INTRODUCTION

This booklet is intended as a general guide to employment law in England and Wales. It should not be regarded as a substitute for professional advice in individual cases.

It concentrates on the individual relationship between employer and employee and does not deal in any depth with the law as it applies to the relationship between employers and trade unions nor strikes and other forms of industrial action. Nor is it concerned (other than incidentally) with the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (implementing the EU Acquired Rights Directive).

The law in Scotland and particularly Northern Ireland differs in some material respects from that set out in this booklet.

The law is correct at the date of going to press, namely 1st January 2000. However, this area of law is subject to considerable change, following the Employment Relations Act 1999 which received Royal Assent on 27th July 1999. The whole Act is subject to being brought in force by commencement orders. One tranche of provisions has already come into force (on 25 October 1999). Another tranche came into force on 15th December 1999 and still others are due to take effect in or about April 2000.

This guide highlights the changes which the legislation has made or is scheduled to make in the near future.

1. THE CONTRACT OF EMPLOYMENT AND EMPLOYEES’ STATUTORY RIGHTS

1.1 General

A ‘contract of employment’ is not necessarily a formal agreement or some other piece of paper, but a legal concept. It is the agreement between an employer and an employee, defining the rights, duties and obligations which exist between them. The terms of this agreement may be recorded in written form (e.g. in a formal document called a ‘contract of employment’ or a ‘service agreement’), in an exchange of letters (typically called an ‘offer letter’ and ‘acceptance’), and/or by reference to relevant section of a staff handbook etc.). The terms may be agreed orally. Employment terms can be express (including those incorporated from other documents) or implied. Terms may be implied by the general law, by custom and practice within the industry, by a course of dealing between the employer and employee, or because they are necessary for the efficacy of the agreement.

1.2 Offer of Employment

The contract of employment comes into existence as soon as the prospective employer has made an unconditional offer of employment and this has been accepted by the individual. The employer is then contractually bound to employ the individual on the agreed terms. Breach may have both contractual and employment protection consequences for the employer.

If the offer was made subject to a condition, for example, ‘satisfactory references’, the offer of employment is conditional. If the references are ‘unsatisfactory’ the
condition remains unsatisfied, and an employment contract does not result. However, because of the difficulties and misunderstandings which may arise from conditional offers of employment (for example, whether the condition is satisfied), it is advisable to take legal advice as to the precise terms of any condition before making such an offer. In particular, employers should think very carefully before making offers of employment conditional upon pre-recruitment medical examinations in the light of the Disability Discrimination Act 1995 ("DDA").

1.3 Immigration Status of Prospective Employees

Although there are a number of exceptions to the general rule, employees who are not British subjects or nationals of one of the EEA member states will require work permits in order to work in the United Kingdom. Dependents of work permit holders will also require entry clearance before they can come to the U.K.

Applications for work permits are made by the employer to the Overseas Labour Service of the Department for Education and Employment and are currently taking between 6 and 8 weeks to process. Advance planning is therefore of paramount importance.

Employers should always check a prospective employee’s immigration status before offering employment. Section 8 of the Asylum and Immigration Act 1996 (which came into force on 27 January 1997) makes it a criminal offence to employ someone aged 16 or over after that date who is ‘subject to immigration control’ (i.e. who needs permission to enter or remain in the U.K. and who has not been granted leave to do so, or whose leave is invalid or subject to a condition precluding employment). Section 8(2) of the Act provides a potential defence to employers - to examine (and retain an appropriate copy of) an original document which falls within the categories of document prescribed by the Secretary of State, and which relates to the potential recruit.

It is important, therefore, for an employer to introduce a system of checks as part of its recruitment procedure in order to avoid liability under the Act. It is equally important that such a system of checks does not render an employer vulnerable to claims of unlawful racial discrimination, so specialist legal advice should be taken.

1.4 Section 1 Employment Rights Act 1996

The Employment Rights Act 1996 requires employers to provide employees with a written statement giving particulars of certain of their terms and conditions of employment, within two months of joining a new employer. This applies to all employees (whether temporary or permanent, full or part time) so long as their employment continues for a month or more. In practice, we suggest that these and other employment terms are all included in a written offer of employment, to which a successful applicant should agree (in writing) before the employment starts. This gives certainty.

The details which must be included under section 1 of the Employment Rights Act are as follows:

♦ the name of the employer and the employee;
♦ the date of commencement of employment;
♦ the date on which the employee’s period of continuous employment is deemed to have commenced, if any previous employment is to be taken into account;
the employee’s job title or a description of the work for which the employee is employed (a 1999 European Court decision suggests that a job title may not be sufficient for these purposes);

the scale or rate of remuneration or the method of calculating remuneration and the intervals at which it is paid (subject to the national minimum wage, if applicable - see further below);

the hours of work, including any terms and conditions relating to normal working hours (subject to the Working Time Regulations - see further below);

any terms and conditions relating to holiday entitlement, including public holidays, and holiday pay (these details are to be sufficient to enable the employee’s entitlement to accrued holiday pay on the termination of employment to be precisely calculated) - again the Working Time Regulations may have an impact here;

the place of work or, if the employee is required or permitted to work at various places, an indication of that fact and the employer’s address;

any disciplinary rules applicable to the employee (or reference to a reasonably accessible document specifying any such rules);

to whom and in what manner the employee can apply:

• if dissatisfied with any disciplinary decision; and

• for the purposes of seeking redress of any grievance;

any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay;

any terms and conditions relating to pensions and pension schemes, (including a statement as to whether a contracting-out certificate is in force);

the length of notice which the employee is obliged to give and entitled to receive to terminate his or her contract of employment;

where the employment is intended to be temporary, the period for which it is expected to continue and, if it is for a fixed term, the date on which it is to end;

any collective agreement that directly affects the terms and conditions of employment including, where the employer is not a party to the agreement, the persons by whom they were made; and

where the employee is required to work outside the U.K. for more than one month:

• the period for which he is to work outside the U.K.;

• the currency in which payment will be made during such period;

• any additional pay and benefits to be provided by reason of the work being abroad; and

• any terms and conditions relating to the employee’s return.
If there are no particulars to be entered under any of the matters set out above, under section 1, that fact must be expressly stated.

Most of the above details must be set out in a single document. However, the written statement may refer the employee to some other document (for example, a handbook) for particulars of sickness and pension provision, and staff disciplinary and grievance procedures. This other document must be one that the employee either has a reasonable opportunity to read in the course of his or her employment, or one which is made reasonably accessible in some other way (see above regarding our recommendation that these and other details should all be included in a written employment contract, agreed by both employer and successful applicant before the employment starts).

Where an employer has less than 20 employees, it has a lesser obligation with regard to giving disciplinary or grievance details: the statutory statement need only include details of the person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment.

An employee has a statutory right to receive written notification of any change to these 'statutory particulars'. This must be given at the earliest opportunity and, in any event, no later than one month after the change. However, this does not give an employer carte blanche to vary employment terms unilaterally. We recommend that an employer should take legal advice if it wishes to change the terms of its employment contracts (including those details of the contract which it is required to give under section 1 of the Employment Rights Act). This is because 'unilateral' changes can result in legal liability for the employer - in claims for breach of contract, constructive dismissal, unlawful deductions from wages, and possibly also under anti-discrimination laws.

N.B. Disability Discrimination Act 1995: In light of the DDA an employer should ensure that all contractual and company/employee information is provided in a format and medium accessible to the particular individual.

1.5 Expressly Agreed Terms of the Contract of Employment

The terms which the parties can expressly agree between themselves are subject to the general laws and to statutory limitations. These include a minimum period of notice requirement, a general entitlement to the national minimum wage (although this is subject to exception), rights in relation to working hours, a guaranteed annual leave entitlement, new rights to parental leave and time off for emergencies relating to dependants and (where the employee is a female) rights to maternity leave.

1.6 Implied Terms of the Contract of Employment

Even if the employer agrees a full written contract of employment with the successful job applicant, as the employment relationship evolves there are likely to be areas in that contract which are not covered by express terms. Certain terms may be implied where a contract fails to provide for particular circumstances, for example, if such terms are customary within an industry.

However, certain basic duties and obligations are implied into any employment relationship, although they tend to be fairly wide in scope and imprecise in application. The following terms are implied into all contracts of employment:

♦ The employer is under a duty to pay the employee for his work. In certain circumstances (e.g. where an employee is employed to exercise a special skill, or
is paid by commission) there is a duty on the part of the employer to provide work for the employee (and in 1998 the Courts showed a willingness to find an obligation on the part of the employer to provide work).

♦ The employee is under a duty to obey the employer’s lawful and reasonable orders.

♦ The employer is under a duty to take reasonable care for the employee’s safety and to indemnify the employee for any loss sustained by him if he fails to do so. In addition, the employer has obligations under Health and Safety legislation.

♦ The employee has a duty to take reasonable care in the performance of his or her duties.

♦ The employer is under an implied duty to afford employees access to a grievance procedure to resolve employment related grievances.

♦ The employee owes the employer a duty of good faith and fidelity - part of the mutual duty of trust and confidence, owed to each other by employer and employee. It would be a breach of the employee’s duty, for example, for the employee:
  • to work for someone else during the employer’s time;
  • to receive some benefit in his capacity as employee which he did not disclose to the employer (e.g. a bribe to award a contract to a particular sub-contractor);
  • to disclose to third parties or to otherwise make use of confidential information of the employer.

It is not necessarily a breach of the duty of good faith and fidelity for the employee to work for someone else in his spare time, unless he is thereby in breach of his duty of confidentiality to the employer (e.g. an employee working for a direct competitor in his spare time) or if such work adversely affects his performance for his employer. This is why written employment contracts often have ‘exclusive service’ and express confidentiality obligations. It makes the application of the contract much more certain.

The duty of good faith and fidelity, in particular the duty of confidentiality, continues to a limited extent after employment has terminated. But again, the application of an express obligation, included in a comprehensive written contract, is much more certain than relying on underlying implied terms.

1.7 Changes to the Terms of the Contract of Employment

1.7.1 Generally

As an employment relationship develops, change is inevitable. The terms of the contract of employment (like other contracts) cannot be altered except with the consent of both parties. This should, whenever possible, be clearly established in writing.

However, consent to a change may occasionally be inferred from conduct. Therefore, if the employer introduces a change in the terms and the employee continues working without objection, the employee may be deemed to have accepted the change after a reasonable period has elapsed if that is
consistent only with acceptance of the change. However, relying on ‘acquiescence’ can be risky for an employer. It does not necessarily connote acceptance. Unilateral variations to employment terms may have this legal repercussions for an employer, and this is not a method which we recommend of changing employment contracts.

In most circumstances, the employee is obliged to adapt to new methods and techniques in performing his duties if the employer provides the necessary training and if the new skills do not so radically alter the nature of the work that it is outside the contractual obligations of the employee.

If the employer unilaterally departs from the terms of the contract in a fundamental way, that breach of contract entitles the employee to resign and to treat him/herself as constructively dismissed (see sections on Termination of Employment). This may result in wrongful and unfair dismissal claims, in claims under protection of wages legislation and possibly under anti-discrimination laws.

The terms of the contract may confer on the employer a discretion to vary specified terms (e.g. where the contract retains a degree of flexibility in relation to working hours, duties or place of work). Variations pursuant to this are not normally breaches, although employers should be careful to exercise such discretions properly.

Because of the legal consequences of changing employment terms, we recommend that an employer takes legal advice at an early stage in its planning. It is likely to have to demonstrate a sound business case for the particular change selected.

1.7.2 Upon the Transfer of a Business

The question of changing employment terms in the context of business transfers is complex. However, relevant case law (including a case in the Court of Appeal where Warner Cranston acted successfully for the employee) has brought some clarity to this area of law.

Where there is a ‘transfer of an undertaking’ (this is a technical, defined term but in colloquial terms it means a business transfer, not a share sale), employees employed in that undertaking immediately before the transfer, transfer with the business to the purchaser (“transferee employer”) on their existing terms and conditions of employment. Any detrimental change to those terms (and this is not a balancing exercise) for a transfer-related reason (and whether made by transferee or transferor employer) is invalidated by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

We would advise employers to proceed cautiously when contemplating variations to employment terms in the context of a business transfer, and to take early legal advice.

