

Quick guide to employment law

Introduction

Employment law is largely based on two branches of law:

- contract law
- statutory employment law.

There are a some other branches of law that can also be relevant.

Contract law basically says that if two or more people (called **parties**) agree to something, and each provides a benefit to the other, you have a contract which is legally enforceable. What each provides for the other is called a **consideration**.

In employment, the employee agrees to work for the employer, and the employer agrees to pay the employee.

A basic principle of contract law is that the parties are free to agree whatever they like. When the parties have equal negotiating position, that is fine. However in employment, the employer is usually in a much stronger position.

In every contract of employment, the law assumes certain conditions. The employee is required to obey lawful orders, and to show fidelity, due diligence and care. The employer is required to maintain a relationship of trust and confidence, and not to act capriciously.

To deal with this, there is also **employment law**. This gives the employee certain rights *regardless of what is in the contract*. In other words, employment law means that an employee cannot sign away certain basic rights, even if he or she wants to.

Employment law gives an employee rights *additional* to what is in the contract. If the contract and employment law contradict, employment law prevails. Many of these rights are found in Employment Rights Act 1996.

It should be noted that employment law is a large, complex and specialist area. These notes do no more than give a very general overview.

Contract law

A contract is a legally enforceable agreement voluntarily made by two parties where each provides something to the other. (This is not a strict legal definition, but it will suffice.)

There are some basic points to note about contracts.

The contract is the *agreement* and not the document. Although there should be a written document, that is evidence of the agreement, and not the agreement itself.

A contract may be verbal or even implied from the conduct of the parties. Such a contract is just as binding as a written agreement. Indeed if a written agreement does not properly reflect what has been agreed, the agreement takes precedence over the document.

The terms of the contract must be made *before* the contract is agreed. An employer does not have the right to change the terms of the contract at will.

The contract is made when either the employer or employee makes an offer of employment and the other party accepts, even though the employment does not start till later (such as after working a period of notice in the old job). This is relevant because it means that if either the employer or employee changes their mind, they commit a breach of contract and could be sued, even if the employment had not yet started.

The employer is required to provide a written contract of employment within two months of the start of employment. Any change must be notified in writing within one month.

Engagement

In general, an employer is free to take on whoever he wishes and to select those employees however he wishes.

However an employer is not allowed to practise unlawful **discrimination** in selection. There are additional requirements of fairness in the public sector.

There are laws restricting the employment of **children** of school age, designed to protect their education.

Most of the old restrictions on the employment of **women** were abolished in 1990. The few that remain are designed to protect women during maternity.

An employer must check that a **foreign worker** is eligible to work in the UK.

A person with a **criminal record** is permitted not to disclose it when the conviction is spent after a rehabilitation period. This is between six months and ten years depending on the sentence. Imprisonment of 2½ years or more is never spent. In some occupations, all convictions must be disclosed and are never spent.

Someone who works with **children or vulnerable people** must be appropriately vetted. A different form of vetting applies for those who work with state secrets.

Discrimination

Discrimination is generally illegal if it relates to a person's:

- race, colour or ethnic origin,
- sex, marital status or pregnancy,
- trade union membership or non-membership,
- disability,
- age,
- sexual orientation,
- religion or belief,
- disability.

In Northern Ireland, discrimination is also illegal on grounds of political opinion.

There are exceptions to all these categories. For example, sex discrimination is usually lawful for acting and modelling. Disability discrimination is limited to making reasonable adaptations to accommodate a disabled person.

Since 1975, it has been a general requirement that men and women are treated equally, and that a woman be paid the same rate as a man if she does the same or equivalent work.

Discrimination can be direct, such as simply saying that you would not appoint a woman or a black person to a position. Discrimination may also be indirect when an irrelevant condition is imposed that is more easily met by one group than another, such as requiring an office manager to be six feet tall or able to lift 100 kilograms.

Dismissal

An employee may bring an action against either unfair dismissal or wrongful dismissal or both.

Unfair dismissal is when a person is dismissed *for an unfair reason*. There is a large volume of case law on what constitutes fairness. This is a statutory right introduced in 1971. An employee must have been employed for one year to make a claim.

Automatically unfair dismissal is when an employee is dismissed for certain grounds, such as for race or trade union membership. If that can be established as the basis for the dismissal, the employee may claim without having to prove unfairness, and at any time, even in the first year.

Wrongful dismissal is when a person is dismissed *in the wrong manner*. Examples would be where notice was not given, or where a disciplinary procedure had not been followed. This is a contractual right. An employer must have a proper grievance procedure and discipline procedure.

An employee may bring a claim for either before an employment tribunal within three months of the dismissal.

Summary dismissal is where a person's behaviour is such that the employer cannot be expected to retain the person. Examples include such matters as theft and violence. The employee can be sacked on the spot without notice or payment in lieu of notice.

Constructive dismissal is where the employer forces an employee to resign. For employment law, this is treated as a dismissal. If an employee accepts an adverse change of employment without registering a protest, the employee is regarded as having accepted the change.

Redundancy is where the person's job disappears, such as when a factory closes. Note that it is *jobs* that are made redundant, not people. An employer is expected to try to redeploy the redundant employee. The employee may be entitled to redundancy pay.

