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Top tips for managers

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Our employment solicitors and HR consultants understand the varied challenges of managing people. We've compiled this guide to help you stay ahead of the game and focus on what you do best. The guide covers 19 of the key HR topics which we help our clients with.

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Recruitment

Recruiting the right people is critical. Employing the wrong person can be a disaster in terms of time and cost.

Most employment legislation is effective from the first day of employment. And some is effective even before then: a job applicant can raise a discrimination claim in an Employment Tribunal.

The Vacancy

A vacancy is a good opportunity to consider a role in terms of what is required to support the business moving forward. Consideration should be given to what skills and experience would be advantageous, and whether this is a good time to make any changes to the role.

Good preparation at this stage will help ensure the right person is recruited for the role. A current job description and person specification will assist with this. The criteria for the person specification must be job related, set at a realistic level and give an acceptable equivalent to any formal qualifications where appropriate.

This is also a good time to consider whether the role needs to be performed on a full-time basis or whether it is open to job-sharing or part-time working.

Resourcing

There are various methods of resourcing available, and it's important to consider which method is most likely to attract the right applicant to the role.

Internal recruitment may be a good option on occasions where there is a need to provide promotion and career development for existing employees. This can be combined with external recruitment.

The most common options for external advertising include:

- Newspapers, Specialist Publications;
- Job Centres, Government Training Centres;
- Commercial Employment Agencies.

Interview techniques

The interview is an opportunity to build upon information already obtained from the applicant. The person conducting the interview should be well prepared and familiar with the requirements of the role.

The interview process should be structured to gain consistent information on all the candidates. A written interview record should be completed to ensure selection of the most suitable candidate.

The interview is a two way process and allows the applicant to find out more about the business and the job vacancy. Salary and benefits may be discussed at the interview, but no commitment should be made at this stage.

Where aptitude tests or similar will be used, the tests must be appropriate to the job role and skills that are required.

Prior to the interview:

- Review the job description, person specification, agree questions to be asked;
- Draft criteria for assessing responses to the questions;
- Review the CV/application forms and identify any gaps which need to be addressed e.g. in employment, education;
- Ensure all necessary paperwork is ready;
- Ensure there are no interruptions and a private room has been arranged - switch off mobile phones!

Conducting the interview:

- Greet the candidate, providing names and positions. Help the candidate 'relax'; safe topics include travel to the interview and the weather etc;
- Explain that the purpose of the interview is to learn more about the candidate and for them to learn more about the role;
- Advise the candidate of the structure of the interview;
- Advise the candidate that notes will be taken;
- Ask the candidate if they have any questions at this stage;
- At the end of the formal questions ask the candidate if they have anything else that they would like to add to their interview that they have not already told you;
- Advise the candidate what will happen next – when can they expect to hear back?
- Thank the candidate for their time and close the interview.

Did you know...

An individual does not have to be employed to raise a tribunal claim. Job candidates can raise a claim for discrimination within the recruitment process and that even applies to the very start of that process (i.e. job adverts).

This stage is a good opportunity to request documentary evidence of the right to work in the UK. This should be requested for all candidates attending interview.

Refrain from asking questions relating to protected characteristics. For example, do not ask questions relating to childcare. Remember to ask each candidate the same questions.

Another useful point to remember is that the candidate should do most of the talking.

Post-interview:

- Communicate the outcome to the applicant. This will normally be carried out verbally, but if this is not possible ensure letters are prepared and issued in a timely manner;
- Retain interview notes for a minimum of 6 months. This is to ensure evidence is available in the event that a candidate submits a claim to an Employment Tribunal.

Pre-employment Checks

Most businesses carry out some checks prior to making a formal offer of employment. References are a very common pre-employment check. References can be written or verbal, with one normally being from the applicant's most recent job. It is important to obtain the applicant's permission prior to doing this (permission can normally be indicated on the job application form).

It may also be appropriate to verify relevant qualifications and/or membership of a professional organisation. Copies of original certificates can be kept on file.

