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LAWYERS

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A BRIEF GUIDE TO EMPLOYMENT LAW.

APRIL 2022

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INTRODUCTION

Dealing with fast changing employment law can be challenging. Employment disputes can involve complex issues and be a major distraction for your organisation. The earlier you seek expert advice, very often, the better the outcome.

We have put this brief guide together to provide employers with some key information relating to employment law which we hope you find useful. If you would like to discuss your employment law requirements at any time please contact us.

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The following is a brief guide to employment law in Scotland, England & Wales. This states the legal position as of April 2022.

KEEPING UP TO DATE

Monthly employment enews

If you don't already subscribe to our monthly employment law e-bulletin but would like to then please email us at employment@morton-fraser.com. As well as providing updates of key employment law developments our monthly e-bulletin also provides details of free employment law webinars that we run throughout the year for our clients and contacts.

Employment law reform timeline

For a regularly updated timeline of recent and future changes to employment law see our Employment law reform timeline.

Employment law fact card

Our employment law fact card is full of useful information for employers including disciplinary and redundancy checklists, Employment Tribunal award limits, family friendly leave entitlements and national minimum wage rates.

You can access this below, or if you would like a free hard copy, please email employment@morton-fraser.com with your name and address.

Employment Law Fact Card 2022/23

Employment law app

Our employment law app can be downloaded free from iTunes by searching MF HR Mobile. Our app includes:

- Key facts and figures including employment tribunal award limits, national minimum wage rates and family friendly entitlements
- Calculators for unfair dismissal awards, maternity pay and statutory redundancy payments
- Disciplinary & redundancy checklists
- Video and podcast links providing useful tutorials and updates on specific topical items
- Our monthly e-news bulletin providing you with all the key employment law developments

For more information see - MF HR Mobile - our employment law app

EMPLOYMENT LAW ADVICE

About us

What means the most to you when you need help with people issues? Speed of response? Clear no-nonsense advice? Support tailored to your needs? All at a cost which is clearly explained so that there are no surprises?

We provide all of these to our clients and more. Morton Fraser is a thriving top 10 Scottish law firm. We deliver clear advice to businesses (from plcs to SMEs), the public sector, charities and individuals. With over 270 people working with us, we provide legal services across the UK.

We have a highly rated employment law team with an excellent reputation. We have more accredited employment law specialists than any other team in Scotland. Our Team is rated by the two leading law firm directories, Chambers and Legal 500, as one of the best.

Our approach

We help our clients solve problems as quickly and cost effectively as possible. We provide clear and pragmatic solutions. You can expect us to be pro-active and accessible providing swift, expert advice, every step of the way, as an employment issue unfolds. We ensure that you are able to focus on your business and minimise lost management time by quickly helping you to deal with any employment issues that arise.

Clarity – our guiding principle

At Morton Fraser we have highlighted clarity as our guiding principle. This directs the way we communicate, the way we advise, the way we conduct relationships with our clients and the way we are totally transparent and upfront about our charges. This applies to all of our services from the straightforward to the more complex.

Such clarity makes us refreshingly different. It gives our clients confidence. We don't do work you don't need. We guarantee that we will provide clear advice and transparent costs.

How much do our services cost?

We know that clarity is fundamental to great advice. Our promise to you is that you will get clear advice, including clarity on cost, at every stage of our relationship.

We have open and transparent feeing discussions with our clients at all times. We offer fixed fee packages for a variety of different areas of work from drafting or reviewing contracts of employment or policy documentation to defending Employment Tribunal claims. We also offer fixed fee retainer packages including our insurance backed Employment Protection Package. If it is not possible to provide a fixed fee then we will provide a clear indication of the likely fee based on an agreed scope of work.

Our costs will always be clear. You have our word. **WELCOME TO CLARITY.**

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> **Chambers & Partners**

PRE EMPLOYMENT CHECKS

An employer's first obligation is to check that all potential employees have the right to work ("RTW") in the UK.