1.8 Statutory Rights of Employees

A number of statutory rights are conferred on “employees” as defined. It is therefore important for an employer to correctly categorise those who work in his or her
business, although increasingly this Government is extending employment rights to non employees. Indeed S.23 of the Employment Relations Act 1999 confers a power on the Secretary of State to introduce Regulations conferring a wide range of employment rights (under the Trade Union & Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996, the 1999 Act and any instrument made under S.2(2) of the European Communities Act 1972) onto non-employees. It is likely that rights would be conferred to all workers other than the genuinely self-employed - so for example to freelance and agency workers. Such a development is designed to meet the needs of an increasingly complex labour market. Some of these rights (notably, rights under anti-discrimination laws) apply regardless of the length of time an employee has been employed by that employer. We shall consider below:

♦ Equal Pay Act 1970;
♦ Sex Discrimination Act 1975;
♦ Sex Discrimination Act 1986;
♦ Disability Discrimination Act 1995;
♦ Race Relations Act 1976;
♦ Maternity rights;
♦ Sickness and Injury Rights;
♦ Time off for public duties and union activities;
♦ Health and Safety at Work etc. Act 1974;
♦ Trade Union Labour Relations (Consolidation) Act 1992;
♦ Public Interest Disclosure Act 1998 (“PIDA”);
♦ Working Time Regulations 1998; and

It should be noted that the NMW Act, PIDA and the Working Time Regulations confer rights on “workers” which is a wider category than employees and includes all but the genuinely self-employed.

The right to a statutory redundancy payment and the right not to be unfairly dismissed will be discussed in section 2 of this booklet.

1.9 Continuous Employment/Employment in Great Britain

As we have mentioned above, entitlement to some of these statutory rights is subject to the employee having completed a minimum qualifying period of continuous employment with the employer in question. Some of these qualifying periods have been recently changed. A summary of the qualifying periods required for the major employment rights is as follows:-
unfair dismissal 1 year where dismissal falls on or after 1 June 1999 (previously 2 years*).

nb. There is no qualifying period, however, where the reason (or, if more than one, the principal reason) relates to certain trade union activities, pregnancy, parental or dependant leave, asserting a statutory right; health and safety reasons; refusing to work on a Sunday, a reason connected with the Working Time Regulations; performing functions as a pension trustee or employee representative; making a protected disclosure under the Public Interest Disclosure act; a reason related to the National Minimum Wage.

Written reasons for dismissal 1 year (previously 2)

redundancy payment 2 years

ordinary maternity leave no qualifying period

additional maternity leave 1 year

parental leave 1 year

dependant leave no qualifying period

right to bring a claim for sex, no qualifying period

race or disability discrimination

The validity of the previous two year qualifying period for normal unfair dismissal cases is currently unclear in the wake of the long-running ‘R v Secretary of State for Employment ex parte Seymour Smith’ litigation. Claims brought in relation to dismissals before 1 June 1999 but where the employee had a period of service of under 2 years are currently stayed pending the deliberation of the House of Lords as to whether the 2 year period was indirectly discriminatory and therefore unlawful.

As a general rule, any week during all or part of which an individual’s relationship with his/her ‘employer’ is governed by a contract of employment, counts towards the employee’s period of continuous service with his/her employer. Certain weeks in which there is no contract not only do not break continuity, but may also ‘count’ towards qualifying service.

Continuity of employment is not broken if:

- an employee is transferred from one employer to another on the transfer of a business;
- an employee transfers from one company within a group of companies to another company within the group;
- an employee is away on maternity parental or dependant leave; or
- an employee is on strike.
This list is not exhaustive of the situations in which continuity is preserved, and specific advice is recommended - just because continuity is not broken does not necessarily mean that the relevant period 'counts' towards an employer's period of continuous service.

1.10 Equal Pay Act 1970

The Equal Pay Act 1970, as amended, gives employees the right to equal pay with members of the opposite sex employed in the same organisation. There is no continuous employment requirement.

The device employed to achieve this result is to imply into all contracts of employment an 'equality clause'. This clause gives the employee a contractual entitlement to equal pay with a person of the opposite sex employed by the employer at the same establishment (or at another but where common same terms apply) who is engaged in:

- like or broadly similar work; or
- work rated as equivalent under a job evaluation study; or
- work (under such headings as effort, skill and decision) of equal value.

Broadly speaking, differences in pay can only be justified by material factors (e.g. age, seniority, experience, competence) other than sex.

Provision for death and retirement is excluded from the equality clause though this area is now partially covered by the Sex Discrimination Act 1986.

The ‘equality clause’ can be enforced like any other term of the contract by instituting proceedings for damages for breach of contract. Previously, damages were limited to the period commencing two years before the date proceedings were instituted but recent case law has held that the 2 year limit is incompatible with European law and therefore unenforceable. The period over which the employee can now recover damages is 6 years prior to the date proceedings were instituted. The claim is made to an Employment Tribunal and can be presented either during the course of employment, or for an ex-employee within six months of leaving employment.

Before the Equal Pay (Amendment) Regulations 1983 came into force on 1st January 1984 an employee could only compare her or himself to an employee within the same organisation engaged on 'like work' or work rated as equivalent under a job evaluation study. The Act was therefore of little value in occupations dominated by one sex or another. Now an employee is allowed to compare her or himself with another employee within the same organisation engaged on work of 'equal value'. Obviously assessing what work is of 'equal value' is no easy task. Before 1996, Tribunals had no power to determine the question of equal value until they had commissioned and received an independent expert’s report. However, the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 now allow Tribunals to determine the question of equal value for themselves.

1.11 Sex Discrimination Act 1975

The Sex Discrimination Act 1975 makes unlawful specific acts of discrimination against a person on account of his or her sex (or married status) in employment and other fields. Note that, although the more usual form of discrimination is against women, it is also unlawful to treat a man less favourably than a woman on grounds of his sex. In addition, as of 1 May 1999 new regulations have amended the SDA to include a prohibition on discrimination against a person on the grounds that they
intend to undergo, are undergoing or have undergone gender reassignment (i.e. a
sex change). Discrimination on grounds of sexual orientation is, however, still not
contrary to the SDA (although any dismissal on those grounds would normally be
unfair).

For convenience, these notes will refer to discrimination against women, but exactly
the same prohibitions of discrimination on account of sex protect men as well.

In the employment context the following acts of discrimination on the ground of the
individual's sex are prohibited:

• discrimination against prospective employees including:
  − in recruitment arrangements;
  − discouraging women applicants by offering them inferior terms of employment;
    and
  − refusing or deliberately omitting to give a woman employment;

• discrimination against existing employees by:
  − denying or restricting a woman’s chances of promotion, transfer or training;
  − restricting or denying a woman access to benefits, facilities or services; or
  − dismissing a woman or subjecting her to any other detriment.

Obviously, the Act is only infringed if the detriment suffered by the woman (refusal to
offer a job, promotion etc.) is on the grounds of her sex. A female job applicant has
not suffered discrimination if the reason the job is offered to a man is that he has
better qualifications.

Sex discrimination can be both direct (less favourable treatment) and indirect. The
latter occurs where the employer imposes a condition or requirement which a woman
cannot comply with, which is such that the proportion of women who can comply with
it is considerably smaller than the proportion of men who can comply with it and
where that condition or requirement cannot be justified, irrespective of the sex of the
person to whom it is applied. A simple example is a requirement that only applicants
who are more than 6 feet tall would be considered for a job. Case law has also
suggested that job advertisements inviting applications from those between the ages
of 25-35 indirectly discriminate against women, since fewer women than men would
be able to apply (as these are childbearing years for women).

There is a very limited defence to direct discrimination where the sex of the person is
a genuine occupational qualification. Some examples of this include certain acting
jobs, jobs where segregation of the sexes is necessary to preserve decency or
privacy, and jobs where the employee has to live on premises provided by the
employer and it is impractical to provide separate accommodation for men and
women. Indirect discrimination, on the other hand, can be defended on the grounds
that the requirement or condition was justified.

In addition to this the Sex Discrimination Act prohibits discrimination by way of
victimisation. This occurs where a person (the discriminator) treats another person
(the person victimised) less favourably than he treats or would treat another person,
because the person victimised has:

• brought proceedings against the discriminator or other person under the Sex
  Discrimination Act 1975 or Equal Pay Act 1970;
• given evidence in connection with proceedings under the Acts brought by any
  person against the discriminator or other person;
• done anything else related to the Acts in relation to the discriminator or other person; or
• alleged that the discriminator or other person has committed an act which would amount to a contravention of the Acts.

These are known as the “protected acts” under the Sex Discrimination Act. One peculiarity of the protection against victimisation is that it applies UNLESS the employee has made an allegation/been involved in a claim which is not true and in bad faith. In other words, an employee who spitefully makes a true allegation or who makes a false allegation in good faith is protected. A recent sex discrimination claim over a reference held that the right not to be victimised can extend beyond the period of employment. For the moment, this is limited on its facts and does not apply to race discrimination cases.

Where a woman feels she has been subject to an unlawful act of discrimination in the employment field her remedy is to present a complaint to an Employment Tribunal within three months of the act complained of. Before submitting such a complaint she has a right, for three months after the alleged discrimination act, to submit a questionnaire to the employer seeking information about the act. After filing an Employment Tribunal complaint, the woman may also submit a questionnaire to the employer within 21 days (or later, by leave of the Tribunal). The employer is not obliged to answer the questionnaire but, if he fails to do so, an adverse inference may be drawn in subsequent proceedings.

If the Tribunal finds the complaint well founded it may make:

• a declaration of rights;
• an order for money compensation based on the foreseeable damage and loss suffered by the employee. This may include a component for injury to feelings caused by knowledge of the discrimination;
• a recommendation of steps to be taken by the employer to reduce discrimination.

There is no cap on the maximum amount of compensation which an employee who has suffered sex discrimination can be awarded for out of pocket loss, principally loss of earnings. In assessing an appropriate amount for injury to feelings, Tribunals have awarded up to £25,000 although average awards are usually considerably lower. Injury to feelings awards may be increased where an employer has acted in a particularly high-handed or aggressive manner.

Sexual harassment is recognised as a form of discrimination. The Commission of the European Communities issued a Code of Practice on measures to eliminate sexual harassment which defines it as “unwanted physical, verbal or non-verbal conduct affecting the dignity at work of employees” of one sex. The Code provides guidelines for employers in this area and is frequently used by Employment Tribunals as a benchmark of good practice.

Employers should be aware that they may be liable for any act of discrimination committed by their employees upon another employee or an applicant, even where these acts are committed without the employer’s knowledge or approval. However, an employer will have a defence to such liability where it can show that he took such steps as were reasonably practicable to prevent an employee behaving in this way.

1.12 Sex Discrimination Act 1986

The Sex Discrimination Act 1986 makes it unlawful for employers to provide for different compulsory retirement ages for men and women in their contract of
employment. Where any provision concerning death or retirement relates to pay or other benefits the employer must treat men and women equally. ‘Pay’ includes contractual pension benefits. Occupational pension schemes may no longer specify different ages at which a pension will normally commence or apply different levels of benefit for men and women at the same age. This follows the decision of the European Court in the Barber v GRE case.

Interestingly, the Equal Opportunities Commission published its proposals in November 1998 for a new sex equality statute, to replace the Equal Pay Act 1970 and Sex Discrimination Act 1975. These proposals seek to further incorporate principles of European law into national legislation. The Equal Opportunities Commission, by its proposals, intends to:

- extend legal protection against discrimination to lesbians and gay men;
- clarify the definition of sexual harassment and expressly prohibit harassment of this nature;
- shift the burden of proof onto employers where an employee presents facts to a tribunal which suggest that they have faced direct or indirect discrimination; and
- extend the time limit for bringing sex discrimination claims.

It remains to be seen how many of these recommendations will be acted upon by the Government.

1.13 Race Relations Act 1976

The scheme of the Race Relations Act 1976 is very similar to the Sex Discrimination Act 1975. It applies to discrimination in employment and other fields.

In the employment field, it is unlawful to discriminate in specified ways against a person on racial grounds. The list of potentially discriminatory acts is the same as under the Sex Discrimination Act 1975 (e.g. denial of opportunity for promotion, failure to make an offer of employment etc.). Discrimination on ‘racial grounds’ includes discriminating against someone on account of his colour, race, nationality or ethnic or national origins. Although the term ‘ethnic’ caused interpretational difficulties for some time, the House of Lords has decided that the term ‘ethnic’ encompasses religious and cultural differences as well as strictly racial differences.

As with sex discrimination, racial discrimination can be either direct or indirect or by way of victimisation. Examples of indirect discrimination in this context include a rule that no headwear may be worn at work (discrimination against Sikhs unless the rule can be justified for a legitimate reason, e.g. the need to wear particular protective headwear), or that all employees must be able to work on Friday evening or Saturday morning (where the needs of the business do not so dictate) which is discrimination against Jews.

Again, as with sex discrimination, the Act is not infringed where a person’s race/nationality etc. is a genuine occupational qualification, but a far narrower range of examples exist.

The remedies available to an aggrieved claimant are similar to those under the Sex Discrimination Act, including the right to submit a questionnaire to the employer about the alleged discriminatory act. A complaint of unlawful discrimination in the employment field can be submitted to an Employment Tribunal within 3 months of the act complained of. If the Tribunal finds the complaint well founded the Tribunal can make:
• a declaration of rights;
• an order for money compensation.
• a recommendation of steps to be taken by the employer to reduce discrimination.

As with sex discrimination, there is no maximum cap on the amount of the damages a victim of racial discrimination can be awarded. Recent cases have established that Tribunals are prepared to make generous awards where discrimination is proved.