Criminal record checks should be made for certain roles. In Scotland the disclosure service is operated by Disclosure Scotland, in England and Wales the Disclosure and Barring Service.

Offer

The successful applicant should receive written notification of their offer of employment as soon as reasonably practicable.

The offer of employment should contain the following information:

- Conditions (pre or post) that apply to the offer;
- Terms of the offer. For example, salary, hours, benefits, pension arrangements, holiday entitlement & place of employment;
- The start date and details of probationary period;
- What action the candidate needs to take. For example, returning a signed acceptance of the offer.

All new employees should receive a copy of their main statement of written terms and conditions. Currently, this must be issued within 8 weeks of their start date. From April 2020, the statement must be issued no later than the day a worker starts his or her employment.

Discrimination

It is important to be aware that applicants can place a claim in an Employment Tribunal; they do not have to be an employee. The grounds on which applicants can claim discrimination are outlined in the Equality Act 2010.

These are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or philosophical belief
- Gender
- Sexual orientation

Throughout the recruitment process, care should be taken to avoid any risk of an applicant feeling that they are being treated differently because of a protected characteristic. For example, application forms should not ask for details of marital status, age or nationality.

The recruitment process and all paperwork should focus on the ability of the applicant to carry out the tasks associated with the role, not their circumstances or physical characteristics. Having a good paper trail demonstrating the selection criteria, interview questions, and reasons for decisions will help defend any claims that may arise.

Working Hours, Breaks & Rest

Did you know...

Where a worker has two jobs the total hours worked should be combined for the purposes of the Working Time Regulations?

The Basics

The Working Time Regulations 1998 introduced the rules relating to working hours, breaks and rest. The Regulations were implemented in the UK in response to an EU Directive. They were designed to ensure that all businesses abide by a set of rules, mainly as a health and safety measure to ensure all workers take adequate breaks and rest periods.

The basic rules are:

- A limit of 48 hours' work in each 7-day period (averaged over 17 weeks);
- 11 hours' consecutive rest in each 24-hour period;
- A 24-hour uninterrupted rest in each 7-day period;
- 5.6 weeks' annual leave;
- An in-work rest break of 20 minutes after 6 hours work.

Annual leave

Every worker, whether part time or full time, is entitled to 5.6 weeks paid annual leave. All annual leave rights apply from the first day of work.

Therefore, if someone works a 5-day week they will be entitled to 28 days leave. If they work 3 days per week they will be entitled to 16.8 days leave.

Note that the entitlement to 5.6 weeks leave is inclusive of all public and bank holidays – there is no legal right to take public or bank holidays off work (unless the contract of employment allows this).

Workers must actually take their leave, rather than be paid in lieu of it. The exception is when a worker leaves during the annual leave year, in which case they are entitled to be paid for any untaken accrued annual leave when they leave.

They can also be required to pay back monies received if they have taken more annual leave than they have accrued when they leave (normally via a deduction from his or her final salary) – provided that their contract of employment specifies this. In the absence of a written agreement, it will not be an option to deduct the monies from the worker.

Most businesses and workers adhere to an agreed system relating to taking annual leave. However, there are some minimum rules in place that operate in the absence of more favourable workplace agreements.

A business can stipulate when a worker takes their annual leave. For example, some may stipulate that workers must take 2 weeks annual leave during the Trades Fortnight. A business must give notice to the worker that is, at least twice the length of annual leave to be taken. For example, 4 weeks' notice would need to be given if 2 weeks leave must be taken by the worker.

In the absence of an agreement, the amount of notice that a worker must give if they would like to take leave should be at least twice the length of the annual leave requested.

For example, if a worker would like 2 weeks of annual leave, they must put in a request at least 4 weeks before they would like to start their leave.

A business can turn down their request within a period of time equivalent to the amount of leave requested. For example, if a worker has requested 1 week of annual leave, they should give at least 2 weeks' notice of their request and a business can turn down that request at least 1 week prior to the proposed leave starting.

