") is widely shared, including respected academics and is consistent with previous decisions of UK courts.

Overall, a belief must be considered carefully before it can be characterised as not worthy of respect in a democratic society. However, the judgment also highlighted that employers would continue to be liable for acts of harassment and discrimination against trans persons committed in the course of employment, and the judgment does not prevent employers from providing a safe environment for trans persons.

Extension of IR35 Rules to Private Sector

The IR35 legislation aims to ensure that workers that provide services through an intermediary such as a personal service company (PSC), but in practice work like employees pay broadly the same employment taxes as their employee counterparts.

As of 6 April 2021, IR35 is the responsibility of all private sector employers that in a tax year have:

- more than 50 employees;
- an annual turnover over GBP10.2 million; and
- a balance sheet worth over GBP5.1 million.

The extension has had significant administrative and cost implications for end-user businesses, that now must make a status determination on any independent contractors that they engage via personal service company.

National Minimum Wage (NMW)

The Supreme Court's decision in the cases of Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad and another (T/A Clifton House Residential Home) was published on 19 March 2021. The Supreme Court took a purposive approach to the meaning of the NMW regulations and found that the care workers that were merely available for work during their night shift (rather than actually working) were only entitled to the NMW for time spent awake and working.

1.2 COVID-19 Crisis

The COVID-19 pandemic has presented unique challenges for employees and employers alike, as well as elicited unprecedented responses from the government that has shaped the "new normal".

Coronavirus Job Retention (Furlough) Scheme

Since its inception in March 2020, the Coronavirus Job Retention Scheme (CJRS) has supported over 11.2 million employees. Though the CJRS was originally planned to culminate on 31 October 2020, the government has continued the scheme until the end of September 2021. All employers with a UK bank account and UK PAYE schemes are eligible for the CJRS.

Under the extended scheme, employees will continue to receive:

- 80% of their salary for hours not worked (up to a maximum of GBP2,500), paid by the UK government; and
- National Insurance and pension contributions (for all of their salary, whether the hours are worked or not), paid by their employer.

The UK government has required further contributions to be made by employers as of July. In addition to National Insurance contributions and pension costs, employers will need to pay a contribution towards the employee's furloughed salary at the following rates:

- 20% in August; and
- 20% in September.

Compulsory Vaccination

On 22 July 2021, following parliamentary approval, legislation was made that will require those working in Care Quality Commission registered care homes in England to be fully vaccinated against COVID-19. Applying to England only, the change is going to be implemented through an amendment to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and will come into force on 11 November 2021.

The announced legislation has raised many questions, such as whether the amendment will mean that employers are free to terminate staff that are not fully vaccinated. Exemptions to compulsory vaccination under the legislation include if vaccination is not clinically appropriate for the individual and those under the age of 18.

There is no exemption for those who refuse vaccination on religious grounds.

Right to Work Checks

During the pandemic, the Home Office has allowed employers to carry out right to work checks using video calls to job applicants and scanned copies of identity documents (such as the prospective employee's passport). From 21 June 2021, employers have been required to resume checking applicants' original documents with the person present, however retrospective checks on employees appointed under the pandemic-adjusted rules are not required.

Holiday Leave

In another legislative response to the pandemic, the Working Time (Coronavirus) (Amendment) Regulations 2020 were amended in 2020 to allow workers to carry over up to four weeks of their accrued statutory annual leave where it was not "reasonably practicable" to take this leave as a result of the effects of COVID-19. The unused leave can now be taken in the two leave years immediately following the year in respect of which it was due to be taken.

Gender Pay Gap Reporting

Employers with more than 250 employees on their "snapshot date" are caught by The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. The Equality and Human Rights Commission (EHRC) granted companies a six-month extension to report their gender pay figures (whereas the annual April deadline introduced in 2017 was suspended entirely in 2020 due to COVID-19). During this temporary measure, the EHRC will not take any enforcement action until 5 October 2021 in order to "strike the balance" between supporting businesses and the Regulations. It has nonetheless encouraged businesses to report their figures as soon as possible.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

In the UK, there are three principal categories of working status: employee, worker or self-employed. The distinction between each is significant because the applicable status determines the extent of the legal protections and rights afforded to the relevant individual and/or the responsibilities that the employer would be required to assume.

