

# Mark Batchelor's Beginner's Guide to Employment and Related Matters

Employing staff is much more than just ensuring that the correct Tax and National Insurance is deducted from their pay.

In recent years there has been much new legislation affecting employers and getting it wrong can be a very costly experience.

This article gives you a basic outline of some of those issues.

For more detailed advice you may need to contact a solicitor who specialises in employment matters.



This guide covers the following topics:

1. The National Minimum Wage
2. Statutory Sick Pay and Statutory Maternity Pay
3. Dismissal Procedures
4. Recruitment Procedures
5. Redundancy Procedures
6. Managing Absence
7. Legal Working in the UK
8. Age Discrimination

# The National Minimum Wage

The National Minimum Wage (NMW) was introduced on 1 April 1999. There have already been a number of instances of employers being penalised for not complying with the legislation. HMRC are the agency that ensures enforcement of the NMW.

We highlight below the main principles of the minimum wage regulations.

Please contact us for further specific advice.

## What is the National Minimum Wage?

The main rate of the NMW is £5.35 per hour from 1 October 2006. This increases to £5.52 from 1 October 2007.

The development rate for employees between 18 and 21 years old is £4.45 per hour from 1 October 2006. This increases to £4.60 from 1 October 2007.

16 and 17 year olds must be paid a development rate which is £3.30 per hour from 1 October 2006. This increases to £3.40 from 1 October 2007.

The Employment Equality (Age) Regulations provide a specific lawful exemption enabling young workers to continue to be paid below the standard adult NMW and allowing the different rates to be used according to the above age bands. This was in response to employers' concerns about financial pressures if the maximum rate was applied to all employees.

In addition, there is a fair piece rate which means that employers must pay their output workers the minimum wage for every hour they work based on an hourly rate derived from the time it takes a worker working at average speed to produce the work in question. The entitlement of workers paid under this system is uprated by 20%. This means that the number reached after dividing the NMW by the average hourly output rate must be multiplied by 1.2 in order to calculate the fair piece rate.

There are no exemptions from paying the NMW on the grounds of the size of the business.

## Key Questions

*Who does not have to be paid the National Minimum Wage?*

- § The genuinely self-employed.
- § Company directors who do not have contracts of employment.
- § Some apprentices, for example those under 19.
- § Some other trainees on government funded schemes or programmes supported by the European Social Fund.
- § Students doing work experience as part of a higher education course.
- § People living and working within the family, for example au pairs.
- § Friends and neighbours helping out under informal arrangements.
- § Members of the armed forces.
- § Share fishermen.
- § Prisoners.
- § Volunteers and voluntary workers.
- § Religious and other communities.

Please note that HMRC have the power to serve an enforcement notice requiring the payment of at least the NMW, including arrears, to all family members working for a limited company.

*What is taken into account in deciding whether the NMW has been paid?*

The amounts to be compared with the NMW include basic pay, incentives, bonuses and performance related pay and also the value of any accommodation provided with the job.

Overtime, shift premiums and regional allowances are not to be taken into account and benefits other than accommodation are also excluded.

*What records are needed to demonstrate compliance?*

There is no precise requirement but the records must be able to show that the rules have been complied with if either the HMRC or an Employment Tribunal requests this to be demonstrated. Where levels of pay are significantly above the level of the NMW, special records are not likely to be necessary.

It is recommended that the relevant records are kept for at least six years.

Normally there is not likely to be any serious difficulty in demonstrating compliance where employees are paid at hourly, weekly, monthly or annual rates but there may be difficulties where workers are paid on piece-rates and where, for example, they work as home-workers.

Where piece rates are used, employers must give each worker a written notice containing specified information before the start of the relevant pay period. This includes confirmation of the 'mean' hourly output and pay rates for doing their job.

*What rights do workers have?*

Workers are allowed to see their own pay records and can complain to an Employment Tribunal if not able to do so.

They can also complain to HMRC or to a Tribunal if they have not been paid the NMW. They can call the confidential helpline 0845 6000 678.

*What are the penalties for non-compliance?*

Enforcement notices can be issued if underpayments are discovered and there can be a penalty equivalent to twice the hourly amount of the NMW for each worker that has been underpaid multiplied by the number of days that enforcement notices are not complied with.

There could also be a maximum fine of £5,000 for having committed a criminal offence.

Employers who refuse to pay the NMW may also face a fine in excess of £200 for every worker they underpay. Employers have to pay back arrears they owe to workers and those who refused to pay up could be penalised.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required. We also offer a full payroll service - please contact us if you would like more information.

# Statutory Sick Pay, Statutory Maternity Pay and Statutory Paternity Pay

Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP) and Statutory Paternity Pay (SPP) are important regulations to understand as they enforce minimum legal requirements on employers. Each operates in a different way.

This factsheet sets out the main principles of the regulations and what an employer needs to consider.

## Statutory Sick Pay (SSP)

SSP applies to all employers regardless of size and represents the minimum payments which should be paid by law.

It is possible to opt out of the scheme but only if an employer's occupational sick pay scheme is equal to or more than SSP. There would still be a requirement to keep appropriate records etc.

We have outlined the general principles below but first we need to explain some of the special terms used.

## Glossary of Terms

### *Period of incapacity for work (PIW)*

A PIW consists of four or more calendar days of sickness in a row. These do not have to be normal working days.