Pre-pandemic the normal process of carrying out a check involved checking physical documents. However the Home Office issued amended guidance on the checking procedure in light of the difficulties with compliance with so many people working remotely during the pandemic. This allows employers to:

- Accept a scanned copy of the relevant document;
- Verify the person's identify by video call; and
- Record that a temporary check was carried out by video call and when this took place.

Use of the amended procedure will continue until 30 September 2022 except for those with biometric cards who must now be checked online using the Home Office online right to work service. Thereafter the long term solution for remote checks is the use of Identification Documentation Validation Technology ("IDVT"). IDVT will allow British and Irish nationals (and others who are not eligible for the current online right to work service which is only available to non EU national employees with biometric residence cards) to upload images of their RTW documents that can then be used to verify identity remotely. However, there will be no requirement to use IDVT for British and Irish nationals, and it will still be possible to carry out a manual check, but this will require the employer to see the original documents and not a scanned copy of them.

If the correct RTW procedure is not followed, and the employee is found not to have the right to work, the company can be fined and the directors could face criminal proceedings."

WRITTEN STATEMENT OF TERMS AND CONDITIONS OF EMPLOYMENT

An employer is under a legal obligation to provide both employees and workers who began work on or after 6 April 2020 with written particulars of terms and conditions of employment on or before their first day of work. Employees who were employed prior to that date must be issued with terms and conditions within two months of their start date.

If no terms and conditions are issued it is possible for an employee (or a worker who began work on or after 6 April 2020) to make an application to an Employment Tribunal who can then determine what particulars ought to have been included. Practically speaking, the main disadvantage if there is no written contract of employment is that issues of dispute can arise if the terms of employment are not sufficiently clear. However, it is also possible for compensation to be awarded to an employee who has not been provided with terms and conditions of employment in certain circumstances.

NOTICE OF TERMINATION

When terminating the contract of employment, employers are required to give an employee the greater of (1) the notice period set out in the contract of employment or (2) statutory minimum notice.

The statutory minimum periods of notice are:

Period of Employment	**Notice Period**
Less than one month	0
One month to 2 years	1 week
2 years	1 week for each year of continuous service (up to a maximum of 12 weeks)

Employees are required to give the notice period set out in their contract of employment and, if this is silent or where no written contract exist, no less than one week (under statute).

As set out below, all employees with over two years' service have the right to raise a claim for unfair dismissal irrespective of whether they have been given the correct period of notice or not.

UNFAIR DISMISSAL

All employees with over two years' service have the right to raise a claim for unfair dismissal.

In calculating whether an employee has two years' service, a period of one week is added on (the equivalent of the statutory minimum notice period - see page 9 above). This means that an employee with 103 weeks' service or more can raise an unfair dismissal claim.

Please note:

- The maximum unfair dismissal award is £111,008 (a basic award of £17,130 and a compensatory award of £93,878).
- The cap on the compensatory award is the lower of £93,878 or 52 weeks' gross pay. A week's gross pay for the purposes of the statutory cap includes employer pension contributions but excludes benefits-in-kind and discretionary bonuses. Dismissals for whistle blowing or related to certain health and safety reasons remain uncapped, as do dismissals relating to unlawful discrimination.
- The median unfair dismissal award in 2019/20 (the most recently published statistics) was £6,646.
- The amount a Tribunal will award for unfair dismissal will depend almost entirely on the employee's salary and benefits at the date they were dismissed and how quickly an employee is able to obtain alternative comparable employment, as a Tribunal will compensate the individual for their loss rather than making any punitive award against the employer.
- In certain specific circumstances, there is no limit on the amount that a Tribunal can award. These circumstances include dismissal for health and safety reasons or dismissal following the employee making a protected disclosure (whistleblowing). In addition, there is no limit on the amount that can be awarded where the dismissal is related to unlawful discrimination (i.e. discrimination on the grounds of sex, race, disability, age, marriage and civil partnership, sexual orientation, gender reassignment, pregnancy and maternity and religion or belief).
- If an employee wishes to raise a claim for unfair dismissal then they must first attempt ACAS early conciliation within three months of their employment terminating. If early conciliation is unsuccessful or either party does not wish to progress it then an Early Conciliation certificate will be issued. The Claimant can then proceed to make a claim to the tribunal. The time limit for making a claim will be extended to take account of the early conciliation process. The requirement for early conciliation applies for the majority of claims that can be made to a Tribunal.
- It is also possible for an employee to raise a claim for constructive unfair dismissal. This occurs where the employer has materially breached the employee's contract of employment in such a way that the employee is entitled to resign and treat themselves as having been dismissed.