On 1 April 1984 the Commission for Racial Equality (“CRE”) issued a Code of Practice “for the elimination of racial discrimination and the promotion of equality of opportunity in employment”. This does not have statutory force, but provides employers with guidelines in the field of race relations. Additionally Local Authorities have an obligation to promote equality of opportunity generally. This has led some Local Authorities to require adherence to the CRE code as a prerequisite to awarding contracts to particular companies. It is again used frequently by Employment Tribunals as a benchmark of good practice.

### 1.14 Disability Discrimination Act 1995

The Disability Discrimination Act 1995 makes it unlawful to discriminate against a person on account of any disability that person might have. Currently, the DDA only applies to employers with more than 15 employees.

The provisions of the DDA are similar, but not identical, to the provisions found in the Sex Discrimination Act 1975 and Race Relations Act 1976. As with sex and race, direct discrimination against a person on grounds of their disability in certain specified ways (for example, discouraging disabled applicants from applying for a job, denying opportunities for promotion) is prohibited. There is no genuine occupational qualification defence, but there is no discrimination if less favourable treatment is ‘justified’, that is, for a substantial and material reason. In addition, in recognition of the historic prejudice against and unthinking exclusion of disabled workers, the DDA imposes a duty to take certain positive steps to avoid disadvantage to those with disabilities. Failure to comply with that duty is discrimination.

#### 1.14.1 Definition of Disability

The key elements which define a person with a disability under the DDA are:

• a **physical or mental impairment** which has a **substantial and long term adverse effect**, affecting that person’s ability to carry out normal **day to day activities**.

♦ **Physical or mental impairment**

Physical impairment is not defined by the DDA. A mental impairment is one which is a clinically recognised mental illness (so, for example, anxiety would not suffice). Certain illnesses are excluded from the definition: kleptomania, pyromania, tendency to physically or sexually abuse others, voyeurism, exhibitionism and hayfever.

♦ **Substantial and long term adverse effect**

Substantial in this context means “more than minor or trivial”. Long term is defined as having lasted for 12 months, or which is likely to last for at least 12 months or the rest of that person’s life, or which is likely to recur.
Day to day activities

These are not defined and are to be approached in a common-sense manner. They include such matters as washing, climbing stairs, ironing and so forth but do not include activities such as piano-playing, even if the person in question is a professional piano player. What is day to day must be judged by what most people do, not by what the individual in question does. The impairment must adversely affect day-to-day activities in one of the ways specified by the Act i.e. It must affect:-

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand
- perception of risk of physical danger

This list is exhaustive

1.14.2 Definition of Discrimination on Grounds of Disability

The DDA prohibits:

- less favourable treatment without justification for a disabled person on the basis of their disability;
- a failure without justification to comply with a duty to make reasonable adjustments to prevent a substantial disadvantage to a disabled person; and
- victimisation.

Less favourable treatment

This must be for a reason connected with the person’s disability e.g. a disabled employee who is made redundant with the rest of his colleagues is not less favourably treated on grounds of disability. An example of less favourable treatment on the grounds of disability would be if an employer chose one candidate over another, equally able, candidate just because the latter was in a wheelchair and the employer assumed that would create difficulties in the office.

Failure to make reasonable adjustments

This is the positive duty imposed by the DDA. An employer should consider what reasonable steps he must take to remedy a disadvantage caused to the disabled person. This may include such things as making physical adjustments to the employer’s premises, modifying equipment or altering working hours.
Where a complaint is presented to a tribunal alleging failure by the employer to make a reasonable adjustment, the tribunal will consider the practicality of such adjustments with regard to the size and financial resources of the employer.

♦ Victimisation

This is prohibited in the same way as for sex and race discrimination.

1.14.3 A complaint is presented to an employment tribunal in the same way as for sex and race discrimination (within 3 months of the Act complained of) and a questionnaire procedure also applies.

1.15 Maternity Rights

Maternity rights are currently protected by the Employment Rights Act 1996, which provides a minimum standard of protection to help women reconcile their work and family responsibilities. As of 15th December 1999, in relation to pregnant women whose expected week of childbirth is 30 April 2000 or after, maternity rights have been extended by the introduction of the Employment Relations Act 1999 and the Maternity and Parental Leave etc. Regulations 1999.

1.15.1 Maternity Leave

A pregnant employee is entitled to:

- 18 weeks maternity leave (increased from 14 weeks) irrespective of service (ordinary maternity leave or “OML”) including 2 weeks compulsory leave after confinement;
- statutory maternity pay if she has completed 26 weeks continuous employment at the beginning of the fifteenth week before the expected week of childbirth; and
- all contractual benefits including pension rights during the 18 weeks maternity leave period, except for pay.

A pregnant employee who has been continuously employed for 1 year has the right to return to work within 29 weeks of the birth. (Additional maternity leave or “AML” - the previous qualifying period was 2 years).

To exercise the right to maternity leave, the employee must give the employer written notice of her intention to be absent from work due to pregnancy at least 21 days before her absence begins or, if that is not reasonably practicable, as soon as it is reasonably practicable. If the employer so requests she must provide a certificate from a registered medical practitioner or registered midwife confirming the expected week of birth.

1.15.2 Maternity Pay

Maternity pay is paid for an aggregate of 18 weeks and is recouped by the employer from the State, as is Statutory Sick Pay. Relevant sums are deducted by the employer from National Insurance contributions payable by him. Maternity pay is, for the first six weeks of payment, nine-tenths of the employee’s normal weekly earnings. Thereafter the sum payable is
(currently) £59.55 per week. Maternity pay is paid with tax and National Insurance deducted.

An employee who does not receive maternity pay can complain to an adjudication officer and then appeal to a Social Security Appeal Tribunal.

1.15.3 **Right to Return to Work**

- An employee only needs to notify her employer of her intention to return to work if she intends to return on a date earlier than the date on which the OML or AML would automatically expire.

If the employee wishes to exercise her right to return to work before the end of her OML or (if she is entitled to it) AML period, she must give the employer at least 21 days’ notice of her date of return. If she fails to give 21 days’ notice, the employer can postpone the return in order to give themselves 21 days’ notice, but cannot postpone it beyond the date when the leave would expire.

In the case of an employee entitled to AML, the employer may ask the employee for written confirmation of the date of childbirth and whether she still intends to return to work at the end of the AML period. The request must not be made earlier than 21 days before the end of OML. The employee must respond within 21 days of receiving this request. If she does not do so, she will lose her right to complain to an employment tribunal that she has suffered a detriment or dismissal for the reason that she took AML. The employer’s request to the employee must be in writing and must state that if the employee fails to give this confirmation within the specified time those rights will be lost.

- Under the previous regime, where an employee was on AML, the 29 week period could be extended by 4 weeks if the employee was unwell or if the employer wished to postpone her return. Under the new regime, those provisions have been removed. The employer cannot postpone return, and the employee’s sickness would be dealt with under ordinary contractual sick leave provisions.

Where an employee has only taken OML, she has a right to return to her previous job on terms and conditions no less favourable than they would have been had she not taken OML. Where the employee has taken AML in addition, she has a right to return to her previous job on equivalent or better terms and conditions or where that is not reasonably practicable, to a job which is both suitable for her and appropriate for her to do in the circumstances. Again, however, the terms and conditions must be no less favourable than those which would have applied if she had not been absent from work at any time since the start of her OML.

The employee’s continuity of employment is preserved during her maternity leave.

If the employer does not permit the employee to return to work, she is deemed to have been dismissed with effect from the notified day of return. Such dismissal is generally an unfair dismissal (see below). The woman on maternity leave also has the right to special treatment if her job becomes redundant during her leave. If the employer can show that it was not reasonably practicable for reasons of redundancy to re-engage
the employee in her old job she is entitled to be offered any suitable alternative employment which may exist on terms not substantially less favourable than before.

1.15.4 Dismissal of Replacement

The dismissal of an employee engaged to replace the employee on maternity leave may be fair provided the employer notified the replacement in writing at the time of her engagement that her employment would be terminated when the absent employee returned. As with nearly all alleged unfair dismissals the employer must still show that he acted reasonably in dismissing the replacement. If the replacement employee had less than one year of continuous service (as will generally be the case) then he or she will have no right to claim unfair dismissal.

1.15.5 Dismissal for Pregnancy

A dismissal or selection for redundancy for reasons of pregnancy is automatically unfair. Where a new or expectant mother is incapable of doing the work for which she was employed or cannot do so without contravening a health and safety obligation, the employer must offer that employee suitable alternative work, if available, or where none is available suspend her on full pay.

There is no requirement for an employee dismissed on pregnancy and maternity related grounds to have been continually employed for one year before bringing an action for unfair dismissal on these grounds. She must make the claim within 3 months of the date of dismissal.

1.15.6 Time Off for Ante-natal Care

All pregnant employees, irrespective of their length of employment, are entitled not to be unreasonably refused the right to take time off for ante-natal care and to receive their normal rate of pay for that period of absence. Apart from the first appointment, before consenting to such time off the employer may require the employee to produce a certificate of pregnancy from a registered medical practitioner, registered midwife or registered health visitor and an appointment card. If time off is denied to the employee, or she is denied her normal rate of pay during such time, her remedy is to bring a complaint to an Employment Tribunal for:

- a declaration of her entitlement; and
- an order to the employer to pay unpaid remuneration in respect of such time off.

1.16 Parental Leave and Time Off for Domestic Incidents

These are new concepts which have been introduced by the Employment Relations Act 1999. They are covered by the Maternity and Parental Leave etc Regulations 1999. The rights came into force on 15th December 1999.

1.16.1 Parental Leave

The 1999 Act, supplemented by the Maternity and Parental Leave etc. Regulations, introduces an entirely new right to U.K. employees, both male and female, which is the right to parental leave.
The right is only applicable to the parents of children born or adopted on or after that date (although it is questionable whether this limitation is lawful and a similar provision in Irish legislation is currently being challenged by the European Commission).

Employers are encouraged to enter into collective or workforce agreements giving employees contractual rights to parental leave. Contractual rights cannot be less favourable than those contained in the Regulations but can be modified in a number of ways (see below) which might be beneficial to employer as well as employee. The statutory regime only applies in default of such an agreement.

Only employees with one year's continuous employment with their employer will be entitled to parental leave. If they change employers (other than by reason of a TUPE transfer) the entitlement is frozen until they accrue one year's continuous employment with the new employer.

The right essentially entitles each parent to a total of 13 weeks leave per child.

The purpose of the parental leave is to enable the parent to look after a child or make arrangements for the good of the child. This might involve, for example, looking after a child in the early weeks or months of life, settling a child into the new school, looking after a child who is ill or simply taking time to develop a parent and child bond.

The right only applies in respect of children up to the date of their 5th birthday unless:

- the child is in receipt of disability living allowance, in which case the leave may be taken at any time up until the child’s 18th birthday (although it is still limited to 13 weeks in total);
- the child is adopted, in which case the leave runs for 5 years from the date of placement of the child or until its 18th birthday, whichever is the sooner.

The right can only be taken in blocks of one week at a time and, if a shorter period is taken, it will nevertheless count as a week's parental leave. This restriction does not apply, however, to parents of a child in receipt of disability living allowance who are entitled to take shorter periods of leave without forfeiting the remainder of the week.

No more than 4 weeks' leave per child may be taken in any 12 month period.

The leave is unpaid and, although the employment contract continues to exist during the period of leave, the only contractual rights and obligations which continue are those which apply during a period of additional maternity leave.

The right to return to work after parental leave is:

- for a period of leave of 4 weeks or less, the same right as a mother returning from OML;
- for a period of leave of over 4 weeks (presumably pursuant to a collective or workforce agreement) the same right as a mother returning from AML.

There is nothing to stop a mother adding a period of parental leave onto the end of her AML (subject to the employer’s right to postpone parental leave - see below). If
She does so, her right is to return to the job she was employed to do before her absence on OML unless:

- it would not have been reasonably practicable for her to return to that job if she had returned at the end of the AML period; and
- it is not reasonable practicable for the employer to allow her to return to that job at the end of the period of parental leave.

In those circumstances she would be entitled to return to another job which is both suitable for her and appropriate for her to do in the circumstances, and which is on no less favourable terms and conditions (including as to remuneration). The effect of this is to put her in no worse a position than she would have been in had she returned at the end of the AML period.

The employee must give his or her employer at least 21 days notice of the date on which leave is proposed to begin, and the notice must specify the period on which leave is due to begin and end.

The employer can postpone the parental leave if “the employer considers that the operations of his business would be unduly disrupted if the employee took leave during the period identified in his notice”. To give some examples, postponement might be justified where the work is of a particularly seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time or where a specific function performed by the employee is of strategic importance and cannot reasonably be postponed.

If the employer does postpone the leave period, he must allow it to be taken at a later date no later than six months after the original commencement date requested.

There are, however, certain circumstances in which an employer is not entitled to postpone leave. These are:

- if the employee is the father of the child and leave is proposed to start on the expected date of childbirth;
- if the employee is adopting a child and leave is proposed to start on the expected date of placement of the child.