The courts have developed a number of tests to determine the correct classification of workers and will look at a wide range of factors when assessing an individual's true employment status. No one factor is determinative of the issue, and the courts will look at the substance rather than form in determining the true nature of such a relationship. The labels used by the parties to describe the arrangement will only be the starting point, and the matters taken into account (and the weight given to them) will vary depending on the circumstances.

Employees

Employee status is the highest form of employment status under UK law. A key test for determining whether someone is an employee is whether there is "mutuality of obligations" between the hirer and the individual. This means that the employer has an ongoing commitment to provide work and the employee has a reciprocal ongoing commitment to accept the work offered.

Subsequently, a range of other factors will be looked at by the courts:

- control – whether an individual has control of how, what, when, where and on what terms services are to be provided;

- personal service – whether an individual is permitted to send along a substitute to perform services rather than being required to perform them personally;
- integration – the extent to which an individual is integrated within the organisation; and
- dependency – the extent to which an individual takes a business risk, such as by supplying their own capital or providing their own tools and equipment.

Consideration will also be given to factors including the nature and length of the engagement, the pay and benefits and the facilities and the equipment provided to the individual, as well as any written contract in order to establish the weight that ought to be placed on the agreed terms.

Broadly, the greater the number of tests which are satisfied, the greater the likelihood that an individual will be an employee. Conversely, the fewer the number of tests which are satisfied, the more likely it is that an individual will be considered to be self-employed.

Workers

Even if an individual is deemed not to be an employee, they may still qualify as a worker. This definition has been subject to extensive scrutiny by the tribunals and courts to determine what types of working arrangements fall within its scope. Subject to certain exceptions, the same tests for deciding whether someone is an employee are typically used in deciding whether someone is a worker, but the "pass mark" is lower. The first inquiry for workers is to examine whether there is a contract of some kind between the individual and their putative employer; either an employment contract or some other kind of contract to perform work or services.

Though workers are entitled to less statutory rights than employees, they are entitled to:

- the national minimum wage;
- rest periods and other limits on working time;
- paid holiday;
- the right to seek compulsory trade union recognition; and
- the right not to suffer detriment under the whistle-blowing provisions of the Employment Rights Act 1996.

Self-employed – Independent Contractors

Under current UK employment law, a self-employed independent contractor is one of the three categories of individuals providing services in the job market (alongside an employee and a worker). There are statutory definitions for employees and workers, although these are not comprehensive and the current position has been substantially defined through case law. An individual who is neither an employee nor a worker will be self-employed for employment law purposes.

An employer seeking to use the independent contractor model will need to take steps to ensure that the reality of the relationship between the company and the contractor accurately reflects their roles as independent contractors in order to mitigate litigation and tax risks.

2.2 Contractual Relationship

The basis of the employment or worker relationship in the United Kingdom is that of a contract between the parties.

Pursuant to Section 1 of the Employment Rights Act 1996, employers are required to give employees and workers a written statement of the principal terms of their employment or engagement in a single document. This is a "day one" right which means that the worker is entitled to receive the statement on or before their start date. This requirement is often satisfied in practice by requiring the employee to sign

a written employment contract that contains the required particulars.

The principal terms to be provided in writing in this Section 1 statement include:

- the names of each party;
- the date of employment began;
- the date of continuous employment;
- remuneration and the intervals at which it is paid;
- hours; holiday entitlement;
- benefits;
- notice period of termination;
- job title;
- place of work;
- probationary period (if relevant); and
- any mandatory training provided by the employer or which must be funded by the employee.

Terms relating to collective agreements, pension arrangements and disciplinary rules and procedures can be provided at a later date and in a separate document provided it is no later than two months after the beginning of employment.

After the fourth year of employment on a renewed fixed-term contract, employment will be deemed to be permanent/indefinite unless the further use of a fixed-term arrangement can be justified.

Fixed-term employees are entitled to equal treatment with comparable permanent employees, unless the difference in treatment is objectively justified. Employers should also be aware that the expiry and non-renewal of fixed-term employment will be a dismissal at law and the employee may be able to claim that this dismissal is unfair.

2.3 Working Hours

The Working Time Regulations 1998 limit working hours as follows.