### *Linking*

Where one PIW starts within eight weeks of the end of a previous PIW the periods can be linked.

### *Qualifying days (QDs)*

These are usually the employee's normal working days unless other days have been agreed.

SSP is paid for each qualifying day once the waiting days have passed.

### *Waiting days (WDs)*

The first three QDs in a PIW are called WDs. SSP is not payable for WDs.

Where PIWs are linked it is only the first three days of the first PIW which are WDs.

## Who Qualifies for SSP?

All employees who at the beginning of a PIW or linked PIWs have had average weekly earnings above the Lower Earnings Limit (£87 in 2007/08).

## How Much SSP is Payable?

The weekly rate of SSP for the 2007/08 tax year is £72.55 but it is computed at a daily rate.

### *The daily rate*

The daily rate may vary for different employees. It is calculated by dividing the weekly rate by the number of qualifying days in a week. For example an employee with a five day working week would normally have a daily rate of £14.51 for 2007/08.

Only QDs qualify for SSP and remember the first three days (WDs) do not qualify.

### *Maximum SSP*

The maximum entitlement is 28 weeks in each period of sickness or linked PIW.

### *Recovery of SSP*

Employers falling within the limits of the percentage threshold scheme can recover some of their SSP.

The general principle is that if in a tax month the SSP due is more than 13% of gross Class 1 national insurance contributions (NIC) the employer is entitled to a refund of the excess.

### *PAYE and records*

SSP is included in gross pay and PAYE operated as normal.

A record of payments for each employee will be needed for the completion of the PAYE end of year forms, where the employer has claimed a recovery of SSP using the percentage threshold scheme.

## Statutory Maternity Pay (SMP)

SMP is paid to female employees or former employees who have had or are about to have a baby.

It is paid to women who have been in the same employment throughout their pregnancy and is compulsory where the employee fulfils certain requirements.

## The Requirements

SMP is payable provided the employee has:

- § started her maternity leave.
- § given 28 days notice of her maternity leave (unless with good reason)
- § provided medical evidence with a form (MATB1)
- § been employed continuously for 26 weeks up to and including her qualifying week
- § had average weekly earnings (AWE) above the Lower Earnings Limit in the relevant period.

It is important to note that mothers have a legal entitlement to take up to 52 weeks off around the time of the birth of their baby whether or not they qualify for SMP. This means that many mothers can choose to take up to one year off in total.

This leave entitlement was only 26 weeks for babies which were due up to 31 March 2007 if the woman was not employed by her current employer before she became pregnant. (This is the continuous employment test described above).

## The Amount Payable

SMP is payable for a maximum of 39 weeks for babies due from 1 April 2007 (and for a maximum of 26 weeks for babies due up to 31 March 2007). The date the baby is due, as shown on the MATB1 certificate, determines the maternity pay period entitlement and not the date the baby is born. The rates of SMP are as follows:

- § first six weeks at 90% AWE (see below)
- § up to a further 33 weeks (20 weeks for babies due up to 31 March 2007) at the lower of:

§ 90% of AWE

§ £112.75 per week for 2007/08

SMP is treated as normal pay.

*Average weekly earnings (AWE)*

AWE need to be calculated for two purposes:

§ to determine if the employee is entitled to SMP (earnings must be above the Lower Earnings Limit)

§ to establish the rate of SMP.

The average is calculated by reference to the employee's relevant period. This is based on an eight week period up to the end of the qualifying week. In some instances subsequent pay rises have to be taken into account when calculating SMP. Earnings for this purpose are the same as for Class 1 NIC and include SSP.

*Recovery of SMP*

92% of SMP paid can be recovered by deduction from the monthly PAYE payments.

Employers may qualify for Small Employers' Relief (SER). SER is 100% of SMP plus 4.5% compensation.

To qualify for SER, the current limits are:

§ total gross Class 1 NIC for the employee's qualifying tax year must be less than £45,000

§ the employee's qualifying tax year is the last complete tax year that ends before the start of her qualifying week.

## Glossary of Terms

*Week baby due*

The week in which the baby is expected to be born. This starts on a Sunday.

*Qualifying week (QW)*

The 15<sup>th</sup> week before the week baby due.

The week baby due and QW are easy to establish from HMRC SMP tables.

*Maternity Pay Period (MPP)*

The period of up to 39 weeks during which SMP can be paid (26 weeks for babies due up to 31 March 2007).

*MATB1*

Maternity certificate provided by a midwife or doctor. This is available up to 20 weeks before the baby is due. SMP cannot be paid without this.

## Statutory Paternity Pay (SPP)

SPP is paid to partners who take time off to care for the baby or support the mother in the first few weeks after the birth.

It is available to:

§ a biological father

§ a partner/husband or civil partner who is not the baby's biological father

§ a mother's female partner in a same sex couple

The partner must have

- § given 28 days notice of their paternity leave (unless with good reason)
- § provided a declaration of family commitment on form SC3
- § been employed continuously for 26 weeks up to and including their qualifying week
- § had average weekly earnings above the Lower Earnings Limit in the relevant period.

## The Amount Payable

SPP is payable for a maximum of 2 weeks, it must be taken as a block either 1 week or a complete fortnight but not 2 single weeks at the following rates:

- § the lower of:
  - § 90% of AWE
  - § £112.75 for 2007/08

SPP is treated as normal pay.