In order to terminate employment fairly the dismissal must be for one of the following grounds:

- Conduct

- Capability (including competence to do the job and ill-health)
- Redundancy
- Contravention of a statutory enactment
- Some other substantial reason

In order to dismiss an employee fairly a fair procedure is essential. Employers are advised to seek guidance prior to proceeding in order to minimise the risk of a claim being made or, if a claim is made, to be in a stronger position to defend it.

- With regard to capability issues, generally speaking, a series of warnings should be issued (with a process at each stage which is compliant with the ACAS code – see below - being followed) over a period of time advising the employee of the particular shortfalls in their performance and any improvements required.
- Similarly, with regard to conduct which does not amount to gross misconduct, again, a series of warnings should be issued. The process at each stage should be compliant with the ACAS code.
- If the conduct is sufficiently serious then an employee could be dismissed for gross misconduct without any previous informal or formal warnings. However, in such circumstances, it is still essential that a proper procedure (compliant with the ACAS Code) is followed which will often involve suspending the employee at the outset whilst a full investigation is carried out. Once the employee has been suspended they would then be invited to a disciplinary hearing but employers are advised to seek advice should such a situation ever arise.

EMPLOYEES WITH LESS THAN TWO YEARS' SERVICE

Employees usually require two years' service before they can raise an unfair dismissal claim. There are a number of exceptions to this qualifying service requirement. These exceptions include (but are not limited to) dismissals for whistleblowing, dismissals related to certain health and safety reasons or dismissals relating to unlawful discrimination. However, in most cases, provided there is no discriminatory reason underpinning the decision, it will very often be possible to dismiss an employee with less than two years' service without any significant procedure being followed. Having said that, employers should still, as far as possible, take into account the procedural recommendations in the ACAS Code of Disciplinary and Grievance Procedures (see below) in most cases.

For more information on this point see our article on dismissing employees with less than two years' service.

As a risk management tool, employers should have a diary system in place to review the employment relationship with any new employees at the end of their probationary period and perhaps also after six months, twelve months, eighteen months and twenty months. Probationary periods are a useful way to monitor a new employee's performance and, in most cases, an employer can terminate the employment relationship, relatively easily, during or at the end of the probationary period. Another option is to extend the probationary period for a further period of time, such as three months, with a view to flagging up to the employee that all is not well. If the probationary period is to be extended there should be a contractual right to do this and the period should be extended prior to the original period expiring.

ACAS CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE

The ACAS Code of Practice on Disciplinary and Grievance Procedures provides a guide for "expected" practice which employers should follow. This code can be referred to in tribunal proceedings and the tribunal has the power to award an increase of up to 25% on any compensatory award where the employer has unreasonably failed to follow the ACAS Code. The Code can be found and downloaded from the ACAS website: www.acas.org.uk

DISCRIMINATION

As indicated above, it is unlawful to discriminate against an employee on the basis of age, sex, race, disability, marriage and civil partnership, sexual orientation, gender reassignment, pregnancy and maternity, and religion or belief. In addition, under the Equality Act 2010 it is unlawful to offer different and less favourable pay and conditions where women and men are doing equal work (i.e. like work or work rated as equivalent or work of equal value).