- Working week: a 48-hour maximum working week calculated as an average over a 17-week period (the maximum working week is reduced for under-18s). An individual may opt-out of the maximum working week by written agreement, unless they are under-18.
- Weekly rest break: 24 hours' uninterrupted rest in each week or 48 hours' uninterrupted rest in each fortnight (exemptions may apply, in which case compensatory rest must be provided).
- Daily rest break: 11 hours' uninterrupted rest (exemptions may apply, in which case compensatory rest must be provided) and 20-minute rest break when the working time exceeds six hours (limited to eight hours per day on average).
- Night work: night workers are entitled to a free health assessment when starting night work and thereafter at regular intervals and can transfer to day work if their night work is causing health issues.

An employer must keep adequate records to demonstrate compliance with working time obligations, including daily working time.

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 apply to part-time workers and provide that part-time workers must not be treated less favourably in their contractual terms and conditions than comparable full-timers, unless different treatment is justified on objective grounds. A part-time worker's salary and holiday entitlement must be calculated on a pro-rata basis.

Subject to compliance with the applicable national living wage or national minimum wage, the law does not require employees to be paid for overtime. However, when employees are paid hourly, it would be uncommon for overtime not to be paid.

In terms of flexible arrangements, employees with at least 26 weeks' continuous employment can make a request for flexible working under the statutory scheme for any reason. Only one request can be made in any 12-month period, however, the Minister for Women and Equalities has called for employers to make the offer of flexible working standard.

2.4 Compensation

On 1 April 2021, the national minimum wage (NMW) rates were increased as follows:

- the national living wage increased 2.2% to GBP8.91;
- the 21-22 year old rate increased 2.0% to GBP8.36;
- the 18-20 year old rate increased 1.7% to GBP6.56;
- the 16-17 year old rate increased 1.5% to GBP4.62;
- the apprentice rate increased 3.6% to GBP4.30; and
- the accommodation offset increased 2.0% to GBP8.36.

The national living wage now applies to all workers aged 23 and over, as opposed to 25 years.

The government also introduced new statutory rates and payments in April 2021 to the following:

- statutory sick pay – GBP96.35;
- redundancy pay – GBP16,320 (maximum pay) and GBP544 (weekly cap);
- statutory shared parental pay (ShPP) – GBP151.97;
- statutory maternity pay (SMP) – GBP51.97;
- statutory adoption pay (SAP) – GBP151.97;
- statutory paternity pay (SPP) – GBP151.97;
- minimum auto-enrolment contributions – minimum pension contribution (8%) between employer and employee;
- voluntary living wage – GBP10.85 (London) and GBP9.50 (UK); and
- tribunal compensation limits:
  (a) weekly pay limit for calculating unfair dismissal basic award – GBP544;
  (b) maximum unfair dismissal award – GBP16,320;
  (c) maximum compensation for unfair dismissal – GBP89,493 (or one years' pay if less);
  (d) minimum basic award for dismissal on trade union, health and safety, pension, employee representative or working time grounds – GBP6,634;
  (e) weekly pay limit for failure to reinstate or re-engage (between 26–52 weeks' pay) – GBP544;
  (f) weekly pay limit for breach of right to accompanied (up to two weeks' pay) – GBP544;
  (g) weekly pay limit for breach of flexible working regulations (up to right weeks' pay) – GBP544;
  (h) failure to give written particulars of employment (two to four weeks' pay) – GBP544; and
  (i) payment for breach of contract claim (eg, wrongful dismissal) – capped at GBP25,000.

From 6 April 2021, the Vento bands for calculating injury to feelings awards in discrimination claims for England, Wales and Scotland also increased.

Bonuses can be awarded by the employer on a contractual or discretionary basis.

Unlike other jurisdictions, it is not customary or required by law to pay bonuses in the UK – such as "13-month salaries". Employers should exercise their discretion to award bonuses fairly and in good faith.

2.5 Other Terms of Employment

UK law provides for the following types of leave: maternity, paternity, adoption, shared parental, parental and parental bereavement.