The calculation of average weekly earnings and the recovery of SPP are subject to the same rules as for SMP.

## Adoptive Parents

There are broadly similar statutory obligations that employers must give to parents of adopted children. We will be happy to provide you with further details and assistance on request.

## The Future

The government has plans to further extend maternity pay to 52 weeks and to introduce new Additional Paternity leave and pay by the end of this Parliament.

## How We Can Help

As the schemes are statutory it is important that rules are adhered to and we will be more than happy to provide you with assistance or any additional information required.

# Dismissal Procedures

There have been many changes to employment law and regulations in the last few years. A key area is the freedom or lack of freedom to dismiss an employee.

An employee's employment can be terminated at any time but unless the dismissal is fair the employer may be found guilty of unfair dismissal by an Employment Tribunal.

We set out below the main principles involved concerning the dismissal of employees including some common mistakes that employers make. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

## The Right to Dismiss Employees

Reasons for a fair dismissal would include the following matters:

- § the person does not have the capability or qualification for the job (this requires the employer to go through consultation and/or disciplinary processes)
- § the employee behaves in an inappropriate manner (the company/firm's policies should refer to what would be unreasonable behaviour and the business must go through disciplinary procedures)
- § redundancy, providing there is a genuine business case for making (a) position(s) redundant with no suitable alternative work, there has been adequate consultation and there is no discrimination in who is selected
- § the dismissal is the effect of a legal process such as a driver who loses his right to drive (however, the employer is expected to explore other possibilities such as looking for alternative work before dismissing the employee)
- § some other substantial reason.

## Claims for Unfair Dismissal

After one year's service employees can make a claim to an Employment Tribunal for unfair dismissal within three months of the date of the dismissal and if an employee can prove that he/she has been pressured to resign by the employer he/she has the same right to claim unfair dismissal or constructive dismissal.

If the employee wins his/her case the Tribunal can choose one of three remedies which are:

- § re-instatement which means getting back the old job on the old terms and conditions
- § re-engagement which would mean a different job with the same employer
- § compensation where the amount can be anything from a relatively small sum to an unlimited amount if the dismissal was due to some form of discrimination.

If the dismissal is demonstrated as being due to any of the following it will be deemed to be unfair regardless of the length of service:

- § discrimination for sex, race, age or disability
- § pregnancy, childbirth or maternity leave
- § refusing to opt out of the Working Time Regulations
- § disclosing certain kinds of wrong doing in the workplace.

## Statutory Disciplinary Procedures

On many occasions a dismissal which seems quite justified to the employer will be found to have been unfair if correct disciplinary proceedings were not followed. As a result of the Employment Act 2002 from October 2004 all employers must have a disciplinary procedure in place which satisfies the requirements of the Dispute Resolution Regulations 2004. Whether you employ just one or hundreds of employees ignorance will be no excuse if you fall foul of this important area of new legislation.

There is a basic three-step Dismissal and disciplinary procedure (DDP) which must be used before an employer dismisses or imposes a significant sanction on an employee such as demotion, loss of seniority or loss of pay.

It applies to all types of dismissal, including conduct, capability, redundancy, retirement, expiry of a fixed term contract, unsuccessful probation etc.

### Standard procedure

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| Step 1 | Employers must set out in writing the reasons why dismissal or disciplinary actions against the employee are being considered. A copy of this must be sent to the employee who must be invited to attend a meeting to discuss the matter, with the right to be accompanied. |
| Step 2 | A meeting must take place   |
| Step 3 | An appeal procedure must be established   |

There may be some very limited cases where despite the fact that an employer has dismissed an employee immediately without a meeting, an Employment Tribunal will very exceptionally find the dismissal to be fair. This is not explained in the regulations but may apply in cases of serious misconduct leading to dismissal without notice. What this means in practice awaits the test of case law.

### Modified procedure

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|--------|--|
| Step 1 | Employers firstly set out in writing the grounds for action that has led to the dismissal, the reasons for thinking at the time that the employee was guilty of the alleged misconduct and the employee's right of appeal against the dismissal  |
| Step 2 | If the employee wishes to appeal against the decision, the employer must invite them to attend a meeting, with the right to be accompanied, following which the employer must inform the employee of their final decision. Where practicable, the appeal meeting should be conducted by a more senior or independent person not involved in the earlier decision to dismiss. |

The only occasions where employers are not required to follow the DDP are as follows:

- § they reasonably believe that doing so would result in a significant threat to themselves, any other person, or their or any other person's property
- § they have been subjected to harassment and reasonably believe that doing so would result in further harassment
- § because it is not practicable within a reasonable period

- § they dismiss a group of employees but offer to re-engage them on or before termination of their employment
- § there are collective redundancies and they consult with employee representatives
- § the business closes down suddenly because of an unforeseen event
- § the employee is no longer able to work because they are in breach of legal requirements eg to hold a valid work permit.