It is also unlawful to discriminate against someone on the basis that they work part-time or on the basis that they have a fixed-term contract.

Employers should have an Equal Opportunities Policy in place. This can be of assistance in the event that an employer requires to defend a discrimination-based claim. Managers and employees should also be provided with relevant training in respect of the policy. Again, this can be of assistance in the event that a discrimination claim is raised.

WORKING TIME

The Working Time Regulations 1998 apply to all "workers" which includes employees. The main features of the Regulations are as follows:

- The employer must take all reasonable steps to ensure that the worker does not exceed the limit of an average of 48 hours per week over a reference period of normally 17 weeks.
- Workers can opt out of the working time limit of 48 hours by signing an agreement.
- Employers must keep a record of workers who have agreed to work longer hours.
- Workers cannot be forced to sign an opt-out agreement and can cancel at any time by giving the notice as agreed between the employer and worker.
- Employers are required to keep certain records regarding the working time of their employees.
- Full time workers are entitled to 28 days' paid annual leave per year (pro rata for part-time workers).
- The 28 day period includes any public and bank holidays, i.e. the entitlement under the Working Time Regulations is 28 days not 28 days plus statutory holidays.
- Subject to specific rules for workers under 18, workers are entitled to a rest break of 20 minutes if they work more than six hours.
- There is a right to have 24 hours off per week and at least 11 hours of uninterrupted rest each day.
- There are certain specific rules regarding night-time workers including the right to a free health assessment.
- There are also more stringent rules in relation to the 48 hour working week and rest periods for night workers.

NATIONAL MINIMUM WAGE

All workers are covered by the national minimum wage legislation. The minimum hourly rates as of 1 April 2022 are as follows:

- National living wage rate for workers aged 23 and over: £9.50
- Standard adult rate for workers aged 21 to 22: £9.18
- Development rate for workers aged 18-20 inclusive: £6.83
- Young workers rate for 16 and 17 year olds: £4.81
- Apprenticeship rate for apprentices under 19 years of age or those aged 19 and over but in the first year of their apprenticeship: £4.81
- These rates will change again in April 2023.

SICK PAY

Employers are only required to pay statutory sick pay (SSP) if the employee is absent because of sickness for a continuous period of four days or more. If the employee is absent for less than four consecutive days then they are not entitled to SSP. Employers must keep records of payments and absences in excess of four consecutive days. Employees may not claim SSP for more than 28 weeks in each period of sickness absence.

Most employees qualify for SSP. If the employee is not entitled to SSP then they may be able to claim incapacity benefit instead. However, this claim is made via the Government and not via the company, albeit the company may be asked to provide certain information in respect of the employee's claim.

It is possible for an employer to pay more than just SSP in the form of occupational or contractual sick pay. The specific sick pay terms would be set out in each employee's contract of employment.

PENSIONS

The law relating to pensions changed with the implementation of “auto-enrolment”. Basically, employers are obliged to automatically enrol their "eligible jobholders" into a pension scheme.

FAMILY FRIENDLY LEAVE

There are certain family friendly rights which employees enjoy. Very broadly, these are as follows:

1. **Maternity leave**

Employees are entitled to six months' ordinary maternity leave (OML) and six months' additional maternity leave (AML).

OML is a period of 26 weeks' leave available to all employees, regardless of length of service, who give birth and comply with the notification conditions. AML follows immediately after the end of OML and lasts for a further 26 weeks, giving a total entitlement of 52 weeks' statutory maternity leave.

An employee will be entitled to statutory maternity pay (SMP) where she has:

- 26 weeks' continuous employment with the employer up to and including the 15th week before the expected week of childbirth (EWC); and
- average earnings of at least the lower earnings limit for National Insurance during the eight-week period ending with the 15th week before EWC.