In these circumstances, the notice given by the employee must specify the expected date of childbirth or placement.

It was noted above that, by entering into a workforce or collective agreement, the employer can seek to modify (but not reduce) the statutory entitlement. Modifications might include:

- allowing parental leave to be taken in blocks of more than 4 months’ per annum - whilst perhaps initially an unattractive prospect to employers, this might in fact have the advantage of minimising disruptions (by discouraging multiple, short absences) and reducing training and recruitment costs;
- reducing the minimum period of leave (set at one week) to allow employees to take their leave by means of temporary reduced or part-time hours. This may be preferable to employees who cannot afford to take unpaid leave but may also be beneficial to employers by minimising business disruption and avoiding recruitment costs.
The other major new introduction is the right to dependant leave, which has been incorporated into the ERA 1996 at sections 57A and 57B.

Unlike parental leave, no qualifying period of employment is required before this right can be taken.

The right came into force on 15th December 1999.

The right is only intended to deal with emergencies which arise in relation to an employee’s dependants. The emergencies are specifically defined as:

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 is responsible for him.

It does not arise in the case of emergencies such as floods or burglaries, or in relation to matters such as taking children to dental appointments. If the employee is allowed time off for such matters, it will be at the employer’s discretion or form part of their annual leave.

Dependants are specifically defined in s.57A as: a spouse, a child, a parent or a “person who lives in the same household as the employee otherwise than by reason of being his employee, tenant, lodger or boarder”. So, for example, an elderly aunt living at the employee’s home would count, as would a step-child, whereas a nanny would not. In addition, however, for the purposes of sub-paragraphs (a) and (b) above, dependant includes “any person who reasonably relies on the employee for assistance on an occasion where the person falls ill or is injured or assaulted, or to make arrangements for the provision of care in the event of illness or injury”. For the purposes of sub-paragraph (d), dependant includes “any person who reasonably relies on the employee to make arrangements for the provision of care”.

The right to dependant leave is a right to take reasonable time off during working hours in order to take action which is necessary in relation to one or more of the circumstances set out above. What is a reasonable period of time to take off is not defined and is therefore left at the discretion of the employer. The DTI Guidance provides some assistance in showing how the right is likely to be interpreted by tribunals. It describes the right as being available in the case of an “emergency” or a “sudden or unexpected problem”.

It further states that, although there is no set limit to the amount of time off which can be taken, in most cases the amount of leave will be one or two days off at the most,
although the exact period will depend on individual circumstances. For example, if a child falls ill, the leave should be enough to help the employee cope with the crisis - to deal with the immediate care of the child, visit the doctor if necessary and make longer term care arrangements. It does not mean the employee may take two weeks off to look after the sick child. There is nothing to stop the employer allowing further time off as unpaid or annual leave, but this will be entirely at the employer’s discretion.

The statutory right to dependant leave is unpaid.

By definition, the right applies to unforeseen events. Nevertheless, the employee must inform his employer about the reason for his absence as soon as reasonably practicable, and must state how long he expects to be off work. There may be occasions when an employee returns to work before it was possible to contact his employer but, in those circumstances, the employer should still be informed of the reason for absence on return to work.

Enforcement

Both the right to parental and to dependant leave can be enforced in the employment tribunals. Employees are protected against detriment or dismissal on the grounds of exercising such rights.

1.17 Sickness and Injury Rights

1.17.1 Sick Pay

An employer is required to pay Statutory Sick Pay (“SSP”) to any employee who is away from work because of illness or injury. There is no entitlement to SSP in respect of the first three days of absence but thereafter the employer must pay SSP for up to a maximum of 28 weeks in a three year period.

The employer may prescribe a time-limit and method for notification by the employee of sickness absences. If the employer does not prescribe a time limit, the notification must be made within seven days from the start of absence unless there is good cause for not so doing. Where notification is not duly given an employer may withhold payment but otherwise, failure to pay will amount to an offence.

An employer may recover part of the payment by deductions from sums he is liable to pay to the State in respect of National Insurance contributions.

Any agreement which excludes, limits or otherwise modifies an employee’s entitlement to SSP is void, as is any agreement that the employee should contribute to the cost of payment by the employer. Where, however, an employer has made a payment under a company sick pay scheme, that payment goes towards discharging the employer’s liability under the statutory scheme.

It is common for employers to agree to pay employees over and above basic SSP rates for a limited period of absence, the length of which will vary depending upon the custom of the industry and the status of the employee.
1.17.2 **Suspension on Medical Grounds**

An employee suspended from work on medical grounds by reason of certain statutory provisions or a recommendation under a Code of Practice issued under the Health and Safety at Work Act 1974, has the right to be paid whilst suspended for a period not exceeding 26 weeks.

1.17.3 **Industrial Injury and Sickness Benefit**

An employee who suffers either an injury caused by an accident arising out of and in the course of his employment or a prescribed disease or injury due to the nature of that employment, will be entitled to draw benefits from the Industrial Injuries Fund. If the injury or disease derives out of the employer's negligence or breach of statutory duty, the employee may sue the employer for damages.

If an employee is unable to work by reason of sickness, (rather than injury or prescribed disease) and the provisions relating to Statutory Sick Pay do not apply (e.g. if the employee has exceeded his 28 weeks entitlement), he may be entitled to draw sickness benefits from the Department of Health and Social Security.

1.18 **Access to Medical Reports Act 1988**

The Access to Medical Reports Act 1988 came into force on 1st January 1989 and applies if an employer requests a medical report from a medical practitioner, relating to an employee or a prospective employee.

The Act provides that an employer cannot apply for a medical report unless he has notified the individual concerned and gained his consent for the request. Furthermore, the employer must notify the individual of his rights under the Act.

If the individual does give consent for the report, he is entitled, on request, to have access to the report before it is supplied to the employer. After seeing it, he can prevent it being supplied to the employer if he so wishes.

If the individual disagrees with something in the report, he can agree to it being supplied to the employer, but ask the doctor to amend anything misleading or inaccurate. If the doctor is unwilling to do this, the individual can attach a statement to the report giving his comments.

1.19 **Time Off for Public Duties and Union Duties/Activities**

1.19.1 **Public Duties**

All employees have the right to claim time off during working hours for specified public duties including duties as a lay magistrate, local councillor, member of a Tribunal, member of a National Health Service body, and school governor.

There is no right to be paid during such absences.

The amount of time off permitted is what is reasonable in the circumstances including the nature of the employer's business.
The remedy of an aggrieved employee is to complain to an Employment Tribunal for a declaration of his entitlement and if appropriate, an award of compensation.

1.19.2 **Union Duties and/or Activities**

This right is available to members of independent trade unions recognised by the employer. This is considered in greater detail in section 3 of this booklet.

1.20 **Health and Safety at Work**

Under the Health and Safety at Work etc. Act 1974, an employer must ensure “so far as is reasonably practicable” the health, safety and welfare at work of all his employees. The employer must provide an employee with safe equipment, safe premises, a safe system of working and reasonably competent fellow employees.

Regulations made under the Act provide for the appointment of ‘safety representatives’, to whom the employer must permit time off to perform the functions specified in the Regulations, and must, upon certain conditions being met, establish a Joint Safety Committee.

1.21 **Miscellaneous Provisions under the Employment Rights Act 1996**

1.21.1 **Employment Protection in Health and Safety Cases**

The Employment Rights Act provides that any employee, regardless of age, length of service or hours of work, has the right not to be dismissed nor selected for redundancy nor subjected to any detriment on the following grounds:

- the employee leaves his place of work in circumstances where he reasonably believes there is serious and imminent danger which he could not have been expected to avert;
- the employee takes appropriate steps to protect himself in circumstances where he reasonably believes there is serious and imminent danger;
- the employee brings to his employer’s attention work circumstances which the employee reasonably believes are harmful or potentially harmful of health or safety and there was no safety representative or safety committee.

Similar protection exists for employees who have some specific health and safety duty.

1.21.2 **Assertion of Statutory Rights**

The Employment Rights Act provides that it is automatically unfair (regardless of age, length of service or hours of work) to dismiss an employee, or select an employee for redundancy, if the reason or principal reason for the dismissal or selection is that:

- the employee has brought proceedings against the employer to enforce a ‘relevant’ statutory right (widely defined, to include a deduction from wages claim, unfair dismissal, redundancy payment, certain rights relating to unlawful deduction of union contributions, time off for trade union duties, etc.); or
• the employee has alleged that the employer had infringed a ‘relevant’ statutory right of an employee.

1.21.3 **Itemised Pay Statements**

Section 8 of the Employment Rights Act provides that all employees have the right to be given a written itemised pay statement. This right was previously restricted to those employees who work 8 or more hours a week.

1.22 **Public Interest Disclosure Act 1998**

The Public Interest Disclosure Act 1998 ("PIDA") introduces a framework of rights to provide protection against victimisation and dismissal for workers who “blow the whistle” in the public interest about fraudulent, criminal or dangerous activities carried on within the organisations in which they work. The provisions of PIDA came into force on 2 July 1999 making it unlawful for an employer to dismiss a worker or subject him to a detriment because the worker has made a ‘protected disclosure’.

1.22.1 **The Purpose of the Legislation**

Prior to PIDA coming into force, an employee who disclosed or threatened to disclose confidential information may have been acting in breach of his contract of employment. This may have led him to suffer disciplinary proceedings or dismissal as a result of any unauthorised disclosure.

1.22.2 **The Scheme of PIDA**

The scheme of the new PIDA is to protect ‘workers’ making ‘protected disclosures’ within the meaning of the Act, from dismissal or other detriment from their employer. In order to be protected the disclosure must fall within one of the specified categories of subject matter attracting protection and have been made in one of the ways specified by the PIDA. There are six categories of subject matter which qualify for protection under the Act and six procedures in accordance with which a protected disclosure can be made.

1.22.3 **The New Provisions**

♦ **Apply to workers**

Protection under new Part IVA ERA 1996 applies to workers and not just employees. The definition of worker includes:

• employees;
• home workers;
• agency workers;
• independent contractors providing services other than in a professional/client or business/client relationship;
• trainees on vacation work experience schemes.

♦ **Cover only qualifying disclosures**

The first thing which has to be proved if an employee is to qualify for protection under the new Act is that the subject matter of his/her disclosure falls within the category of six ‘qualifying disclosures’ laid down by the Act.
A ‘qualifying disclosure’ is one which a worker reasonably believes tends to show one of the following:

- that a criminal offence has been, or is likely to be committed;
- that a person has failed, is failing, or is likely to fail, to comply with any legal obligations to which he is subject;
- that a miscarriage of justice has occurred;
- that the health and safety of any individual has been, is being, or is likely to be endangered;
- that the environment has been or is likely to be damaged;
- that information tending to show any of the preceding has been, is being, or is likely to be deliberately concealed.

The standard to be applied to the above considerations is a subjective one, i.e. it is not a question of whether a criminal offence has been committed (or is likely to be committed), but whether it is the reasonable belief of the worker that the information disclosed demonstrates that this is the case.

In order to be protected under the Act, a ‘qualifying disclosure’ must be made in one of the prescribed methods laid down in the Act.

♦ Cover only protected disclosures

(a) Disclosure to the employer will be protected if the worker has an honest and reasonable suspicion that the malpractice has occurred and acts in good faith;

(b) Disclosure to a ‘prescribed person’ (defined by separate Regulations) is protected if the worker:

- has an honest and reasonable suspicion that the malpractice has occurred;
- acts in good faith
- reasonably believes the information disclosed is substantially true

(c) Under disclosure (for example to the media, police or members of Parliament) is protected where, in addition to meeting the requirements for disclosure to prescribed persons, the disclosure is:

- reasonable in all the circumstances
- is not made for personal gain

In addition, the worker must meet three further requirements:

- the worker reasonably believes that he or she would be victimised if the matter were raised internally or with a prescribed person;
- there was no prescribed person and the worker reasonably believed the evidence was likely to be concealed or destroyed;
or

- the concerns had already been raised with the employer or a prescribed person.

In deciding whether it is ‘reasonable’ for the worker to make the disclosure, the following should be borne in mind:

- the identity of the person to whom the disclosure is made;
- the seriousness of the ‘relevant failure’ and whether it is continuing, or likely to continue;
- whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person;
- any action which the employer or the prescribed person to whom the previous disclosure was made, has taken or might reasonably be expected to have taken as a result of the previous disclosure;
- where the worker has previously disclosed substantially the same information, whether in making that disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

♦ Act subject to exceptions

It should be noted that if a worker commits a criminal offence by making a disclosure, then the disclosure ceases to qualify under the Act, and loses its protection.

♦ Miscellaneous provisions

Any term in a contract which tries to prevent a worker from making a protected disclosure is void. This applies not just to this type of term in an employment contract but also, for example, to such a term in an agreement compromising a claim for statutory employment protection rights.