Workers are entitled to 'normal remuneration' during each week of annual leave. Normal remuneration includes any payments which are intrinsically linked to the work carried out (e.g. overtime, commission, bonus, offshore allowances etc.) or relates to his personal or professional status (e.g. payments reflecting seniority, length of service or professional qualifications).

Night Working

There are specific rules for night time workers. A night worker is someone who works at least 3 hours during night time. Night time is defined as the period between 11pm and 6am, although this can be a different period if agreed. It must be at least 7 hours long and include the period from midnight to 5am.

The basic rules are:

- A limit of 8 hours work per night;
- A right to receive free health assessments on an annual basis.

The daily 8-hour limit to working time can be averaged out over a 17-week period (longer if agreed in a workforce or collective agreement) unless the work involves special hazards or heavy physical or mental strain. However, the rules have become increasingly complex and within each of the above there are derogations and exceptions. There are also more specific rules defining a day, night etc.

Did you know...

Employees continue to accrue annual leave whilst on family friendly leave?

Employees who are sick during annual leave have the right to defer annual leave to another time?

Opt Out

The UK Government has negotiated an 'opt out' option for businesses to utilise. This gives workers the option to agree to work in excess of 48 hours a week.

The agreement must be in writing and signed by the worker. This is generally referred to as an 'opt out agreement'. Please note that the agreement must be voluntary, and workers can opt in again by giving at least 7 days' notice (or 3 months' notice if this is what was agreed in writing). The 'opt out' does not apply to night time or young workers.

Did you know...

There are special rules relating to maximum working hours and rest breaks for young workers?

Right To Work In The UK

The Basics

Whether a person can carry out work, the hours they can work, and the type of work they can do depends upon their right to work in the UK. British Nationals do not normally require any permission to work in the UK. However, other employees do need to obtain permission to work in the UK whether this is through a visa or a government scheme. There is no way to be sure of an employee's nationality or their eligibility to work in the UK without carrying out checks. Employers should not make any assumptions about an individual's right to work and must carry out checks on all prospective employees.

It is unlawful to employ someone who does not have the right to reside and the appropriate right to work in the UK or who is working in breach of their conditions of stay. An employer can be penalised if they employ someone who does not have the right to work and they did not carry out the correct checks or do them properly. It's therefore crucial that the correct checks are carried out and that accurate records are maintained.

The Home Office issues updated and detailed guidance regularly which can be accessed on the Government's website. It is important to keep up to date with any developments to ensure that proper procedures are followed.

Right to Work and Brexit

An EU Settlement Scheme has been introduced by the Government to allow EU, EEA or Swiss citizens and their families to reside in and work in the UK. Under the scheme, individuals can apply for settled status which they will obtain if they have 5 years' continuous residence by the time of applying. Those who do not have 5 years' continuous service residence by the time of applying will receive pre-settled status and will be required to reapply within 5 years.

For an individual to have 5 years' continuous residence they must have been in the UK for at least 6 months in any 12-month period for 5 years in a row. The only exceptions are where they have not been in the UK for one period of up to 12 months for an important reason (such as childbirth, serious illness, study, vocational training or an overseas work posting) or a period of any length for compulsory military service.

Further details of the deadline for applying and for residing in the UK are available on the Government website. Law At Work will provide updates on any changes to the scheme.

Manual Checks

There are 3 basic steps to conducting a manual right to work check. An employer must complete all 3 steps before employment commences to ensure they have conducted the prescribed check fully.

1. Obtain

Obtain original documents (or a combination of two specified documents) given in the Home Office Lists A or B, depending on whether the individual has an ongoing or time-limited right to work in the UK. These lists can be found on the Government website.

2. Check

Check that the documents are genuine and that the person presenting them is the prospective employee or employee, the rightful holder and allowed to the type of work being offered.

3. Copy

Make and retain a clear copy and record the date the check was made. All copies of documents should be kept securely for the duration of the worker's employment and for two years afterwards. The copy must then be securely destroyed.