If you satisfy the criteria above you will receive payment in respect of the initial 39 week period of maternity leave. The first six weeks are paid at 90% of your usual rate of pay (before tax).

Thereafter, for the remaining 33 weeks of the paid portion of maternity leave, only the flat rate of SMP is paid. The current SMP flat rate is £156.66 a week.

2. **Shared parental leave**

Shared parental leave (SPL) is completely separate from and does not affect the parental leave which is discussed at point 5 below.

A mother or primary adopter is entitled to 52 weeks of maternity/adoption leave. SPL allows the mother or primary adopter to give notice to end their maternity leave early and share what would have been the remainder of the maternity/adoption leave with the child's father or the mother's husband or civil partner or partner; or, in the case of adoption, the secondary adopter (the "other parent"). The mother's partner for these purposes is a person (whether of a different sex or the same sex) who lives with the mother and with the child in an enduring family relationship but is not the mother's child, parent, grandchild, grandparent, sibling, aunt, uncle, niece or nephew.

For more details see - Shared parental leave.

3. **Adoption leave**

Adoption leave operates in much the same way as maternity leave and in the event that the conditions are met, an employee adopting a child will benefit from Statutory Adoption Pay. This is paid for 39 weeks.

4. **Paternity leave**

An employee who has a child born or expected to be born or placed for adoption and satisfies certain conditions is entitled to two weeks' paternity leave. This can be taken at any time up to eight weeks after the date of birth or placement for adoption. In order to qualify for paternity leave, the employee must be the father of the child or be married to, or be the partner or civil partner of, the mother or adopter of the child. In addition, the employee must have or expect to have responsibility for the upbringing of the child. The employee also requires to give notice to the employer and must have 26 weeks' continuous employment ending with the 15th week before the EWC. Paternity pay is paid at the same flat rate as SMP.

5. **Parental leave**

Any employee who has completed one year's continuous employment and who "has, or expects to have responsibility, for a child" has a legally enforceable right to take unpaid parental leave while the child is under the age of eighteen, subject to an overall maximum of 18 weeks leave in respect of each child (4 weeks per year in terms of the default scheme).

6. **Parental bereavement leave and pay**

Any employee who has a child die before they turn 18, or if they have a stillbirth after 24 weeks of pregnancy is eligible for 2 weeks parental bereavement leave. The leave may be taken as 2 weeks together, 2 separate weeks or only 1 week of leave. The leave can start on or after the date of death or stillbirth, but must finish within 56 weeks of the date of death or stillbirth.

In order to qualify for statutory parental bereavement pay, an employee must have been continuously employed for at least 26 weeks up to the end of week immediately before the week of death or stillbirth. The employee must also continue to be employed up to the day the child dies or is stillborn, earn on average £123 a week before tax (gross) over an 8 week period and give the employer the correct notice and information for statutory parental bereavement leave.

7. **Other rights**

All employees with 26 weeks of service are entitled to request a flexible working arrangement. Employers require to consider any such request reasonably. ACAS have published a Code of Practice for Handling Requests to Work Flexibly in a Reasonable Manner.

In addition, employees have the right to time off (unpaid) to deal with certain domestic emergencies.

DATA PROTECTION - employment aspects

Employers require to comply with the UK General Data Protection Regulation (UKGDPR) and also the Data Protection Act 2018 including when processing the personal data of job applicants, workers, employees, consultants, volunteers and others.

The UKGDPR sets out seven key principles which lie at the heart of the data protection regime and must be complied with in relation to:

- Lawfulness, fairness and transparency
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Integrity and confidentiality (security)
- Accountability

Employers must identify a lawful ground for collecting and using personal data and be transparent with individuals from the outset as to how their information might be used (often by way of a "Privacy Notice"). In addition, employers should have a clear internal policy for the use and processing of personal data (often by way of a "Privacy Policy").