1.22.4 The Protection Afforded by the Legislation and Enforcement

Where a worker has made a protected disclosure, if he/she is either dismissed or subjected to any other detriment as a result of the disclosure, this will be unlawful. No minimum period of quantifying service will be required in order to bring a complaint before the Employment Tribunal, nor is there any limit on compensation in these circumstances (that is, the usual £50,000 limit for unfair dismissal compensation does not apply).

1.23 Working Time Regulations 1998

1.23.1 Introduction

From 1 October 1998 all employers are under an obligation to comply with new working time provisions.

The entitlements are provided for in the Working Time Regulations 1998 (S.I. 1998/1833) which implement the EU Working Time Directive (No. 93/104). The Regulations introduce a number of new rights and obligations for the
benefit of workers relating to work and rest. This guide is designed to set out only the key points contained in the Regulations. Detailed questions should be directed to your employment lawyer.

In brief, the Regulations make the following provisions:

- a limit on average weekly working time to 48 hours a week;
- a minimum of 11 consecutive hours away from work in a 24 hour period;
- a minimum of 24 continuous hours away from work in any 7 day period;
- a minimum of 20 minutes rest break for a daily working period of six hours;
- right to paid annual leave;
- record keeping obligations on the employer.

The scope of the Regulations is wide. The entitlements extend to most employees, agency workers and contractors.

1.23.2 How the Regulations Apply

- Whilst the Regulations impose a 48 hour maximum working week, the operation of this provision is flexible. It limits working time to 48 hours in 7 days calculated as an average over the ‘relevant reference period’. It is also possible for workers to opt out from the limit.

  Even if a worker works 80 hours for one week, the provision will not be breached. The limit will only be a problem if the worker consistently works more than 48 hours a week so that the average hours worked over the relevant reference period are greater than 48 hours. An employee may work up to 816 hours in any 17 week period.

- Most of the regulations do not apply to those workers who can genuinely control their own working hours.

- Working time is defined as any period during which:
  - the worker is working;
  - at the employer's disposal; and
  - carrying out his or her activities or duties.

  All three characteristics have to be present. For example, in travelling to a client meeting - if working on the case - an employee is working, at the employer’s disposal and carrying out his or her duties. But if he or she is not ‘thinking’ about the case arguably he or she is not carrying out his or her duties.

- Workers can choose to disapply the weekly working time limit by entering into a written agreement with the employer. The opt-out can be for a limited period or throughout the employment relationship.

  The employer may include the opt-out in the contract of employment or offer letter.

  A worker who has opted out of the limit, can decide to opt back in at any time by giving written notice. The employer can ask for a maximum of 3
months’ notice to be given. In the absence of any such notice provision, a minimum of 7 days’ notice must be given.

♦ The Regulations specify that no worker should suffer any detriment as a result of his refusal to opt out or his decision to opt back in. Performance, rather than hours in the office, is the measure for pay raises and promotions. A worker who wishes to complain to an employment tribunal that he or she has been dismissed for a reason related to the Working Time Regulations requires no qualifying period of employment.

♦ The Regulations also provide for three rest provisions, but an employee may choose not to insist on them:

- **Daily Rest**
  A worker is entitled to at least 11 continuous hours rest that is, hours away from work, in each 24 hour period during which he or she works.

- **Weekly Rest**
  A worker is entitled to 24 continuous hours rest in each seven day period which he or she works. Or, if the employer so chooses, the weekly rest entitlement can be either two periods of 24 hours or one continuous period of 48 hours in each 14 day period.

- **Rest Break**
  Where a worker has worked for 6 hours continuously, he or she is entitled to an uninterrupted break of at least 20 minutes.

♦ For the first time workers have been given statutory rights to paid holiday. The right is subject to the worker having completed 13 weeks consecutive qualifying service. Each worker is entitled to 4 weeks annual leave. This includes bank holidays. Employers are obviously free to extend more generous provisions to their employees.

♦ It is the legal responsibility of employers to ensure the provisions in the Regulations are being complied with. The Regulations impose various record keeping obligations upon employers so that compliance with the Regulations can be monitored (although the recording obligations were watered down by amending regulations which came into force on 17th December 1999). Employers may consider installing a simple card system for staff, or insist that employees fill in some kind of time sheet.

1.24 **Data Protection Act 1998**

1.24.1 **Background**


For an employer, the most significant provision of the 1984 Act was the right of access to certain automated data which employees could exercise. The 1998 Act, when in force, will increase the scope of the right of access to certain non-automated or ‘manual’ data, and apply new conditions to the obtaining, recording, holding or carrying out of any operation or series of operations ("processing") on manual and automated data. This guide only focuses on rights of access; other rights also exist on which specialist advice should be taken.
Despite receiving Royal Assent in the U.K. on 16 July 1998, the DPA is not yet in force. At this point it is expected to come into force on 1 March 2000.

1.24.2 Scope

The 1984 Act only applies to employee records held on computer. However, the new Act is not limited in its scope to computerised information. The definition of “Data” also encompasses information which ‘is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system’. A ‘relevant filing system’ is defined as a set of non-automated information relating to individuals which is ‘structured’, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

It is likely that a relevant filing system would therefore include manually filed personnel records.

1.24.3 The Data Protection Principles

There are eight principles governing the processing of personal data. “Processing” is defined widely to include the collection, organisation, storage, retrieval, alteration, disclosure or destruction of data. Personal data is defined as data about a living individual who can be identified from that data.

The eight data protection principles are as follows:

♦ Personal data shall be processed fairly and lawfully.

One or other of a number of conditions has to be complied with here. For example:

- the data subject (i.e. the employee) must have given his consent to the processing; or
- the processing must be necessary for the performance of a contract to which the employee is a party or for the taking of steps at the employee’s request with a view to entering into a contract; or
- the processing must be necessary for compliance with any legal, but not contractual, obligation to which the employer is subject. (e.g. PAYE or national insurance contributions).

♦ Personal data shall be obtained only for specified and lawful purposes and shall not be processed in any manner incompatible with these purposes.

♦ Personal data shall be adequate, relevant and not excessive in relation to the purposes for which it is processed.

Therefore, if personnel files of long serving employees contain a backlog of out of date or irrelevant information, employers will be well advised to review their personnel files periodically with a view to removing such material.

♦ Personal data should be accurate, and where necessary, kept up to date.
One way of ensuring compliance with the fourth principle is for employers to provide employees with a copy of their personnel files at regular intervals and to arrange for employees to notify any changes.

♦ **Personal data shall be kept for no longer than is necessary for the purposes of which it is processed.**

The minimum period of time for which an employer will want to preserve a personnel record is until any potential legal action would be time barred. In the case of unfair dismissal, this is three months. However, for personal injury, the time is three years or longer if the injury is not apparent when the employee leaves.

♦ **Personal data shall be processed in accordance with the rights of data subjects under the Act.**

♦ **Personal data shall be subject to appropriate technical and organisational measures to protect against unauthorised or unlawful processing and accidental loss, destruction or damage.**

Employers may be expected to adopt computerised back-up procedures and to ensure that only authorised persons within the organisation have access to employee data.

♦ **Personal data shall not be transferred to a country outside the EEA unless that country or territory ensures an adequate level of data protection.**

Adequate protection is not required where the data subject consents to the transfer of the data or in other specified circumstances.

### 1.24.4 Sensitive Personal Data

The Act introduces new restrictions on the processing of sensitive personal data relating to employees. Sensitive personal data is defined widely to include information concerning ethnic or racial origin, political opinions, religious beliefs, trade union membership and physical and mental health.

Therefore, when processing sensitive personal data, employers would be well advised to reconsider what kind of information they ask their employees to provide and for what purposes that information is likely to be used. Employers should also seek professional advice concerning the circumstances in which sensitive data can be processed.

### 1.24.5 Rights of Data Subjects

♦ On the date the Act comes into force, the Data Protection Act 1984 will be repealed and the 1998 Act’s own provisions will be phased in over about seven and a half years. There are two transitional periods (from the date the Act comes into force to 23 October 2001, and from 24 October 2001 to 23 October 2007).

♦ From the date the Act comes into force until 23 October 2001 (the first transitional period), in so far as rights of access are concerned:
employees will continue to have the right, in relation to *automated* data, to be informed whether personal data (that is, relating to them individually) is being processed by the employer, and to have communicated to them, in intelligible form, the information which constitutes that information;

the only relevant exception to this relates to automated data used only to calculate pay or pensions or to keep business accounts (including business forecasting tools), to which there is no right of access as above;

employees will not have any right of access to *manual* data which is "subject to processing which was already under way immediately before 24 October 1998".

From 24 October 2001 onward, insofar as rights of access are concerned:

employees will have a right, in relation to all *automated* data relating to them individually, *whenever processed*, and in relation to all *manual* data relating to them individually (except data which the employer held before 24 October 1998 and which has, since that date, been kept and used in pre-existing formats):

- to be informed whether personal data (that is, relating to them individually) is being processed by the employer;
- if so, to be given by the employer a description of the personal data on them, the purposes for which they are processed, and the recipients or classes of recipients to whom they are or may be disclosed;
- to have communicated to them, in intelligible form, the information which constitutes that data and any information available to the employer as to the source of the data;
- to be informed in relation to any automated data the automatic processing of which constitutes the sole basis for any significant decision affecting him or her of the logic involved in that decision taking (unless this is a trade secret).


The Act introduces a statutory national minimum wage ("NMW") which covers every region of the U.K. and almost all sectors of the economy. Employers should note that the right applies to workers and not just employees (see para 1.22.3).

Some workers are excluded from the entitlement. They are:-

- workers below the age of 18
- apprentices who are:-
  - 18 years old
  or
- 19 - 20 years old and in their first year of apprenticeship
- students and trainees on placement schemes
- au pairs and family workers

**The rate**

The basic rate is £3.60 per hour. A £3.00 per hour rate applies to 18 - 21 year olds. A £3.20 per hour rate applies to a worker who has attained the age of 22, is within the first 6 months of employment and has agreed in writing to take part in 26 days of accredited training before the end of that 6 month period.

The provisions for calculating whether an employee has been paid the minimum hourly rate are extremely complicated. The government has provided employers with assistance by issuing detailed guidance on the Act, with worked examples, at www.dti.gov.uk

An employer is under a number of record-keeping obligations in relation to NMW. In relation to each worker it is necessary to keep records that are sufficient to show that an employee is being paid a rate at least equivalent to the NMW. Ideally these should include details as to

- hours worked
- gross salary paid
- overtime and shift premium
- commission or bonuses paid
- tips or gratuities paid through the pay roll
- details regarding any deduction or payment for accommodation
- any absences e.g. for rest breaks, sick leave, holiday, travel or training during work hours, and their length.

If the worker suspects he or she is not being paid the NMW, the worker has a right to inspect those records that relate to him or her, provided a written request has been made. An employer has 14 days from the request to produce the records. It is a criminal offence if an employer fails to keep records, keeps false records or produces false records. An enforcement officer may visit the company and ask to inspect the records.

**Enforcement:**

A worker can go to a tribunal to recover any money owed by reason of not being paid the NMW, or can enforce the claim in the civil courts. A worker may also claim unfair dismissal or victimisation if he or she suffers dismissal or a detriment for a reason related to the NMW. In relation to the claim for unfair dismissal, there is no qualifying period of employment.

Criminal offences relating to NMW can attract a fine of up to £5,000 per offence.
2. TERMINATION OF EMPLOYMENT

2.1 Contractual Position

2.1.1 Fixed Term Contracts and Notice Periods

The circumstances in which a contract of employment can be terminated are normally specified in the contract.

If the employment is expressed to be for a fixed term (i.e. its maximum length is known or ascertainable at the outset), the contract of employment will automatically terminate on the expiry of that specified fixed term (its expiry and non-renewal on the same terms constitutes a ‘dismissal’ for statutory employment protection purposes - see below).

However, most contracts are for an indefinite period (or until the employee reaches retirement age) and are terminable by a specified minimum period of notice to be given by one party to the other. An employment contract can be terminated summarily (without notice) in the event of gross misconduct. The consequences of a dismissal (with or without notice) under employment protection laws are considered below. The period of notice necessary to end the contract is normally set out in the contract, but if no period is specified, ‘reasonable notice’ must be given. What is reasonable has to be judged in the light of all the circumstances including custom and practice prevailing in the particular industry or organisation and the employee’s seniority. Senior employees may be entitled to lengthy notice periods.

Notice periods may not be less than the minimum periods specified by section 86 of the Employment Rights Act. An employee who has more than one month, but less than two years’ continuous employment is entitled to receive one week’s notice from his employer and must give one week’s notice of resignation himself. Thereafter the minimum period of notice required of the employee remains the same, but the notice required of the employer increases by one week for each completed year of continuous employment up to a maximum of 12 weeks’ notice after completion of 12 years’ continuous service.

If an employee’s contract of employment provides for lesser notice, statutory minimum notice prevails. If the contract provides for greater notice (including ‘reasonable notice’), the contractual period prevails.