- Maternity: up to 52 weeks (no qualifying conditions) with six weeks' pay at 90% of pay and 33 weeks at statutory maternity pay (currently GBP151.97 per week) subject to qualifying conditions in length of service and earnings.
- Paternity: two weeks to be taken on or within 56 days of the birth or adoption of the child (subject to qualifying length of service) at statutory paternity pay (currently GBP151.97 per week).
- Adoption: up to 52 weeks (no qualifying conditions) with six weeks' pay at 90% of pay and 33 weeks at statutory maternity pay (currently GBP151.97 per week) subject to qualifying conditions in length of service and earnings.
- Parental: Up to 18 weeks' unpaid leave in total per child under the age of 18, limited to four weeks a year unless otherwise agreed (subject to qualifying length of service).
- Shared parental: Up to 50 weeks of the mother's maternity leave and 37 weeks of pay (currently GBP151.97 per week) can be shared with her partner.
- Parental bereavement: Up to two weeks to be taken at any time within 56 weeks of the death of a child under 18 (includes a stillbirth after 24 weeks of pregnancy) (no qualifying conditions).

All UK workers are legally entitled to 5.6 weeks' paid holiday a year (including bank holidays).

3. RESTRICTIVE COVENANTS

3.1 Non-competition Clauses

During the course of their employment, employees owe an implied duty of fidelity to their employer, which includes an obligation not to compete. After employment is terminated, the ability of employers to prevent competition is more restricted as this implied duty falls away, and the employer must rely on restrictive covenants.

Restrictions that limit the activities of the employee post-termination will be void and unenforceable unless specific conditions are met. A post-termination restriction will be enforceable only when it:

- protects the legitimate business interests of the employer (for example, trade connections, goodwill or employees);
- is the minimum required to protect that legitimate business interest; and
- is reasonable in scope.

To determine reasonableness, the court will balance the interests of the employer and former employee. Issues to consider will include the duration of the restriction, geographical scope, the seniority of the former employee, the nature of their role, and the nature of the industry (including whether it will be possible for the employee to obtain a new job if the restrictions were to be enforceable).

There is no maximum period for a post-termination covenant. However, restrictions lasting more than 12 months are unlikely to be enforceable in the United Kingdom except for in exceptional circumstances.

Employers should avoid using a "one-size fits all" approach to the covenant provisions with-

in their employment contracts, as covenants should be based on the individual's seniority and tenure. Furthermore, the court expects the duration of restrictive covenants to be shorter if the employee's notice period is short. For example, if the term of the covenants is disproportionate, especially for more junior employees, then the court may deem them unenforceable as a restraint of trade.

The UK government opened a consultation on measures to reform post-termination non-compete clauses in contracts of employment. The consultation closed in February 2021 and proposed to allow workers greater freedom to find new or additional work, discourage the widespread use of non-compete clauses, and include a proposal to introduce a mandatory requirement for compensation to be paid for the duration of a non-compete restriction. An extreme proposal under the consultation is to ban non-compete clauses altogether.

3.2 Non-solicitation Clauses – Enforceability/Standards

A non-solicitation clause is a restriction preventing an employee from poaching other employees or customers for a specified period, and a non-dealing clause similarly prevents an employee from doing business with other employees or customers. The same principles discussed above apply – employers must be prepared to justify any post-termination restriction with a legitimate business interest and not go any further than what is necessary in order to achieve this interest.

While the UK government's recent consultation document referred to non-compete post-termination restrictions throughout, it similarly sought views on whether the proposals should apply to non-solicitation clauses and non-dealing clauses.

4. DATA PRIVACY LAW

4.1 General Overview

The Data Protection Act 2018 (the DPA) and the retained EU General Data Protection Regulation (Regulation (EU) 2016/679) (UK GDPR) are the primary legal instruments that protect employees' personal data.

Processing personal data must be carried out in accordance with the data protection principles. The first of these is that data should be processed in a lawful, fair and transparent manner and thereby must satisfy one of the specific conditions in Article 6(1) UK GDPR. The most relevant conditions for employment purposes are:

- data subject (employee) consent;
- the processing is necessary for the performance of a contract to which the data subject is a party; or
- the processing is necessary for the purposes of the legitimate interests of the data controller.

The first two conditions will typically apply in an employment context, therefore employee consent will not always be required. If consent is required, it needs to be specific, informed and freely given.

Sensitive Data

Under Article 9 UK GDPR, additional safeguards apply in relation to the processing of personal data that is classified as a "special category of personal data" (or sensitive personal data).

The special categories of personal data are:

- race or ethnic origin;
- political opinions;
- religious or philosophical beliefs;
- trade union membership;
- genetic and biometric data;

• health; and
• sex life or sexual orientation.