Both the employer and employee are required to give each other **notice** of an end of employment. The notice period is generally one week for each year's service to a maximum of 12 weeks. The contract of employment may specify a longer period.

Transfer of undertakings

If the employer is taken over or partly taken over, the new employment is regarded as a continuation of the old.

The new employer is expected to maintain the same or similar rates of pay and other conditions of service.

Pay

An employee is entitled to be paid the sum agreed in the contract. An employee is not automatically entitled to any pay rises, but any exclusion of a particular employee at a time of pay rises could be regarded as capricious behaviour for which legal action may be possible.

An employer must provide an **itemised payslip** for each pay day.

There are strict rules about what may be deducted from pay. **Deductions** are restricted to:

- income tax and national insurance,
- pension contributions to an occupational scheme,
- payments the employee has authorised in advance (such as loan repayments or trade union dues),
- attachment of earnings orders from courts and some other bodies,
- corrections of errors on previous payslips (but see below), and
- certain deductions for shortfalls in the retail sector.

Not all **errors** on payslips may be corrected. If the mistake was the employer's, the employee could not have realised the error and has spent the money, the employer may not have the legal right to reclaim an overpayment.

An employer may not make any other deductions, even though the employee owes the money.

Holidays

From 2001, every employee is entitled to 5.6 weeks paid **holiday** per year. For someone working a five-day week, this is 28 days. This includes bank holidays. An employee does not have the right to take off a bank holiday unless the contract of employment says so.

An employee has limited rights to carry forward unused holiday entitlement from one year to the next. An employee has no right to be paid for untaken holiday, unless the contract says so.

Sickness

An employee who is **sick** is entitled to be absent from work and to be paid statutory sick pay if the conditions are met. Any additional payment for sickness depends on the contract of employment or the discretion of the employer.

The employer must specify both the notice required and the evidence required for a period of sickness.

Maternity

An employee who becomes a **mother or father**, or who adopts a child is entitled to leave from work and to a statutory payment if the conditions are met. For statutory maternity pay, there is a qualifying period designed to ensure that a woman is paid only if she became pregnant after starting that job.

A woman may take up to one year's **maternity leave** but only receives statutory maternity pay for nine months. A woman may not return to work until two weeks after the birth.

The partner of someone claiming statutory maternity pay or statutory adoption pay may be able to claim ordinary **statutory paternity pay**, even if female. This is two weeks leave with statutory paternity pay. From 6 April 2011, a woman may transfer up to six months of her maternity leave to her partner as additional paternity leave and any used statutory maternity pay.

The first six weeks of statutory maternity pay is calculated as 90% of her earnings. The rest is paid at a set rate revised each year from April.

A woman has a statutory right for paid leave to attend ante-natal classes, and not to suffer dismissal or other detriment because of her pregnancy or childbirth.

Time off work

An employee is entitled to time off work for sickness, maternity and holiday.

In addition, an employee is entitled to **paid leave** for:

- attending ante-natal classes while pregnant,

- acting as a company safety representative,
- acting as a trustee of the company's occupational pension scheme,
- acting as an official of a recognised trade union,
- looking for work while under notice of redundancy,
- study leave if seriously under-educated.

An employee is entitled to **unpaid leave** for:

- jury service,
- serving as a magistrate, councillor or other public role,
- parental leave (see below),
- looking after dependants (see below).

Otherwise staff have no legal right to time off work. There is no legal right for compassionate leave or for dental appointments, for example.

Parental leave allows a parent to take unpaid absence to care for a child. It is limited to 13 weeks per child and is intended to cover such things as medical appointments, settling a child into a new school, or taking a child to stay with grandparents.

Time off for dependants allows an employee time off to deal with an urgent issue relating to a dependant child or adult, such as sorting out a problem at school or when a childminder fails to turn up. It does not extend to non-urgent issues, such as sorting out probate or looking after a child on a day when the employee knows a nursery will be closed.

All these forms of leave are subject to conditions. Employers have some limited rights to refuse leave or to dictate when it may be taken.

There are also circumstances when an employee has the right to ask for **flexible working** in relation to being a parent or reaching retirement age. An employer must seriously consider such a request. In practice, about 80% of such requests are granted.

Trade unions

An employee is free to join or not to join a trade union, and cannot be discriminated against in either case.

There are procedures for the registration of trade unions, and for their recognition in a workplace. Any industrial action must be authorised by a properly conducted ballot of members in favour. Seven days' notice must be given to the employer.

A worker who takes industrial action is not entitled to any pay or PAYE tax refunds for those days. This applies even if the employee attends work and is prepared to perform some duties of the employment. Periods of industrial action are excluded from continuous employment, which could affect certain rights under employment law (such as claims for unfair dismissal or redundancy).

An employee taking official action cannot be dismissed for 13 weeks.

Agency law

An employee is an agent of his or her employer.

This means that the employer is **vicariously liable** for the conduct of an employee on the employer's business. So an employer can be liable for a delivery driver's road accidents or for the lecherous behaviour of an employee at a Christmas party.

As an agent, any gifts the employee receives, such as from a supplier or customer, belong to the employer. An employee could be sacked or even prosecuted for theft for secretly keeping such a gift.

The employer and employee are both responsible for complying with health and safety law.

An employer is responsible for injuries suffered at work. The employer must have insurance cover and display a certificate to that effect.