Online Checks

Employers can also use the Home Offices' online Right to Work Checking Service which gives real-time information about an individual's right to work. Employers are able to rely on this online service to prove they have conducted the necessary right to work checks.

Individuals can provide prospective employers with a 'share code' allowing them to access the record on their immigration status. The online checking service can be used by non-EEA nationals who hold biometric residence permits or biometric residence cards and EEA nationals who have been granted settled status.

Checks During Employment

If an employee's right to work is time-limited, the check will have to be carried out again when it's due to expire. There should be an effective system in place to alert Managers as to when the employee needs to start applying to renew their visa or to apply for a new one.

Provided that the employee puts in an application prior to the expiry of their existing visa, they can normally continue working until a decision is made on their application. If a visa expires and there is no application pending, you should meet with them to discuss their visa and steps may need to be taken to end their employment.

In the event that an employee's visa is expiring, or you are unsure of an employee's eligibility to work in the UK you should use the Home Office's Online Employer Checking Service.

Sanctions

A failure to carry out right to work checks or to carry them out properly could result in a £20,000 fine for each illegal worker found to be in your employment. It is also a criminal offence for an employer to employ somebody they know or had reasonable cause to believe is an illegal worker. This could lead to an unlimited fine or imprisonment and the right to sponsor employees may be lost.

Visas and Sponsorship

Tiers 2 and 5 of the points-based system are the primary immigration routes for non-EEA migrants who wish to work in the UK. These individuals must be sponsored by an organisation or company that holds a Tier 2 and/or Tier 5 licence which gives an organisations permission to sponsor workers in its business.

Employers who apply to become sponsors must make a licence application. The Home Office will consider whether they are a genuine organisation operating lawfully in the UK, whether they are honest, dependable and reliable, whether they are capable of carrying out their sponsor duties and whether they can offer work of the appropriate skill level. Further details on applying for a licence and sponsor duties can be found on the Government website.

If you intend to sponsor migrants under Tier 2 or Tier 5, you may need to check how much time they may be allowed to spend in the UK and any other restrictions that apply to individuals coming to the UK under these tiers.

Contracts & Handbooks

There has been a rapid increase in flexibility and diversity of legal and economic relationships and practices in the workplace. This has made it harder to decide whether an individual doing paid work does so under an employment contract and, if so, for whom. There has been a growth in atypical working for example, casual staff, temps, fixed term etc. where patterns don't fit the traditional concept of an employee working full time for a single employer. The development of the so-called 'gig economy' has further complicated matters. Working individuals may be, for example, employees, workers, self-employed or agency workers and there are important distinctions between them.

Why is it important to establish whether an individual is an 'employee'? Whether or not an individual is working under a contract of employment i.e. is an employee, will determine whether they are entitled to certain statutory rights, such as statutory redundancy payments and statutory maternity pay and the right not to be unfairly dismissed.

Some pieces of legislation apply to employees only – and some to workers. It is therefore important to be able to distinguish whether there is a contract of employment in place given that the employment relationship confers a wider range of rights and responsibilities on both parties.

As a general rule, there are 3 key elements which must be in place before a contract of employment can be deemed to exist. What are they?

1. The person must perform the work personally (i.e. they cannot substitute another).
It would be inconsistent with employment status to be able to provide a substitute or to subcontract the service obligations.

2. There is a mutuality of obligation (they are obliged to turn up for work and the employer to offer work).
This aspect becomes important in the case of, for example, casual workers. Are they obliged to accept work and does the obligation to accept work continue during periods when the individual is not working?

3. The employer exercises control over how the work is carried out.
Providing equipment, direction, performance management, subject to company procedures and policies, determine days and times of working etc.

These 3 elements are often described as the irreducible minimum - so if any of them are missing, it is unlikely that there is an employment relationship in place.