2.1.2 Wrongful dismissals

If either party terminates the contract of employment in breach of its terms, the other party is potentially entitled to damages for breach of contract. It may additionally be possible to restrain a dismissal in breach of, for example, a contractual disciplinary policy.

Where the employer has terminated the employment in breach of the contract’s express or implied terms, for instance by failing to give the notice of termination prescribed by the contract, this is known as ‘wrongful dismissal’.

Employment Tribunals have jurisdiction to hear claims for wrongful dismissal provided that they are brought within 3 months of the termination of the relevant employment, and the value of the claim does not exceed £25,000.
2.1.3 **Damages**

The normal remedy for wrongful dismissal is a claim in damages. Damages are awarded to compensate the employee for the financial loss of salary and contractual benefits he has sustained in consequence of not continuing in employment for the notice period. The loss of remuneration is assessed net of tax and National Insurance (i.e. it reflects what the employee would have been entitled to if the employment had been terminated in accordance with the contract of employment), and takes into account the value, to the employee, of contractual non-cash benefits, such as company car, private medical insurance etc.

Damages are also assessed on the assumption that the contract breaker would have performed the contract in the manner most favourable to himself, for example, that he would have terminated the contract lawfully as soon as possible. Recent case law suggests that the Courts will not necessarily assume that the contract would have been performed in the cheapest way possible, if this does not reflect what happened in practice, during the employment.

Reductions are made to the resulting amount to take account of the employee’s duty to mitigate his loss by seeking alternative employment and on account of ‘accelerated payment’ i.e. receiving the amount in one lump sum rather than in instalments over a period of time.

2.1.4 **Payment in Lieu**

If the contract of employment gives the employer the option of paying salary in lieu of notice, this provides the employer with an alternative way of bringing the contract of employment to an end lawfully. Even where there is no specific contractual term, salary in lieu is often paid. However, the employer will generally be in breach of the contract in doing so. This is important - a dismissal in breach of contract renders the remaining provisions of the contract unenforceable. Recent case law indicates that pay in lieu clauses should be treated with some respect and advice should be sought in relation to their drafting and interpretation. Where the employer has the right to end the contract immediately on payment in lieu of notice, but in breach gives no notice or payment, the employee has the right to claim that payment, without giving credit for mitigation or accelerated receipt.

2.1.5 **Employee’s Breach**

If the employee has terminated the contract of employment in breach, by leaving employment without giving the period of notice required by the contract, the employer is entitled to receive damages in respect of any financial loss he suffers in consequence. However, in practice, it is generally very difficult to prove that a financial loss has been suffered in consequence of the employee’s early departure, and therefore it is not generally worthwhile for employers to pursue such a claim.

2.1.6 **Constructive Wrongful Dismissals**

If, during the employment, the employer fundamentally breaches the terms of the contract of employment, the employee may leave immediately without giving notice to terminate the contract. If the employee does so, the breach is ‘accepted’ and the employee can claim to have been constructively
dismissed. Examples of fundamental breaches which entitle an employee to treat himself as ‘constructively dismissed’ are reducing an employee’s salary or commission, demoting an employee, or reprimanding an employee in front of other staff. An employee who has been constructively dismissed is entitled to damages for breach of contract, again assessed with reference to the period of notice the employer was required to give to terminate employment.

2.1.7 Fixed Term Contracts

Wrongful dismissals in the context of fixed term contracts can be very costly for an employer, particularly if the contract does not allow for termination during the fixed term on notice. The relevant calculation period for wrongful dismissal damages is then the unexpired portion of the fixed term contract.

2.2 Statutory Position

As well as rights under the contract of employment, an employee also has rights which have been conferred by statute. These statutory rights are additional to, not instead of, the contractual rights.

Relying on the statutory rights, an employee may claim the following on the termination of his or her employment:

- unfair dismissal (after a certain period of continuous employment, now one year in relation to dismissals occurring on or after 1 June 1999, having been reduced from two years);
- redundancy payment (after two years’ continuous employment);
- sex discrimination (no continuous employment necessary);
- race discrimination (no continuous employment necessary);
- disability discrimination (no continuous employment necessary);
- that the dismissal was ‘automatically unfair’ (no continuous employment necessary) because it was:
  - due to certain specified trade union activities
  - due to the employee’s pregnancy or childbirth;
  - on specific health and safety grounds;
  - on specific Sunday working grounds;
  - related to functions as an occupational pension scheme trustee;
  - related to functions or activities as an elected employee representative (including standing for election);
  - in response to the fact that the employee asserted a statutory right;
  - on specified grounds relating to Working Time rights;
  - for making a protected disclosure under PIDA
  - for a reason relating to parental or dependant leave or maternity
  - for a reason relating to NMW

Sex, race and disability discrimination have been dealt with in section 1. In this section, we focus on the right to receive a statutory redundancy payment, and unfair dismissal rights.

In order to claim a statutory redundancy payment or to present a complaint of unfair dismissal the employee must show that he/she has been dismissed. For these purposes a dismissal occurs when:

- the employer terminates the contract of employment with or without notice;
• a fixed term contract of employment expires without being renewed on the same terms; or
• the employee terminates the contract of employment with or without notice when entitled to do so on account of the employer’s fundamental breach of the contract of employment (“constructive dismissal” - see above).

2.3 Entitlement to receive a redundancy payment

An employee with sufficient qualifying service who is dismissed for redundancy is generally entitled to a statutory redundancy payment from the dismissing employer.

2.3.1 What is a redundancy?

An employee is dismissed for redundancy if his dismissal is attributable wholly or mainly to:

• “the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease to carry on that business in the place where the employee was so employed; or
• the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where so employed, have ceased or diminished or are expected to cease or diminish.”

This definition therefore covers the following factual situations:

− closure of an office or factory;
− relocation of an office or factory (unless the employees can be required to relocate under their contracts of employment);
− where there is an overall reduction in the numbers of employees required by the employer; and
− where there is a reduction in the number of employees required to undertake a particular type of work, even if the overall number of employees or the amount of work remains the same.

2.3.2 When can an employee claim a redundancy payment?

Not all redundant employees are entitled to a statutory redundancy payment. The following conditions have to be met:

• the employee must have been continuously employed for two years at the date of dismissal;
• the employee, must be aged under 65 or under the normal retirement age for the employer. (Although in 1998, these age limits have been challenged on grounds of sex discrimination. Currently there is no law against age discrimination. The upper age limit does not apply in certain circumstances.)

2.3.3 How is the statutory redundancy payment calculated?

The statutory redundancy payment is calculated according to a formula involving the number of years of continuous employment, the age of the employee and the amount of the employee’s pay per week. Broadly speaking the payment is calculated as follows:
• calculate the number of complete years of continuous employment (up to a maximum of twenty) disregarding any period before the age of eighteen;
• calculate the employee’s gross pay per week (up to a prescribed maximum set by statute), currently £220 per week;
• working backwards from the date of termination (or if dismissed without notice the date employment would have ended, had statutory minimum notice been given), allow:
  − 1½ weeks’ pay for each year of employment in which the employee was age 41 and over;
  − 1 week’s pay for each such year in which the employee was between the ages of 22 and 40; and
  − ½ week’s pay for each such year in which the employee was between the ages of 18 and 21.

The payment is reduced where it is made in the employee’s 65th year.

An employer may have a policy to pay employees money in addition to the statutory entitlement in the event of redundancy.

2.3.4 What remedy does the employee have?

If an employee is dismissed by the employer by reason of redundancy but is not paid the statutory redundancy payment to which he/she is entitled, he/she may bring a claim before an Employment Tribunal.

If the claim is for statutory redundancy pay, it must be lodged with the Tribunal within 6 months of the termination of the employee’s employment.

If the claim is for monies payable under a contractual redundancy scheme, different considerations apply. Normally claims for breach of contract or unlawful deductions from wages must be lodged within 3 months of the relevant date.

A redundancy may give rise to an unfair dismissal claim - for example, if the selection is unfair, if it takes place without proper consultation, or without a proper search for suitable alternative employment.

2.4 Unfair dismissal

Generally, a dismissed employee can present a complaint of unfair dismissal to an Employment Tribunal if certain conditions are met. These include:

♦ The employee has the relevant amount of qualifying service which is now one year. The validity of the previous two year qualifying period for normal, non-discriminatory, unfair dismissal rights is currently unclear in the light of the long running *Seymour Smith* litigation and Employment Tribunals have been staying unfair dismissal applications made by employees with ‘short service’ who were dismissed before 1st June 1999 pending clarification of the law.

There is no minimum qualifying period if the employee claims ‘automatically unfair dismissal’ as listed above.
The employee is not over the normal retiring age or if there is no such age, over 65 (although, this upper age limit does not apply in certain circumstances and has been challenged on grounds of indirect sex discrimination).

A dismissed employee will succeed in his complaint of unfair dismissal unless the employer can show firstly that the dismissal was for a potentially fair reason and was carried out in a fair manner.

The five potentially fair reasons to dismiss an employee are set out in the Employment Rights Act 1996:

- a reason relating to the conduct of the employee (misconduct);
- a reason relating to the capability or qualifications of the employee;
- the employee was redundant (see above for definition);
- the employee cannot continue to work in the position he held without contravention of a duty or restriction imposed by or under an enactment; and
- some other substantial reason.

The Tribunal will assess whether the employer acted reasonably in treating the reason given for the dismissal as a sufficient reason for dismissing the employee.

2.4.1 Misconduct

There are three broad categories of misconduct which can justify dismissal:

- a refusal to obey a lawful order;
- infringement of generally accepted, or the employer’s own particular (and universally known and accepted), disciplinary standards;
- commission of some act, for example, fraud or theft or perhaps a criminal offence outside work which affects the employee’s ability to carry out his or her duties, and/or results in the employer no longer having the requisite degree of trust and confidence in the employee.

Generally speaking, for the employer to show that he acted fairly in dismissing for misconduct he is required to show that at the time he took the decision to dismiss:

- he genuinely believed that the employee had committed the misconduct in question;
- he had reasonable grounds for that belief;
- he had carried out as much investigation into the matter as was reasonable in the circumstances; and
- that dismissal was the appropriate sanction for the offence, taking into account the seriousness of the offence, any mitigating factors, and whether the employee had received any previous warnings for misconduct.

Thus it can be of crucial importance for the employer to show it followed a fair procedure before dismissing the employee. This is extended to the point that a dismissal will be unfair if the employee is denied access to an appeals procedure run by the employer. Moreover, such denial may lead to additional awards of compensation; Employment Rights (Dispute Resolution) Act 1998.
An employer should have disciplinary rules. Such rules should specify a broad procedure to be adopted in dealing with a disciplinary matter and set out an employee’s right to appeal against any disciplinary action later. It is important for the employer to consider whether the disciplinary procedure should be incorporated into the contract of employment and we suggest that advice be sought in relation to this issue.

- Detailed guidance as to the procedures to be followed by employers is contained in the ACAS Code of Practice on disciplinary practice and procedures in employment. This Code is considered by Tribunals in deciding whether a procedure is fair or unfair.

The basic principles of this Code are:

- the employer should have clear rules and disciplinary procedures, in writing which should be brought to the attention of all employees;
- the procedures:
  - should specify to whom they apply;
  - provide for matters to be dealt with speedily;
  - indicate the disciplinary measures which may be taken;
  - specify the level of management required to take the various forms of permissible disciplinary action. (Immediate managers should not have power of dismissal without reference upwards);
  - ensure that, except for gross misconduct, no employees are dismissed for a first breach of discipline;
  - ensure individuals are given an explanation for any action taken;
- employees should be informed in detail of any complaints against them and given an opportunity to state their case before decisions are taken;
- employees should have the right to be accompanied by a trade union representative or a fellow employee (this has become a statutory entitlement under in the Employment Relations Act 1999);
- no disciplinary action should be taken until a case has been carefully investigated;
- the employer should provide employees with a right of appeal and specify the procedure to be followed.

In addition to procedures set out in the Code, employees will soon have a statutory right to be accompanied at disciplinary and grievance hearings by a fellow worker or a trade union representative. It is irrelevant for these purposes that the employer does not recognise trade unions or that the employee is not a member of a trade union or is a member of a different trade union to the representative. This right is due to come into force in Spring 2000.

When dismissing an employee it is important for the employer to follow its own procedure and to observe the general principles of fairness, otherwise known as natural justice. It is important to maintain accurate and confidential records of disciplinary action taken in relation to employees.
2.4.2 **Lack of Capability**

(a) *Incompetence*

- An Employment Tribunal cannot assess an employee’s competence. Therefore a dismissal for incompetence will generally be fair if the employer can succeed in showing that:

  - it honestly and reasonably believed that the employee was incapable of performing his duties;
  - that the employer had reasonable grounds for that belief; and
  - that the employee had been informed in detail of the respects in which his/her work was considered unsatisfactory and given a reasonable opportunity (including appropriate training) to reach the required standard.