## Common Mistakes That Employers Make

For many the regulations have caused some confusion and practical difficulties. Some of the most common mistakes include:

- § not applying the procedures to employees with less than one year's service. Whilst such employees are often unable to claim unfair dismissal (unless the reason for their dismissal is one of the automatically unfair reasons for which there is no qualifying period of employment such as pregnancy), they may be able to bring other claims such as discrimination with compensation increased accordingly
- § failure to invite employees to disciplinary hearings in writing or supply adequate evidence before the disciplinary hearing. The standard procedure requires the employer to set out the 'basis of the allegations' prior to the hearing
- § excluding dismissals other than disciplinary dismissals (eg non-collective redundancies, ill-health terminations, retirement, expiry of fixed term contracts)
- § not inviting employees to be accompanied
- § not including a right of appeal in a non-collective redundancy situation
- § not appreciating the statutory requirement to proceed with each stage of the procedure without undue delay
- § failure to appreciate that an employee may have right to appeal even if it is requested verbally rather than in writing and is after a timescale set down by the employer
- § not hearing grievances raised after termination of employment
- § not appreciating that paying an employee a lower bonus for performance related reasons could potentially amount to 'action short of dismissal' by the employer
- § failure to treat as a grievance any written statement/letter (for example a letter of resignation) which raises issues which could form the basis of a tribunal claim to which statutory procedures apply. This means that the employer must be alert to issues being raised in writing even if there is no mention of the words grievance.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required.

# Recruitment Procedures

Most claims for discrimination in recruitment have no maximum limit.

Can your business afford compensation of perhaps £20,000 because you made a simple mistake?

How do you make sure you don't break the law?

We set out below the main principles involved in the recruitment of employees. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

## Good Recruitment Procedures

Employers recruiting staff can make simple but very expensive mistakes in all sorts of ways when trying to take on new staff. Sound recruitment procedures help avoid mistakes, as well as ensure that your recruitment process improves and you take on better staff as well.

## Where Can Things Go Wrong?

You can easily make mistakes at various stages in the recruitment process that would probably mean you would lose your case at an Employment Tribunal.

These stages include:

- § defining the job itself or identifying the person required
- § attracting candidates by advertising
- § how you assess the candidates you see
- § making the actual selection decision
- § the terms of employment that you offer.

The danger, quite apart from the cost of recruiting the wrong person and then having to get rid of them and recruit again, is that someone whom you have turned down at some point in the process may complain to an Employment Tribunal that you discriminated against them. If the Tribunal finds the claim to be valid then compensation can be awarded not just for actual loss but also to compensate for projected future loss and what is known as 'injury to feelings'.

## What is Meant by Discrimination?

Employers must not discriminate against candidates for employment because of their sex, gender reassignment, marital status, their ethnic origin or race, religion or belief, sexual orientation, age or because they suffer from any disability. The relevant pieces of legislation are the Race Relations Act 1976 (RRA), the Sex Discrimination Act 1975 (SDA), the Disability Discrimination Act 1995 (DDA), the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006. A further area where discrimination can be claimed is in connection with trade union membership or non-membership.

Acts of Discrimination are categorised as being either Direct or Indirect Discrimination. Direct Discrimination would involve either establishing different, unjustifiable and therefore discriminatory recruitment criteria or deliberately excluding certain categories, for example, 'men only may apply'. Indirect Discrimination is not as obvious (and indeed employers can find themselves committing indirect discrimination quite unintentionally and innocently).

Examples of indirect discrimination would include:

- § setting recruitment criteria which are not actually justified by the job or job description but which have the effect of discriminating against certain groups of people (eg requiring exam qualifications suggesting skills which are not actually needed by the job and which could discriminate against individuals with learning difficulties)
- § using assessment tests measuring abilities not required by the job but which could discriminate against groups of people (ie reasoning ability tests for unskilled manual jobs which could discriminate against those without English as a first language)
- § setting different tests for different applicants for a job (eg female applicants cannot be asked to carry out tests of physical strength if male applicants are not asked to do the same)
- § asking questions of some applicants and not of others (the classic and very common example being that of asking a female applicant when she intends starting a family).

In considering whether an act of indirect discrimination has occurred or not, an Employment Tribunal can draw reasonable inferences from an employer's normal practices in addition to looking at the facts of the particular case. The Tribunal members might for example, in the case of a claim for racial discrimination, look at the ethnic makeup of the existing workforce and compare this with the ethnic makeup of the local community. A significant difference between these proportions could suggest to the Tribunal that discrimination is more likely to have happened.

*Possible but strictly limited exceptions where applicants can be chosen on grounds of sex, sexual orientation, religion race or age*

Whilst direct and indirect discrimination are generally prohibited, the legislation accepts that in some occupations it may be necessary to be of a particular sex, sexual orientation, religion, racial group or age. These limited exceptions are referred to as being Genuine Occupational Reasons (GORs) (there are no such exceptions for disability). None of the Acts actually allow discrimination to be used to maintain a balance between the sexes, the religious or the racial mix.

The Sex Discrimination Act (SDA) includes reference to GORs of:

- § physiology - for example in modelling
- § decency or privacy - where there is likely to be physical contact between the job holder and persons of the opposite sex to which the latter might object such as lavatory attendants - care needs to be taken here if there are a number of posts meaning that such contact would not necessarily happen
- § single sex establishments - such as prisons
- § working outside the UK
- § where a job involves living in and the premises which are available do not allow for appropriate privacy or decency - again care needs to be taken as the GOR will not be upheld if the employer could reasonably be expected to make suitable facilities available
- § personal services such as welfare/personal/educational where these can best be provided by a man or woman - this GOR is used by social services and welfare providers

The Religion or Belief Regulations include examples of GORs.