Special category data may be processed provided explicit consent, or, amongst other things, processing is necessary either to protect the vital interests of the data subject, is necessary for reasons of public interest in the area of public health, or for carrying out rights and obligations under employment law.

Background Checks

Background checks are permissible provided that they are conducted in compliance with the UK GDPR. The employer should conduct a data privacy impact assessment to ensure that the information is legitimately required and that there is compliance with the data protection principles.

Data Subject Access Requests (DSARs)

Under Article 15 UK GDPR, current and former employees can obtain all their "personal data" held by their employer by making a DSAR. As personal data is information that relates to an identifiable individual, employers often hold significant amounts of personal data about their staff. An employer has one month to respond to an employee's DSAR, although it is possible to extend this deadline for a further two months in the case of complex requests.

Employee Monitoring

Guidance provided by the ICO has confirmed that covert monitoring will only be justified in exceptional cases. Employers will still need to carry out an impact assessment before undertaking the monitoring, not only to determine whether it is necessary but also to ensure the monitoring is conducted in a way that is the least intrusive. From a cultural perspective, employee monitoring can also erode trust between employee and employer.

Data Breaches

In WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents), the Supreme Court overturned judgments by the Court of Appeal and High Court and found that Morrison Supermarkets was not vicariously liable for an unauthorised and deliberate breach of the DPA 1998 committed by a disgruntled employee. Though this decision confirmed that employers will not always be liable for data breaches committed by rogue employees, the Supreme Court held that, in other circumstances, employers may still be vicariously liable for a data breach committed by an employee who controls data in the course of their employment.

5. FOREIGN WORKERS

5.1 Limitations on the Use of Foreign Workers

All foreign workers who do not have an underlying right to work in the UK must have the necessary visa or work permit. Employers are obliged to check that workers have the right to work and should keep a record of these checks and the evidence provided. Other than in relation to the immigration requirements, there are no limitations to using foreign workers.

Whether a foreign worker is subject to UK employment taxes and national insurance contributions will depend on a number of factors, including the duration of the assignment to or employment in the United Kingdom and whether there is a tax treaty between the host country and the United Kingdom.

5.2 Registration Requirements

The government has created a new immigration system following the cessation of EU freedom of movement on 31 December 2020. The deadline to apply for EEA or Swiss citizens to apply for

pre-settled status in the UK expired on 30 June 2021.

Skilled Workers

Anyone an employer recruits from outside the UK for the skilled worker route needs to demonstrate that:

- they have a job offer from a Home Office licensed sponsor;
- they speak English at the required level;
- the job offer is at the required skill level of RQF3 or above (equivalent to A level); and
- they will be paid at least GBP25,600 or the "going rate" for the job offer, whichever is higher.

There are different salary rules for workers in some health or education jobs, and for "new entrants" at the start of their careers.

Intra-company Transfers

If an employer wants to transfer a worker from one of its overseas businesses and work in the UK, then it can apply for the tntra-company transfer route. Applicants will need to be existing workers who will undertake roles that meet the skills and salary thresholds:

- be sponsored as an intra-company transfer by a Home Office licensed sponsor;
- have 12 months' experience working for a business overseas linked by ownership to the UK business they will work for;
- be undertaking a role at the required skill level of RQF6 or above (graduate level equivalent); and
- be paid at least GBP41,500 or the "going rate" for the job, whichever is higher.

Permission for workers transferred to the UK on the intra-company transfer route is temporary. Workers can be assigned to the UK multiple times, but they cannot stay in the UK for more than five years in any six-year period. However, workers paid over GBP73,900 do not need to have worked overseas for 12 months and can stay for up to nine years in any ten-year period and workers that are part of a graduate training programme for up to one year can apply for the intra-company graduate trainee route.

Other Routes

An employer does not need a licence to hire under an unsponsored route such as the global talent visa. An individual can apply to the global talent scheme if they are an endorsed leader or potential leader in:

- academia or research;
- arts and culture; and
- digital technology.

6. COLLECTIVE RELATIONS

6.1 Status/Role of Unions

Less than one third of the employee workforce in the UK is unionised and union membership is much higher in the public sector than the private sector. Trade union membership is voluntary, and there is no obligation on an employer to recognise a trade union or set up an employee representative body unless a specific and valid request has been made by the workforce. The trade union's right to take industrial action is governed by complex rules.