- Again, it is very important for the employer to show that it followed a fair procedure in relation to the employee before taking the decision to dismiss, including showing:

  - that detailed complaints were put to the employee who had a proper opportunity to comment on them;
  - it allowed the employee an opportunity to be accompanied at the ‘capability’ meeting;
  - that it gave the employee a specified and reasonable period of time in which to improve performance together with appropriate warnings/cautions;
  - the employee received adequate supervision and training;
  - the employee was allowed a right of appeal against an adverse company decision.

There is one important difference between the operation of disciplinary and capability procedures. In the former case the warnings which will normally be given to an employee before dismissal can follow each other very quickly. For instance, if an employee is warned for misconduct and the following week commits the same misconduct again, a second warning will immediately be appropriate. On the other hand, for incompetence or lack of performance, the employer should normally allow the agreed period of time to elapse before formally reviewing the employee’s performance again and deciding whether or not a further warning/caution or further action is appropriate.

In all cases of alleged incompetence the employer should be extremely careful to ensure that the employee knows precisely what is required of him or her and receives adequate supervision and training.

(b) *Ill Health*

There are two distinct types of situation where an employer may wish to dismiss an employee on account of ill health (i) where the employer has been involved in an accident, or contracted a disease, which leaves him/her incapacitated for a long period; and (ii) where, over a period, the employee is frequently absent from work for short periods, due to minor and various illnesses such as colds etc.
Note that this section does not deal with pregnancy related illness. Dismissal/detriment for such reasons will generally have unlawful sex discrimination consequences for an employer.

(i) **Long term absence**

In this situation, the first requirement of the employer is that it should take steps to discover the true medical position and the likely date when the employee might be able to return to work. To this end it should consult with the employee, and take steps to obtain an opinion from the employee’s medical adviser. This could take the form of a report from the employee’s own GP, a report from a doctor nominated by the employer or from a specialist. The employee must give his/her consent to such a medical examination and it is not sufficient that the contract of employment requires the employee to undergo a medical examination if required to do so by the employer.

Once appraised of the full facts, the employer has to balance its interests against those of the employee before taking any decision. Obviously this is a very difficult task. Relevant factors to be taken into account include the likely length of the employee’s absence, whether other employees can absorb the absent employee’s duties, whether absence is due to an injury occurring at work, whether temporary labour can be drafted in and whether the employee is expected to recover fully.

Under the Disability Discrimination Act 1995, employers also have an obligation, where the Act applies, to make ‘reasonable adjustments’ for employees with disabilities as defined in the Act (see above). This can include physical adjustment of equipment, e.g. computer keyboard, and/or allocation of duties although much will depend on the circumstances. A dismissal for serious incapacity could be unfair if it could have been avoided had reasonable adjustments been made. However, even where the employee does not have a ‘disability’ as defined, it is likely to be good practice to consider ‘reasonable adjustment’ so as to accommodate the employee in the workforce.

It is not necessarily unfair to dismiss someone who is still entitled to receive remuneration under the employer’s sick pay scheme and vice versa. Dismissal during entitlement to contractual sick pay is, however, likely to be a breach of contract and/or an unlawful deduction from wages. Case law suggests that it may constitute a breach of an implied term of the contract to dismiss for incapacity whilst the employee is qualifying to receive benefits under a company permanent health insurance (“PHI”) scheme.

Where an employee has been permanently incapacitated in consequence of an injury or illness and is unable to carry out his normal duties, but is able to do some work, consideration should be given to whether it is possible to offer the employee alternative employment.
(ii) Short term intermittent absences

In situation two where an employee is persistently absent on account of minor illnesses, the transient nature of the symptoms may mean that it is inappropriate to obtain a medical report on the employee (although the symptoms may be indicative of an underlying medical condition of which the employer should be aware in taking any decision about the employee's future). In such a case it is generally more appropriate to consult the employee about the high level of absences and discover the underlying cause, for example, high absence levels can be indicative of ongoing harassment at work. Where there is no underlying reason for the sporadic sickness absences, it may also be necessary to warn the employee that if this level of absences continues it may/will result in dismissal. It may also be necessary to specify a period of time over which absences will be monitored. Clearly good record keeping and effective monitoring of this situation are required.

2.4.3 Redundancy

Redundancy is generally a fair reason for dismissing an employee, but a dismissal described as a redundancy can be unfair in the following circumstances:

♦ Where redundancy is not the real reason for the dismissal.

♦ Where an unfair procedure has been used to carry out the redundancies. As well as a fair selection procedure, the employer must also consult individually with the employees whose jobs are at risk of being made redundant. Each employee must be warned of the redundancies and the employer should consult with them to explore the options, for example, of how the redundancies could be avoided, the number reduced or the effect mitigated.

In addition to the obligation to consult individually, where 20 or more employees are made redundant, the dismissing employer may have statutory collective consultation obligations (although, in order to ensure redundancy dismissals are fair, it is important for employers to consult with employees’ trade union representatives in every case). Collective consultation means consultation with ‘appropriate representatives’ - these can be trade union representatives or elected employee representatives.

Previously, the duty was only to consult with the appropriate representatives of those employees at risk of being made redundant but under Regulations which came into force on 28th July 1999, the law was amended so as to require consultation with the appropriate representatives of all employees affected or likely to be affected by the dismissals, not just those at risk of being dismissed. In addition, previously the employer had the option of whether to consult with the trade union or simply with elected workers’ representatives. Under the amended law, where there is a recognised trade union, the employer must consult with the union. He can only consult with employee representatives if there is no recognised trade union.

The Employment Tribunal may make monetary awards where an employer has failed to comply with these obligations.
Please note that redundancies, in particular mass redundancies, may create many difficulties and we suggest that legal advice be obtained before any such action is taken.

♦ Where the employee was unfairly selected for redundancy. Selection does not necessarily have to be made on the basis of service i.e. “last in first out” in order to be fair. The employer should decide objective criteria by which individuals will be selected (e.g. skill, experience, qualifications etc.) and should apply these criteria objectively. Where there is an agreed procedure or a customary arrangement for selecting redundancies (e.g. between the employer and a recognised trade union) this should be followed. If the procedure is incorporated into individual contracts, employees may be able to restrain redundancy dismissals in breach of procedure.

♦ Where the employer handled the dismissal unreasonably;

♦ Where the employer failed to consider and where available, failed to offer (with retraining if necessary) alternative employment within the organisation (this includes taking steps to ascertain whether there are any job vacancies in other group or associated companies).

### 2.4.4 Some Other Substantial Reason

This is a miscellaneous category to cover other situations where it is reasonable for the employer to dismiss the employee. Examples of dismissals which have been held to be fair under this section include:

- where a reorganisation has meant a rearrangement of job duties;
- where an employee has refused to accept reasonable changes in his terms and conditions of employment; and
- at the end of a short, temporary engagement, where the employee was originally engaged on a temporary basis and was informed at the outset that this was the basis of the engagement.

### 2.5 Remedies for Unfair Dismissal

The Employment Tribunal has power to grant the following remedies to an employee if it finds he/she was unfairly dismissed:

- reinstatement;
- re-engagement;
- compensation.

(1) The first two remedies are rarely used by Tribunals.

An order for reinstatement is an order that the employer shall treat the employee in all respects as if he/she had not been dismissed. Arrears of pay must therefore be paid.

An order for re-engagement is an order that the employee be re-employed by the employer in a job comparable with the one from which he/she was dismissed.
Before making such orders, the Tribunal must consider whether it is practicable for the employer to comply, whether it is just, and whether the relationship of trust and confidence between the parties has broken down.

Failure to comply with a reinstatement or re-engagement order may result in an additional award of compensation for the ex-employee.

(2) Compensation is the most common remedy. This award is in two parts:

- a basic award (calculated in exactly the same manner as a statutory redundancy payment); and
- a compensatory award of up to £50,000. This figure has increased from the previous limit of £12,000 where the dismissal occurred on or after 25th October 1999.

The compensatory award shall be such amount as the Tribunal considers just and equitable, taking into account the loss sustained by the employee in consequence of the dismissal insofar as the loss is attributable to action taken by the employer.

Both the compensatory and basic awards may be reduced by the Tribunal if it finds the dismissal was caused or contributed to by any action of the employee. The employee, as is the case of wrongful dismissal, must also try to mitigate his loss by seeking alternative income.

2.6 Settling Unfair and Wrongful Dismissal Claims

2.6.1 Unfair Dismissal

There are two ways of effectively settling an unfair dismissal claim.

- **ACAS - Form COT3**

  An agreement reached under the auspices of an ACAS Conciliation Officer. The officer must ensure that both parties to the agreement understand its terms and effect. An ACAS officer will only become involved in the process if proceedings have actually been issued in the Employment Tribunal.

- **Compromise Agreements**

  An agreement settling proceedings (both actual and proposed) will be enforceable provided that:
  
  - it is in writing;
  - it relates to a particular complaint or proceedings;
  - the employee must have received independent legal advice from a qualified lawyer or other designated adviser as to the terms and effect of the proposed agreement and particularly its effect on the individual’s right to pursue a claim(s) before an Employment Tribunal;
  - there must be in force, when the adviser gives the advice, an insurance policy covering the risk of a claim by the complainant in respect of loss arising in consequence of that advice;
2.6.2 Wrongful Dismissal

A wrongful dismissal claim is based on a breach of contract and not on rights conferred by statute. Therefore, although an employee can waive the right to bring such a claim in a formal agreement such as a compromise agreement, any other oral or written agreement would be equally effective, as long as the employer gives the employee consideration for the promise not to sue for breach of contract. Oral agreements are not recommended. As always, legal advice in the wording of such an important document is recommended.

2.7 Automatically Unfair Dismissals

See above.

If an employer intends to dismiss an employee for any of these reasons, legal advice should be sought before any action is taken.

3. TRADE UNIONS AND THE EMPLOYMENT OF TRADE UNION MEMBERS

3.1 Introduction and Historical Perspective

U.K. employment law is largely based on the concept of a contract between an employer and each of its employees. In consequence, under U.K. law, industrial action by an employee is treated as a breach of the contract of employment for which he can be dismissed without compensation, except in exceptional circumstances. In line with general principles of common law, any attempt by a third party to encourage or induce a breach of that contract, for example by a union calling a strike, is on the face of it an unlawful act. However, in the early part of this century, Parliament decided that, as a matter of public policy, Trade Unions should be given immunity from being sued for damages in such circumstances, provided the strike was connected with a trade dispute.

From the 1960s onwards, successive governments have used the law to change the balance of power in industrial relations and collective bargaining between employers, Trade Unions and employees. This process accelerated particularly during the 1980s and changes were made by Acts of Parliament.

New changes to this area of the law have been implemented by the Employment Relations Act 1999. The Prime Minster has explained that his Government wishes to replace the notion of conflict between employers and employees with the promotion of partnership. Even after the proposed changes, however, Britain still has the most lightly regulated labour market of any leading economy in the world.

3.2 The General Framework

The law on Trade Unions, industrial relations and collective bargaining is currently fragmented and consists mainly of prescribing ways in which Trade Unions should act to preserve their basic immunity from civil action for calling strikes, rather than giving to them positive rights. In addition, the nature of some disputes makes the general criminal law or the law of public order also relevant, for example, concerning demonstrations.
3.3 **Trade Unions**

A Trade Union is not a body corporate but nonetheless, it is capable of making contracts, suing and being sued in its own name, and capable of being prosecuted for an offence committed in its name. An official (the Certification Officer) is appointed by the Secretary of State for Trade and Industry and maintains a list of Trade Union organisations. A Trade Union is required to keep proper accounting records and to make an annual audited return to the Certification Officer.

Detailed statutory provisions regulate the ways Trade Unions should conduct their affairs to ensure they are democratic and accountable. In particular, a Trade Union is required to abide by the rules of natural justice. However, it is for each Trade Union to determine who is eligible for membership and whether a person shall continue to be a member. There is a statutory right contained in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") not to be unfairly disciplined or unreasonably excluded or expelled from union membership. This right is in addition to and not in substitution for any other rights and remedies.

The rules of a Trade Union constitute a contract between the union and its members and if they are broken, an individual member may seek redress from the courts. There are rules concerning the election of officials of the Trade Union and the conduct of secret ballots for that purpose. Specific help is available to Trade Union members to pursue actions through the courts if their Trade Union does not comply with any of these provisions.

3.4 **Recognition of Trade Unions: the new law**

3.4.1 **Recognition**

The statutory machinery which obliged an employer to ‘recognise’ a Trade Union or to negotiate with it for collective bargaining purposes was abolished in the 1980s, such that recognition became wholly voluntary on the part of the employer. The Employment Relations Act 1999 reintroduces this idea. It contains provisions which will, in certain circumstances, allow a Trade Union to be automatically recognised, while in others it may gain recognition as a result of a secret ballot.