- § A hospital wishes to appoint a chaplain to minister the spiritual needs of the patients and staff. The hospital is not a religious organisation but decides a chaplain ought to have a religion or similar belief. The hospital may be able to show that it is a GOR within the context of the job for the postholder to have a religion or similar belief.
- § A Christian school may be able to show that being a Christian is a requirement of the teachers whatever subject they teach.

An example of a GOR relating to sexual orientation may be a business advertising an opportunity to work in a middle eastern country. Because gay sex (even between consenting adults) is criminalised in that country, the business may be able to demonstrate it is a GOR for the person taking the job not to be gay, lesbian or bisexual.

An example of a GOR relating to age may be a requirement for a position as an actor for an old or young part.

The Race Relations Act also includes GORs but there are fewer of them. They are:

- § dramatic performance where an individual of a particular ethnic background is required
- § authenticity such as the requirements for a particular modelling assignment
- § ambience - such as an ethnic restaurant
- § personal services are also dealt with by the SDA above.

## The Meaning of Disability

The Disability Discrimination Act (which now applies to all employers irrespective of the number of employees) insists that employers may not treat a person with a disability less favourably than other persons without justifiable reasons. The Act requires employers to make 'reasonable adjustments' to the workplace where these would overcome the practical effects of an individual's disability. If an applicant for a position believes that he/she has been discriminated against they may make a complaint to an Employment Tribunal.

The definition of disability is very wide and covers anyone with a physical or mental impairment which is long term or recurring, preventing them from carrying out normal day to day activities and includes for example problems of mobility/speech/hearing/manual dexterity etc.

Notably in December 2005 disability legislation was extended to protect those suffering from conditions such as cancer, multiple sclerosis and aids, notwithstanding these conditions do not necessarily prevent an individual from undertaking their day to day activities.

## What are 'Reasonable Adjustments'?

In this context the word reasonable means whether or not such steps would be practicable and would actually have an effect, and are reasonable given the resources of the employer. For example the local branch of Marks & Spencer would probably be expected to have more resources than would a small local retailer.

Reasonable adjustments to the workplace that employers might be expected to make include:

- § transferring the individual to fill another vacancy or to a different place of work
- § altering working hours
- § allowing them time during working hours for rehabilitation or treatment
- § allocating some duties to another person
- § arranging for special training
- § acquiring or modifying premises, equipment, instructions or manuals
- § providing readers or supervision.

## Claims Against Employers for Discrimination

Applications can be made to an Employment Tribunal from someone who was not selected for an initial interview, for a final short-list or offered the job, and who believes it was because of sex, marital status, colour or ethnic origin, trade union membership or lack of such membership, disability, age or religion. The application must be made within three months of the alleged discrimination and the Tribunal will take into account reasonable inferences from the actual employment practices of the employer as well as from the particular facts of the individual case.

## Good Sound Recruitment Procedures

In order to avoid the danger of discriminating in some way, particularly unconsciously, employers must take care to develop and use recruitment procedures which will avoid the risk. Using sensible procedures will also inevitably improve recruitment decisions and the quality of the people, taken on. Sensible procedures would include the following:

- § always produce clear job descriptions which identify both the essential activities of the job and the skills and attributes needed by candidates. It should be possible to see from this whether a disabled candidate would be able to deal with those essential activities. Avoid gender references such as he or she and only refer to qualifications and/or experience which are clearly required by the job. The danger is that any such attributes which cannot be shown to be essential could be inferred as being there to deter women, candidates from ethnic minorities or those with a disability
- § in seeking candidates ensure that any wording used does not imply that some category (such as men or women) are favoured candidates, and be careful with words like energetic (unless this is a genuine requirement of the role) which might deter candidates with disabilities. The process for seeking candidates must also be non-discriminatory and not restricted in a way which could be seen to be discriminatory. An obvious error would be to put an advertisement in a place where it would only be seen by, for example, males (such as an all male golf club)
- § selection methods must be chosen which will enable the appropriate skills and attributes to be assessed but should avoid anything which would in effect be discriminatory. An example could be written tests involving English comprehension for a basic cleaning job where the skills assessed by the test would be irrelevant. Where tests are used all candidates need to be given the same tests to avoid any suggestion of discrimination
- § be careful to avoid discriminatory questions at interview (eg when do you expect to have a family?) and generally try to ensure that all candidates are asked the same questions
- § consider modifying the workplace to make it suitable for candidates with disabilities - the code refers to a reasonable cost as being what the extra costs involved in recruiting a non-disabled person might be. You should also look critically at the physical arrangements for recruitment to assist candidates with disabilities to apply more easily (eg wheelchair ramps) and consider whether changes may need to be made to application forms. These should not ask questions which do not impact on the suitability of the candidate for the particular job and should not ask if a candidate is registered disabled
- § it is essential that good records are kept for an appropriate period of time about applications, reasons for rejection and performance in any assessments and at interviews, and that these complement the job description and the skill requirements for the job. Obviously such processes help with selection anyway but these records may be essential if anything goes to an Employment Tribunal.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required.

# Redundancy Procedures

There have been many changes to employment law and regulations in the last few years. A key area is the freedom or lack of freedom to make an individual redundant.