Under Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, a worker must not be subject to any detriment for their involvement in trade union activity. Employers should therefore exercise caution when considering disciplinary action if the employee's actions may fall within the realms of trade union activity and ensure that, if disciplinary action is taken, records are kept to show the reason was

other than carrying out a trade union activity (University College London v Brown).

6.2 Employee Representative Bodies

Unlike in other EU countries, there is no formal legal mechanism that provides for on-going workplace representation in the UK.

However, the law requires information and consultation with employee representatives in certain circumstances, including in a collective redundancy situation or the transfer of an undertaking. If no trade union is recognised and there is no standing employee representative body, ad hoc employee representatives must be elected. The conditions for this type of election are set out in Section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to collective redundancies, and in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in relation to a business transferor service provision change (ie, an outsourcing arrangement).

6.3 Collective Bargaining Agreements

Collective bargaining agreements (CBAs) are commonly used across the world to regulate employee terms and conditions and often enhance them compared to minimum legal standards. However, the ways in which trade unions work, their level of influence and how employers can work with them most productively, can differ considerably between jurisdictions.

In the UK, there are no national, sector-specific or employer-association negotiated CBAs of general application. Locally negotiated CBAs may apply within particular unionised UK employers – for example, CBAs are commonplace in the automotive sector.

A key advantage of CBAs is the ability to agree binding terms across all employees. Whenever an employer is implementing or amending one of its policies, it should check whether the respective policy is subject to the terms of a CBA. However, pursuant to recent case law, terms that are truly collective in nature cannot generate enforceable individual rights (Hamilton v Fife Council) and the fact that a collective agreement can be incorporated into employees' contracts and legally-binding does not mean that it cannot not be later rectified (Nexus v National Union of Rail, Maritime and Transport Workers & Unite).

7. TERMINATION OF EMPLOYMENT

7.1 Grounds for Termination

At common law, an employer can contractually dismiss an employee for any reason, provided appropriate notice is given. In effect, a dismissal without cause is not prohibited by law, but it is likely to be an unfair dismissal.

If the employee acquires the relevant qualifying length of service (two years) they may be dismissed only for a potentially "fair reason" under statute, on the basis of:

- capability;
- conduct;
- redundancy;
- breach of a statutory enactment by the employee; or
- some other substantial reason that justifies dismissal.

The dismissal of an employee for certain reasons (eg, pregnancy, maternity or whistle-blowing) will be automatically unfair.

In addition to having a fair reason, the employer must also follow a fair and full procedure. This will be informed by the employer's compliance with the ACAS Code of Practice on disciplinary and grievance procedures (the minimum stand-

ard), or more likely the employer's own code or policies.

There is no requirement to notify any government authority of a dismissal other than in a collective redundancy situation, or in relation to payroll obligations. For collective redundancy situations, if the proposed redundancy will affect 20 or more employees within a period of 90 days or less, it must notify the Department for Business, Innovation and Skills (BIS) and consult with employee representatives under Section 188 TULRCA 1992. The financial consequences for employers that do not comply with collective consultation provisions can very high as a protective award is available to each affected employee.

7.2 Notice Periods/Severance

The rights under an employment contract will include prior notice of termination. However, the statutory minimum notice is one week for service of more than one month and less than two years, and thereafter one week per complete year of service up to a maximum of 12 weeks, which overrides the provisions in the employee's contract, if lower.

Employers may only dismiss an employee without notice if a payment in lieu of notice provision (PILON) is contained in the contract, otherwise the employee may have a claim for wrongful dismissal.

In terms of the procedural requirements for dismissing an employee, there is a duty for an employer to act "reasonably" pursuant to the Employment Rights Act 1996 for a potentially fair reason if it is dismissing an employee with at least two years' continuous service.

Employers carrying out dismissals (except for dismissals on the grounds of redundancy or the non-renewal of a fixed-term contract) should also follow the principles set out in the Code of Practice of the Advisory, Conciliation and Arbitration Service (ACAS) (a government public body). A failure to follow the ACAS Code does not in itself make an employer liable to a claim; however, employment tribunals will take the ACAS Code into account when considering relevant cases and can adjust any awards they make by up to 25% for unreasonable failure by an employer to follow the ACAS Code.