Additional restrictions apply to the processing of (a) "special category" data relating to an individual's race, ethnic origin, politics, religion, trade union membership, genetics, biometrics (where used for ID purposes), health, sex life or sexual orientation and (b) criminal offence information.

Individuals also have extensive rights under UKGDPR including:

- The right to be informed
- The right of access
- The right to rectification
- The right to erasure
- The right to restrict processing
- The right to data portability
- The right to object
- Rights in relation to automated decision making and profiling.

It is important for employers to comply with UKGDPR not least given the possibility of substantial fines which can be imposed by the ICO (up to a maximum of €20 million, or 4% of total worldwide annual turnover, whichever is higher).

HEALTH AND SAFETY

Under the Health and Safety at Work etc. Act 1974 certain obligations are placed on employers with regard to health and safety such as the general duty on employers 'so far as is reasonably practicable' to protect the health, safety and welfare at work of all employees. In addition, employers must provide safe plant and systems of work, safe methods for the use, handling, storage and transport of articles and substances, necessary information, instruction, training and supervision, a safe and well-maintained workplace, including safe access and egress and a safe working environment with adequate welfare facilities.

In addition to its own employees, an employer owes statutory duties to:

- other people's employees working on the employer's premises; and
- members of the public who are affected by the activities of the employer.

Section 7 of the Health and Safety at Work etc Act 1974 also places a duty on employees to take reasonable care of their own health and safety, and that of anyone who could be adversely affected by their 'acts or omissions at work' and to co-operate with their employer in taking steps to meet legal requirements. Therefore where reasonable care has not been taken by the employee and the employer has done everything in his power 'so far as reasonably practicable' to comply with the various obligations placed on him, the employer may not be liable for the breach.

Under the Management of Health and Safety at Work Regulations 1999 the employer should appoint one or more persons he believes are competent to assist him in carrying out his health and safety obligations. It is for the employer to decide on the person suitable for the post and therefore whether they are competent. Factors to be considered in judging competency are whether they have sufficient training and experience or knowledge and other qualities to enable them properly to assist in undertaking the necessary measures. The employer will still be ultimately responsible for health and safety – the fact that they have appointed people to assist will not absolve them from responsibility.

There are more detailed regulations setting out specific health and safety requirements for employers relating to:

- assessing risks to health and safety at work;
- devising a written health and safety policy where there are five or more employees (where there are fewer than five employees appropriate measures still require to be taken but there is no need to commit this to writing);
- providing employees with adequate first aid facilities;
- notifying employees of general matters under health and safety law.

Any breach of these obligations will result in the employer being held liable. Liability can be both civil and criminal. Responsible managers and officers of the company may be personally liable in addition to the company. Employers are obliged to maintain insurance against liability for bodily injury or disease sustained by employees arising out of or sustained in the course of their employment in the UK. The insurance must be taken out under one or more approved policies with authorised insurers.

Over and above the legislation already referred to there are a vast number of more detailed regulations that target specific work related hazards including safety of the workplace and work equipment, fire hazards and lifting or other strenuous activities to name but a few.

The Health and Safety Executive enforce compliance with the regulations but they also produce a lot of helpful information for employers that can be accessed on their website www.hse.gov.uk. For employers working in low risk environments the HSE have an area of their website dedicated to making health and safety simple. That information can be accessed here.

PAYROLL AND TAXATION

It is necessary to register with HM Revenue & Customs (HMRC) for employee income tax and national insurance purposes. Before an employer registers with HMRC it is necessary to gather certain preliminary information which the employer will then need during the registration process (which in most cases can be done over the telephone or by email). The pieces of information required relate to general facts about the company (e.g. business name, address, nature of business), details about how many employees will be involved and information on where the payroll will be run from and the names, addresses and phone numbers of those looking after the payroll. With these items, employers can register with the HMRC who will then send all the information required to set up the payroll.

More details can be found on HMRC's website: www.hmrc.gov.uk

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THANK YOU.

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