An employee's employment can be terminated at any time but unless the redundancy is fair an Employment Tribunal may find the employer guilty of unfair dismissal.

We set out below the main principles involved concerning the redundancy of employees. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

## What is Redundancy?

Under the Employment Rights Act 1996, redundancy arises when employees are dismissed because:

- § the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was so employed or
- § the employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed or
- § the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish or
- § the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed, has ceased or diminished or are expected to cease or diminish.

In other words, the business reasons for redundancy do not relate to an individual but to a position(s) within the business.

## Consultation - Legal Requirements

- § Employers who propose to dismiss as redundant 20 or more employees at one establishment have a statutory duty to consult representatives of any recognised independent trade union, or if no trade union is recognised, other elected representatives of the affected employees.

Consultation should begin in good time and must begin:

- § at least 30 days before the first dismissal takes effect if 20 to 99 employees are to be made redundant at one establishment over a period of 90 days or less
- § at least 90 days before the first dismissal takes effect if 100 or more employees are to be made redundant at one establishment over a period of 90 days or less.

Employers also have a statutory duty to notify the Department of Trade and Industry if they propose to make 20 or more workers redundant at one establishment over a period of 90 days or less.

If an employer fails to consult, a Tribunal has discretion to make a protective award of up to 90 days pay.

It is good practice in all organisations however, regardless of size and number of employees to be dismissed, for employers to consult with employees or their elected representatives at an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all. Then they should ensure that individuals are made aware of the contents of any agreed procedures and of the opportunities available for consultation and for making representations. It must be remembered that redundancy is a form of dismissal and therefore all employers must follow a disciplinary and dismissal procedure which satisfies the requirements of the Dispute Resolution Regulations 2004, namely to include a letter setting out the reasons for the potential redundancy, a meeting and an appeal process.

## Disclosure of Information

Employers have a statutory duty to disclose in writing to the appropriate representatives the following information so they can play a constructive part in the consultation process:

- § the reasons for the proposals
- § the number and descriptions of employees it is proposed to dismiss as redundant
- § the total number of employees of any such description employed at the office in question
- § the way in which employees will be selected for redundancy
- § how the dismissals will be carried out and over what timescale
- § the method of calculating the amount of redundancy payments (other than statutory redundancy pay) to be made.

To ensure that employees are not unfairly selected for redundancy, the selection criteria should be objective, fair and consistent. They should be agreed with employee representatives and an appeals procedure should be established.

Examples of such criteria include last in first out (LIFO), attendance record, experience and capability. The chosen criteria should be measurable and consistently applied. Non-compulsory selection criteria include voluntary redundancy and early retirement, although it is sensible to agree management's right to decide whether or not such an application is accepted or not.

Employers should also consider whether employees likely to be affected by redundancy could be offered suitable alternative work within the organisation or any associate company.

Employees who are under notice of redundancy and have been continuously employed for more than two years, qualify for a reasonable amount of paid time off to look for another job or to arrange training.

## Unfair Selection for Redundancy

An employee will be deemed to have been unfairly selected for redundancy for the following reasons:

- § participation in trade union activities
- § carrying out duties as an employee representative for purposes of consultation on redundancies
- § taking part in an election of an employee representative
- § taking action on health and safety grounds as a designated or recognised health and safety representative
- § asserting a statutory employment right
- § by reasons of discrimination
- § maternity-related grounds.

## The Right to a Redundancy Payment

Employees who have at least two years' continuous service qualify for a redundancy payment.

The entitlement is as follows:

- § For each complete year of service until the age of 21 - half a week's pay
- § For each complete year of service between the ages of 22 and 40 inclusive - one week's pay
- § For each complete year of service over the age of 41 - one and a half weeks' pay.

A week's pay is that to which the employee is entitled under his or her terms of contract as at the date the employer gives minimum notice to the employee. The maximum statutory limit for a week's pay is £310 with effect from 1 February 2007. This figure is reviewed annually and employers may, of course, pay in excess of the statutory minimum.

The employee is also entitled to a period of notice or payment in lieu of notice by statute and their contract of employment.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required.

# Managing Absence

Recent surveys indicate that the adverse impact of absence on business profitability today is significant, with thousands of man hours lost every day. Recent statistics show that the average annual cost to employers is £13.4bn (£544 per employee) and businesses lose 33 million working days during the year.

We consider below the main principles of effective absence management.

## Good Absence Management Procedures

The majority of businesses surveyed confirm that tightening of policies to review attendance has a major influence on controlling levels of absence, particularly when three fifths of all absence is for minor illness of less than five days duration.

## The Difference Between Short and Long-Term Absence

When managing sickness absence issues, employers need to distinguish between short-term and long-term absences. Where the absence consists of short but persistent and apparently unconnected absences then, after suitable investigation, disciplinary action may be appropriate. However, this is not a suitable course of action in relation to longer-term sickness absence management.

## Short Term Absence Procedures

There are a number of key steps in managing short-term absence.