The Government has stressed that improving information and consultation is a primary objective of collective arrangements. These are important in all companies but there is a particular need in large multinational companies where management decisions may be taken far away from the employees affected. The Government has argued that in recent years unions have changed to reflect the change in business and that many unions now focus much more strongly on working with management to develop a flexible, skilled and motivated workforce. Trade unions can be a source for fair treatment and a means of driving towards innovation and partnership.

However, the Government also recognised that where agreements are reached voluntarily between the employer and a trade union, they are most likely to be successful and suited to the needs of the enterprise. In enacting a new system of recognition, the starting point is voluntary agreement and only where this proves impossible should another means be invoked. If employees believe that their interests are best served through a trade union voice the Government believes that the business will gain by accommodating this wish. According to the Government, neither the business nor employees will gain from protracted, possibly hostile, disagreement which can only
damage future relationships, whether or not a trade union is eventually recognised.

Under the Employment Relations Act, an independent trade union seeking recognition will make a formal request to the employer complying with specified criteria. The employer, together with associated employers, is only covered if it employs at least 21 workers. The Act lays down a strict timetable in which the employer and the union should try to reach a voluntary agreement.

3.4.2 Automatic Recognition

The Employment Relations Act provides that if the union can show a majority of the workers constituting the bargaining unit (that is, the group of workers concerned or groups of workers taken together) are members of the union, it may apply to the Central Arbitration Committee (“CAC”) who must issue a declaration of recognition in respect of that unit. However:

- if the CAC are satisfied that a ballot should be held in the interests of good industrial relations; or
- if a significant number of members within the unit inform the CAC that they do not want the union to negotiate on their behalf or
- if membership evidence is produced which leads the CAC to conclude that there are doubts whether a significant number of union members want the union to bargain on their behalf,

then instead of issuing a declaration, the CAC must arrange a secret ballot.

3.4.3 Recognition Ballot

Where the union does not show the majority of workers in the bargaining unit are union members then the CAC must arrange for a secret ballot. An employer has a duty to co-operate generally in connection with the ballot and the Secretary of State has the power to issue Codes of Practice. If the employer fails to fulfil its duties the CAC may take action including a declaration that the union is recognised without a ballot being held.

If the union is supported in the ballot by a majority of the workers voting and at least 40% of the workers constituting the bargaining unit, the CAC will declare that the trade union is recognised.

3.4.4 Collective Bargaining

The term “collective bargaining” refers to the process by which representatives of the Trade Union(s) negotiate with an employer or an employer’s association about a wide range of matters including the terms and conditions of employment of employees and the procedure by which disputes should be settled.

Note that the new statutory regime only applies to collective bargaining in relation to pay, hours and holidays unless the parties agree otherwise. So, for example, negotiations about such matters as grievance procedures are outside the scope of the Act.
Once a trade union has been recognised the parties will negotiate to agree a method by which they will conduct collective bargaining in future. If they cannot agree, the CAC will impose a method.

3.4.5 De-recognition

Either the employer or the employees can request an end to the recognition of the union. This is available on the expiry of three years of the voluntary agreement/declaration of recognition and may involve the holding of another secret ballot. If fewer than half the workforce constituting the bargaining unit are members of the union at the end of the three year period then de-recognition may be automatic.

3.4.6 Worker's Right Against Detriment

The Employment Relations Act provides that a worker has the right not to be dismissed or subjected to any detriment by any act or any deliberate failure to act by his employer, if the act or failure takes place on the grounds that:

- the worker acted with a view to obtaining or preventing recognition of the union;
- the worker indicated that he supported or did not support the recognition of a union by the employer;
- the worker acted with a view to securing or preventing the ending of bargaining arrangements;
- the worker indicated that he supported or did not support the ending of bargaining arrangements;
- the worker influenced or sought to influence the way in which votes were to be cast by other workers in the ballot arrangements;
- the worker influenced or sought to influence other workers to vote or abstain from voting at such a ballot;
- the worker voted in such a ballot;
- the worker proposed to do, failed to do, or proposed to decline to do any of the above.

3.5 Disclosure of Information

If a Trade Union is recognised by the employer for the purposes of collective bargaining, the employer must disclose to the union’s representatives information relating to the employer’s undertaking without which the representatives would, to a material extent, be hindered in carrying on such collective bargaining and which it would be in accordance with good industrial relations practice to disclose. In determining the latter point, regard must be had to the ACAS Code of Practice, “Disclosure of Information to Trade Unions for Collective Bargaining Purposes”. Certain information need not be disclosed, for example, information received in confidence or information which, if disclosed, would cause substantial injury to the employer’s business (for reasons other than its effect on the collective bargaining).

3.6 Time Off

If a Trade Union is recognised, an employer must allow reasonable time off, with payment, for officials of the union to carry out their duties. At present, ‘duties’ include a wide range of matters concerned with the industrial relations between the employer and the employees but does not include industrial action. Trade Union officials are also entitled to time off to undergo training in aspects of industrial relations relevant
to carrying out those duties. Health and Safety representatives are also entitled to
time off to perform their duties. Additionally, members of a recognised Trade Union
are entitled to time off to participate in union activities. This will be without payment.
These rights are set out in TULRCA.

TULRCA provides that officials of a recognised Trade Union will only be entitled to
time off where the duties:

- are concerned not simply with industrial relations but with negotiations with the
  official’s own employer;
- relate to the terms and conditions of employment; and
- relate to a matter for which the union is recognised by the employer.

If time off is refused, a complaint may be made to an Employment Tribunal within
three months of the employer’s failure to allow the time off or if that is not reasonably
practicable, within a further reasonable period. If the Tribunal upholds the complaint,
a declaration to that effect may be made and compensation may also be awarded to
the employee.

Trade union members have the right not to suffer any detriment caused by any act or
omission of his employer on the grounds of trade union membership or activities
under TULRCA.

3.7 Industrial Action, Strikes, Picketing, Secondary Action and Injunctions

Under English common law, an employee who takes part in industrial action or goes
on strike is in breach of his contract and can be dismissed (save in exceptional
cases) without compensation. Furthermore, if a Trade Union caused or encouraged
that strike or other industrial action, it induced a breach of contract and is itself
committing an unlawful act for which it may be sued for damages. However,
provided the Trade Union acted “in contemplation or furtherance of a trade dispute”,
the Trade Union is protected in law against being sued for damages by affected
employers. This term ‘trade dispute’ has come to mean matters directly affecting the
workplace or salary and other terms and conditions of employment, the termination of
the employment of particular employees, matters of discipline, membership of Trade
Unions, facilities and negotiations.

It is worth noting that a trade dispute which concerns political matters or which does
not directly affect the particular employees, will not fall within this definition.

3.7.1 Loss of Immunity

Immunity may be lost by the Trade Union in the following circumstances:

(a) Ballots

To retain immunity from legal action by employers or individual citizens,
trade unions must ensure that the strict ballot formalities set down in
legislation are complied with and must take reasonable steps to ensure
that employers receive written notice (containing certain specified
information) of any industrial action before the industrial action is set to
begin. The Employment Relations Act incorporates minor amendments to
the requirements for balloting before trade union action.

The legislation currently sets down a period after which the ballot ceases
to be affective in terms of the union retaining immunity. The Employment
Relations Act amends this period of effectiveness for the ballot. It is to be either 4 weeks or such longer period, not exceeding 8 weeks, as is agreed between union and employer. You should seek advice on the status of the Employment Relations Act before relying on its provisions.

The Government's wish with these reforms is to simplify the law as it believes existing provisions to be unnecessarily complex and rigid, making it difficult for unions and their members to understand their rights and responsibilities.

(b) **Secondary Action**

In the 1980s the Conservative Government sought to limit the secondary action that can lawfully be taken by a Trade Union. As a result a Trade Union now only has statutory immunity for action taken against an employer with whom there is a dispute, and for acts which directly interfere with the supply of goods or services to and from that employer. Any other ‘secondary’ action will not be given immunity by statute, and any persons affected can bring whatever common law action would be appropriate in the circumstances. There are no changes to this in the Employment Relations Act.

(c) **Picketing**

The law on peaceful picketing was also substantially amended in the 1980s. Peaceful picketing is lawful for a person in contemplation or furtherance of a trade dispute if it is:

- at or near his own place of work; or
- if he is an official of a Trade Union, at or near the place of work of a member of that Union who he is accompanying and whom he represents,

for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working. These provisions are unchanged.

Unlawful picketing may also attract civil, as well as criminal liabilities.

(d) **Injunctions**

Since any loss of immunity for civil action under the law will make a Trade Union’s actions unlawful, it is possible for the employer, either in advance of or during such action, to apply to the court for an order restraining the union from acting unlawfully. Such an order, called an injunction, is available at the discretion of the court and only where monetary damages for final loss would be an inadequate remedy, for example if considerable and unquantifiable loss of business revenue would result.

3.7.2 **Dismissal Of Employees Taking Part In Industrial Action**

Under the Trade Union and Labour Relations (Consolidation) Act 1992, an employer can dismiss employees taking part in a strike or other industrial action. If he does so, an Employment Tribunal will have no jurisdiction to determine whether that dismissal was ‘fair’ or ‘unfair’ provided that:
• the employer dismissed all relevant employees who were taking part in the strike or other industrial action; and
• the employer did not selectively re-engage any of those dismissed within three months of the complainant’s dismissal.

This means that an employer who does not ‘pick and choose’ amongst its employees will, under the law as it exists prior to the implementation of the Employment Relations Act 1999, be safe from statutory liability. If he/she does pick and choose however, any of the employees dismissed may bring claims to an Employment Tribunal where, to avoid a finding of unfair dismissal, the employer must show that he acted reasonably in not taking back those strikers who were not offered re-engagement. The question will be determined by the circumstances, having regard to equity and the substantial merits of the case.

An employer will lose this protection if it seeks to dismiss before the strike has begun. The Employment Relations Act provides further protection for the employee taking part in official strike action. The new provisions will mean that if the employee is dismissed in such circumstances he is regarded as automatically unfairly dismissed if the reason is that he took place in protected industrial action and either:

• the dismissal took place within eight weeks of first taking part in the action;
• it took place after the end of that period and the employee had ceased to take part in the action before the end of that period; or
• it took place after the end of that period, the employee had not ceased to take part in the action before the end of that period, and the employer had not followed an appropriate procedure for resolving a dispute.

There is no qualifying period or upper age limit for unfair dismissal claims on this ground. The appropriate procedure for dispute resolution could be a procedure laid down by a collective agreement. TULRCA will be amended accordingly. Again, you should seek specific advice on the status of the Employment Relations Act before relying on the proposals outlined above.

In relation to unofficial industrial action, i.e. industrial action that has not been approved by the Trade Union or a representative of the Trade Union, the employer can dismiss with impunity those employees taking part. This means that employees dismissed while taking part in unofficial action are excluded from bringing claims to Employment Tribunals even when ‘picking and choosing’ has taken place. This is not amended by the Employment Relations Act.

3.8 Closed Shop Dismissals

Closed Shops (i.e. agreements that only members of one or more particular Trade Union shall be employed) were not regarded favourably by the Conservative Government and the new Labour Government also support this approach. However, before 1988, it was ‘fair’ to dismiss an employee who was not a member of the Trade Union when there was a valid closed shop in existence and if it had been approved by an appropriate ballot. However, these provisions were repealed in 1988 with the result that a dismissal of a non-unionist in a closed shop situation is now automatically ‘unfair’ and a dismissed employee may be awarded substantial cash compensation. These provisions are contained in TULRCA.
The current Government believes the abolition of the closed shop was one of the many employment reforms of the 1980s that were justified and will remain. While every employee should be free to decide to join a trade union, equally every employee should be free not to join. Trade unions should be voluntary organisations and the Labour Government have assured there will be no return to the closed shop.

3.9 Shop Floor Pressure to Dismiss Employees

The Employment Relations Act contains provisions designed to deal with dismissals brought about by pressure from employees in the form of actual or threatened industrial action. The Act provides that where an employer dismisses an employee for any reason, and that employee brings a complaint to an Employment Tribunal, the Tribunal will not take any account of pressure to dismiss that was exerted on the employer by way of industrial action or threats of industrial action. Any complaint of unfair dismissal must be decided as if no such pressure had been exerted.

Therefore, if the employer’s only reason for dismissal was the pressure of industrial action, the Tribunal will almost certainly find the dismissal to be unfair, because the employer will be unable to establish a ‘potentially fair’ reason for dismissal.

3.10 Deduction of Union Subscriptions

An employee may authorise the employer to make deductions from pay of union subscriptions at the appropriate rate as it may be from time to time. This authorisation is continuous, but the individual employee does retain the right to opt out of deductions at any time.

Employment Department

DISCLAIMER: This booklet does not contain legal advice or provide a thorough and complete analysis of the law, and no liability is accepted in connection with it. Some provisions of the law are not covered. The purpose of this booklet is to provide a basic summary of selected main provisions and their effects and to offer some general practical guidance for the setting up, operation and termination of agency relationships. Specific legal advice should be taken in relation to the facts of any given case.