In a redundancy scenario, a statutory redundancy payment is payable for employees with two or more years' service. The exact amount is linked to the length of service, the age of the employee and the statutory cap on "weekly pay". Redundancy pay may be enhanced by the employer at its discretion.

7.3 Dismissal For (Serious) Cause (Summary Dismissal)

Summary dismissal is immediate dismissal of an employee without notice. This will be a wrongful dismissal, unless the dismissal is in response to the employee's repudiatory breach of contract, including gross misconduct (which can include, amongst other things, dishonesty, intentional disobedience or negligence).

An employer should follow its disciplinary procedure when determining whether it is appropriate to dismiss an employee summarily. An investigation should be held prior to a disciplinary hearing being instigated, and the employee should be given the opportunity to make representations. Once the decision-maker has issued their decision, the employee should be offered the right to appeal the finding.

An employee who considers they have been unfairly dismissed for cause may seek to bring an unfair dismissal claim in the Employment Tribunal.

7.4 Termination Agreements

It is possible for the employee to waive any employment claims arising on termination, including unfair dismissal, by way of a settlement agreement, but this must comply with the statutory formalities to be effective and enforceable.

In order to be legally binding, a settlement agreement must comply with six statutory requirements. These are as follows:

- it must be in writing;
- it must relate to particular proceedings – ie, it is insufficient to draft that the agreement covers "all employment claims". Each of the potential employment claims must be listed to be valid and provide maximum protection for the employer;
- it must outline that the statutory conditions relating to settlement agreements have been satisfied;
- the departing employee must have received legal advice on the settlement agreement from an independent legal adviser;
- the adviser must be professionally insured; and
- the agreement must specifically identify the adviser.

Employees must be fully informed in order to make the agreement fair, which is why the employee attaining independent legal advice is essential. Significantly, "full and final settlement" can be precluded where a settlement includes a general release and one party was aware that the other party settled in ignorance of a potential claim, as the Court of Appeal held in CFL Finance v Laser Trust (2021).

A settlement sum will vary depending on the claim and facts of the case and compensation for loss of employment is usually tax free up to GBP30,000.

7.5 Protected Employees

Employees with two years' service are protected from being unfairly dismissed under statute.

The following categories have automatic unfair dismissal protection (but require two years' service):

- dismissal owing to a "spent" conviction; and
- dismissal in the context of a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (together, TUPE).

Dismissals in the following contexts have automatic unfair dismissal protection and do not require any qualifying length of service:

- jury service;
- leave for family reasons and related leave for time off for dependants;
- health and safety activities;
- Sunday working;
- asserting certain statutory rights;
- asserting rights under the Working Time Regulations 1998;
- employee trustees of occupational pension schemes;
- employee consultation representatives or candidates (including European and domestic works councils), who are also not entitled to be subjected to a detriment on the grounds of their status;
- whistle-blowers;
- flexible working requests;
- certain discrimination-related dismissals;
- exercising the right to be accompanied at disciplinary or grievance hearings;
- the rights of part-time workers;
- the rights of fixed-term employees;

- in connection with entitlement to a national minimum wage;
- in connection with entitlement to working tax credits;
- in connection with the right to request study and training; and
- trade union membership or activities or official industrial action.

Protected Disclosures

Workers who blow the whistle in relation to some form of perceived malpractice or wrongdoing are protected against detriment and dismissal in response for having done so. The Public Interest Disclosure Act (PIDA) 1998 aims to protect individuals who make "protected disclosures" in connection with their work.

A worker has to make a "protected disclosure" to the correct person in a prescribed way in order to be protected under the legislation, as set out in the PIDA. The kinds of disclosures that are protected include disclosures of information about:

- a criminal offence;
- a breach of a legal obligation;
- a miscarriage of justice;
- danger to health and safety of any individual;
- damage to the environment; or
- a deliberate attempt to conceal the above.

The event can be a past, present or future event that is likely to take place.

The complaint must be made to a prescribed person whether within the organisation or in another organisation such as a public body. Further, the complaint must be in the public interest in order to be protected.

There is no minimum period of qualifying service for a worker who wishes to bring a claim for whistleblowing detriment or dismissal, and the damages that can be awarded by an Employment Tribunal in the event of a successful claim are uncapped.

An employee who considers they are being unfairly dismissed as a result of making a protected disclosure can bring a claim for "interim relief" within seven days of the date of termination. This is a remedy by which an employee can seek continuation of their employment until the full unfair dismissal case is heard.