- § Establish a clear procedure that employees must follow, for example, the use of a return to work interview with line management and completion of self-certification forms even for one day of absence. This will ensure that everyone is aware that monitoring takes place and there is a complete record of absence.
- § Establish a system of monitoring absence and regularly review this for emerging trends. Frequent absences could perhaps be evidence of malingering but on the other hand could be a symptom of a deeper problem. Tangible statistics can provide useful warning signals to prompt early action and avoid problems in the future.
- § Return to work interviews should always be undertaken by the individual's immediate line manager, which will ensure that clear reasons for taking time off from work emerge. This will give managers the opportunity to get to the root cause of an absence which could be a symptom of a deeper problem.
- § If the issues are personal and not work related, the employer should decide on the amount of flexibility he or she is prepared to give to enable the individual to address their issue.
- § If there may be an underlying medical condition the employer should consider requesting a medical report to support the level of absence; there may be a hidden underlying condition and links to disability discrimination may not be immediately apparent.
- § All employees should be made aware that any abuse of the sick pay provisions will result in disciplinary action.
- § If there is no good medical reason for the absences the employee should be counselled and told what improvement is expected and warned of the consequences if no improvement is seen.

- § If there are medical reasons for the absence, consider any links to the Disability Discrimination Act 1995 (DDA), for example, does the absence relate to hospital appointments or treatment required; if so, the employer is required to make reasonable adjustments which includes allowing time off for treatment.
- § If the situation reaches a stage where the employee is to be dismissed and there is no defined medical condition, it may be on the grounds of misconduct. Here the employer must be able to show that a fair procedure has been followed taking into account the nature and length of the illness, past service record and any improvement in the attendance record.
- § If the employee has a recognised medical condition that is not a disability but the absence rate is unacceptably high, it may be possible to dismiss fairly for some other substantial reason after following the due process. Again length of service and the availability of suitable alternative employment are relevant factors to consider before reaching a decision.

## Long-term Absence Procedures

The key steps in managing long-term absence include:

- § absence procedures, monitoring and return to work interviews are as important as in the case of short-term absence
- § it is always prudent to gather medical advice to assess whether the employee's condition amounts to a disability and also the capability of the employee to undertake their role going forward
- § it is important to be specific about the information required from the medical report for example the nature of the illness, the ability of the individual to undertake their role, having provided a detailed description of responsibilities, the length of time the illness is likely to last, and any reasonable adjustments that would ease the situation
- § upon receipt of the medical evidence a process of consultation and discussion should take place with the individual (welfare visit) subject to any recommendation of the doctor
- § it is important to listen to the employee's proposals for their return to work
- § if the cause of the illness is work related, the root cause should be investigated. Employers should discuss ways to reduce the influencing factors, for example, increased support, training or reallocation of duties. Could the employee return to work on a staged basis or on a part time basis for a short period?
- § ensure all steps are recorded in writing to confirm what is expected of the employee and also what steps the employer is going to take, so there is no confusion and all actions taken are seen to be reasonable
- § if the employee is to be dismissed it is likely to be on the basis of capability, however care will be needed to ensure all the requirements of the DDA have been considered and to demonstrate that a fair procedure has taken place.

## Definition of Disability

The definition of what constitutes a disability can be split into three parts:

- § the employee must be suffering from a physical or mental impairment
- § the impairment must have a substantial adverse effect on the ability to carry out normal day-to-day activities. Substantial means more than minor or trivial
- § the effect must be long-term, in other words have already lasted for at least 12 months or be likely to last that long.

## Reasonable Adjustments

If a medical report identifies a disability, in accordance with the DDA an employer has a duty to make reasonable adjustments. This is quite broad and may mean physical adjustments to premises or the provision of equipment to assist the employee in carrying out their duties. It can also mean adjustments to the role itself by removing certain duties and reallocating them, changes in hours or place of work, or the provision of further training and supervision. It may also include transferring to any other vacant post subject to suitability.

In other words quite a number of steps are required of an employer if they are to establish a fair dismissal for capability in relation to an employee who has been absent for a long term of sickness.

## How Can We Help

We will be more than happy to provide you with assistance or any additional information required.

# Legal Working in the UK

In line with the Asylum and Immigration Act 1996, it is a criminal offence to employ anyone who does not have an entitlement to work in the UK, or undertake the type of work you are offering. Any employer who does not comply with the law may be facing a fine of up to £5,000.

We provide an overview of the documentation required to ensure that your business does not fall foul of the law.

## The New Rules

The increasing trend of illegal immigrants entering the UK has led to a rise in forged documentation, as well as grounds for certain employers to take advantage of cheap labour.

To combat this, the Home Office reviewed the law in this area and regulations were introduced on 1 May 2004.

## Documentation Requirements

An employer must now obtain and take a copy of either one of the original documents included in List 1 or two original documents in List 2 using either 'Combination One' or 'Combination Two'.

### § List 1

- § a UK passport
- § an EEA national passport or national identity card
- § UK residence permit
- § an application registration card issued by the Home Office to an asylum seeker stating that the holder is permitted to take employment.

### § List 2

#### Combination One

- § A document giving the person's permanent national insurance number and name, plus:
- § Original birth certificate or
- § A certificate of registration or naturalisation stating that the holder is a British citizen or
  - § a letter issued by the Home Office which indicates that the person named in it can stay indefinitely in the UK or has no time limit on their stay or
  - § an immigration status document issued by the Home Office with an endorsement indicating that the person named in it can stay indefinitely in the UK, or has no time limit on their stay or
  - § a letter issued by the Home Office which indicates that the person named in it can stay in the UK and this allows them to do the type of work you are offering or
  - § an immigration status document issued by the Home Office with an endorsement indicating that the person named in it can stay in the UK and this allows them to do the type of work you are offering.

#### Combination Two

- § a work permit or other approval to take employment that has been issued by Work Permits UK plus:
- § a passport or other travel document endorsed to show that the holder is able to stay in the UK and can take the work permit employment in question or

- § a letter issued by the Home Office confirming that the person named in it is able to stay in the UK and can take the work permit employment in question.

## Checking Procedures

The following checks must also be taken to ensure that each document also relates to the prospective employee in question:

- § ensure that any photograph and date of birth is consistent with the appearance of the individual
- § if more than one document is produced ensure that the names on each are identical. Otherwise further explanation and proof will be necessary, for example, a marriage certificate
- § check expiry dates
- § take copies of original documents only.

To ensure that there is no discrimination, it is recommended that all potential employees are asked to produce original documents indicating they have the right to work in the UK.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required.

# Age Discrimination

On 1 October 2006, the Employment Equality (Age) Regulations 2006, one of the most far reaching pieces of legislation this century came into force to prevent discrimination against workers, employees, job seekers and trainees on the basis of their age.

Its importance is underlined by the fact that nearly a third of all workers will be over the age of fifty by 2020, which means that businesses increasingly need to recognise the benefits of age diversity in the workplace.

Unfortunately, a recent survey of over 150 organisations indicates that most businesses are not prepared for the changes. Employers need to ensure they have the appropriate policies and procedures in place to deal with age discrimination and should raise awareness of it so that acts of discrimination on the grounds of age can be prevented.

## Direct and indirect discrimination

Both direct discrimination (treating someone less favourably because of their age or because of the age they appear to be) and indirect discrimination (having a policy or practice which puts people of a certain age at a disadvantage, compared with other people) are unlawful.

An example of direct discrimination would be where someone with all the skills and competencies to undertake a role is not offered the position just because they completed their professional qualification 30 years ago. Other examples could include refusing to hire a 40 year old because of a company's youthful image, not providing health insurance to the over 50's and not promoting a 25 year old because they may not command respect.

A business requiring applicants for a courier position to have held a driving licence for five years is likely to be guilty of indirect discrimination. A higher proportion of people aged between 40 and above will have fulfilled this criteria than those aged 25. Other examples of indirect discrimination could include seeking an 'energetic employee', requiring 30 years of experience or asking clerical workers to pass a health test.

Unlike other forms of anti-discrimination legislation, however, age discrimination can be objectively justified if it is both proportionate and necessary. For example, an employer might argue that it was appropriate and necessary to refuse to recruit people over 60 where there is a long and expensive training period before starting the job. However, cost by itself is not capable of justifying such an action.

## Harassment

Harassment on the basis of age is equally unlawful. For example, a mature trainee teacher may be teased and tormented in a school on the grounds of age during the teaching experience. If no action is taken by the head teacher, this may be treated as harassment. An employee may be written off as 'too slow' or 'an old timer'. This too could be seen as harassment.

## Recruitment

Employers must be aware of the significance of the legislation at all stages in the recruitment process and to avoid breaking the age rules they should consider:

- § removing age/date of birth from adverts for example: 'Trainee Sales Representatives.... envisaged age 21-30 years'
- § reviewing application forms to ensure they do not ask for unnecessary information about periods and dates
- § avoiding asking for 'so many years of experience' in job descriptions and person specifications for example: 'graduated in the last seven years'
- § avoiding using language that might imply a preference for someone of a certain age, such as 'mature', 'young', 'energetic' or 'the atmosphere in the office, although demanding, is lively, relaxed and young'
- § ensuring that other visible methods are used to recruit graduates as well as university milk rounds, to avoid limiting opportunities to young graduates

- § focusing on competencies to undertake a role and not making interview notes that refer to age considerations
- § never asking personal questions nor make assumptions about health or physical abilities.

## Service related benefits

Employers are allowed to use a length of service criterion in pay and non-pay benefits of up to five years' service. Benefits based on over five years service are also allowed if the benefit reflects a higher level of experience, rewards loyalty or increases or maintains motivation and is applied equally to all employees in similar situations. It is for the employer to demonstrate that the variation in pay/benefits over five years can be objectively justified.

Employers are recommended to review their pay and benefits policies now to ensure that they are based on experience, skills and other non-age related criteria.

## Redundancy

The existing statutory payment provisions remain in place. Employers can, as before, pay enhanced redundancy payments. However, to avoid discriminating, employers should use the same age brackets and multipliers as used when calculating statutory redundancy pay.

## Retirement

An employer must give an employee notice of their intention to retire them, the intended retirement date and the employee's 'right to request' to continue working past the intended retirement date. This notice must be given not more than one year and not less than six months before the intended retirement date.

Employees have the right to request to work beyond 65 or any other retirement age set by their employers. Employers have a 'duty' to consider such requests and to hold a meeting with the employee to discuss the request.

## Action for employers

Employers need to undertake the following to ensure that they are not breaking the law:

- § review equal opportunities policies
- § review employee benefits
- § review policies and procedures on retirement
- § undertake equal opportunities training covering recruitment, promotion and training.

## How We Can Help

We will be more than happy to provide you with assistance or any additional information required.