8. EMPLOYMENT DISPUTES

8.1 Wrongful Dismissal Claims

Wrongful dismissal is a claim for a breach of contract arising from a failure to provide any notice (or payment in lieu of notice) to the employee or providing an inadequate amount of notice (or payment in lieu of notice) when the employee has not committed misconduct. However, a wrongful dismissal claim typically coincides with an actual or constructive dismissal claim.

A notice period may be:

- express;
- implied; or
- incorporated by statute.

Where there is an express notice period in the contract, it will operate subject to the statutory minimum notice periods contained in section 86 of the Employment Rights Act 1996 (ERA) that implies a minimum notice period into all employment contracts. Where there is no express notice period, common law provides that "reasonable" notice should be given.

The remedy for wrongful dismissal is damages (determined by the salary and other contractual benefits due under the notice period, which may

include a bonus) to put the employee back in the position they would have been if the contract had been performed properly. As it is a contractual claim, factors such as mitigation are relevant to the employee's award.

8.2 Anti-discrimination Issues

The Equality Act 2010 is concerned with direct and indirect discrimination and other prohibited conduct such as victimisation and harassment in respect of the following protected characteristics:

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

There must be a causal link between the less favourable treatment and protected characteristic. In discrimination claims, a two-stage approach to the burden of proof applies.

- Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.
- Stage 2: is the respondent's explanation sufficient to show that it did not discriminate? (note, this stage does not apply in instances of direct discrimination).

Notably, unlike many other employment claims, there is no cap on the award that can be made by the Employment Tribunal. However, in cases of unintentional indirect discrimination, the Tribunal must first consider whether making a declaration or recommendation (or both) would suffice before it makes an order (if any) awarding compensation on a just and equitable basis. Compensation can be awarded for financial losses (including loss of earnings, pension, and benefits in kind and any out-of-pocket expenses) and non-financial losses (including injury to feelings in accordance with the Vento bands, personal injury and aggravated damages). Damages are calculated to put the claimant in the position they would have been in if the unlawful discrimination had not taken place (Ministry of Defence v Wheeler), though claimants are also expected to mitigate their loss.

9. DISPUTE RESOLUTION

9.1 Judicial Procedures

There is no direct equivalent to the US class action in the United Kingdom.

However, there are procedural means of dealing with group actions of multiparty claims that allow groups of claimants to link the claims to proceed against a single defendant, as follows:

- where more than one person has the "same interest" in a claim, the claim may be begun or the court may order that one or more claimants, or one or more defendants, may bring or defend the claim representing others who have the same interest in the claim. Any judgment will be binding on all individuals represented unless the court directs otherwise; and
- where claims by a number of individuals give rise to common or related issues of fact or law, a court may make a group litigation order to manage the claims. Judgments, orders and directions of the court will be binding on all claims within the group litigation order.

In the UK, the specialised employment forum is the Employment Tribunal. Claims must be brought within three months and the employee should exhaust the ACAS early conciliation

procedure before commencing litigation. It is possible to appeal a decision made by the Employment Tribunal to the Employment Appeal Tribunal, however, appeals can only be made on a point of law and the Employment Appeal Tribunal will not normally re-examine issues of fact.

9.2 Alternative Dispute Resolution

Provided that the arbitration does not involve statutory employment protection rights, arbitration is possible contractual disputes.

Where statutory employment protection rights are affected, an employee cannot validly agree, in advance, to give up their right to litigate those rights. By way of example, an employee cannot agree in their employment contract, entered into before the dispute arose, not to sue their employer for unfair dismissal.

Once a dispute has arisen, private mediation agreed to between the parties is relatively common. Any settlement of a dispute about statutory employment protection rights (including one agreed to during mediation) must satisfy the statutory contracting out requirements if the relevant statutory right is to be validly compromised.

9.3 Awarding Attorney's Fees

Costs, including legal fees, are not usually paid by the losing party in Employment Tribunal cases. Notwithstanding this, costs can be awarded by a tribunal if one of the parties has behaved vexatiously, disruptively, abusively or otherwise unreasonably in bringing proceedings or the way they have conducted themselves during those proceedings.

A costs order or deposit order might also be made if a claim is pursued (or defended) despite the claim/defence having no reasonable prospect of success.

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