There are however other factors that may be taken into account. For example, is the individual free to work for other organisations, how long are they engaged for, do they provide their own equipment, who carries the financial risk in the arrangement, how far are they integrated into the organisation?
Self-employed persons tend to have the ability to determine how and when to work, can appoint an appropriate substitute, bear any financial risk or losses associated with the work, can work for other organisations and are not under the direct contract of the company.

Contracts of Employment and Employee Handbooks, which are consistent with current legislation and issued to and accepted by all employees, is best practice for you as an employer.

Sickness Absence

Did you know...

Employees don't have to be signed off for a set period before you can take steps to manage their absence (e.g. contact them, obtain a medical report, etc).

With the estimated cost of absence to employers being around £520 per employee per year, the spotlight is very much on promoting employee well-being. This figure represents the average of 6.3 days sickness leave that each employee takes each year (CIPD 2016 Absence Management Survey). Absence therefore represents a very significant cost for most businesses, reflecting the fact that dealing with absence can be difficult and complicated.

There are two types of sickness absence – short term and long term. Long term is commonly defined as lasting 4 weeks or more. Two thirds of absence is attributed to short term absence. The most common cause of short-term absence is minor illness such as a cold or headache. Minor illness remains the most common cause of short-term absence followed by musculoskeletal injuries, back pain and stress. There are still a significant number of organisations reporting an increase in stress and mental health problems within their workforce.

Absence policies

A business should have a good absence policy in place that supports its objectives and culture. Having a policy will also comply with the Employment Rights Act 1996, which requires employers to provide staff with information on 'any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay'.

A policy should include:

- Details of statutory and/or contractual sick pay including eligibility rules;
- What an employee should do if they are sick. In particular, when and whom they should notify if they are unable to attend work;
- Information on when and how to complete a self-certificate form;
- Information on when and how to submit a medical certificate (fit-note) from their doctor;
- State that the business has the right to require the employee to attend an examination by an appointed doctor and (with the employees consent) obtain a medical report from the employee's doctor;
- Information on return to work interviews.

Did you know...

Alcoholism is not covered by the disability provisions of the Equality Act, but illness caused by it (such as cirrhosis) may be?

People who are classed as obese may be considered to be disabled for the purposes of the Equality Act.

Managing an absence

Law At Work's top tips for successfully managing absence are as follows:

1. Involve line managers

There is an important role for line managers, who often manage the contact with the absent employee and facilitate a return to work.

Managers need good communication skills to encourage employees to discuss problems at an early stage before matters escalate. Managers should be provided with appropriate training.

Training should include:

- The absence policy and procedure;
- Their role in managing absence;
- The disciplinary procedure;
- The legal implications involved;
- The role of occupational health services;
- Return to work interview skills;
- How to handle sensitive and/or difficult conversations.

2. Keep in contact

Ensure contact is maintained on a regular basis using a sensitive and non-intrusive approach. Agreed regular contact will ensure the employer and employee are aware of all relevant information and facilitate conversations about a return to work.

3. Hold return to work interviews

These have been identified as the most effective intervention to short-term absence. They help identify any problems at an early stage and provide an opportunity to start a dialogue with employees regarding their absence. Records of interviews also provide good evidence in the event that disciplinary procedures are instigated.

4. Utilise occupational health services

Health professionals can play a major role in evaluating reasons for absence, conducting health assessments, providing information on diagnosis and symptoms of illness, how this will affect work, and in facilitating a return to work.

For frequent or longer-term absences:

5. Make adjustments

The aim of adjustments (often made in conjunction with a medical report) is to remove or reduce the risks and obstacles that hinder a return to work.

Examples of adjustments include:

- Adjusted working hours to allow a gradual return to work, accommodate family demands, reduce pressure, reduce symptoms of illness etc;
- Providing special equipment such as wrist supports or a special chair;
- A temporary or permanent change in tasks to be carried out.

6. Have a return to work plan

This can be arranged and continued for an agreed period of time. The plan should include goals, statements about new working patterns, details about adjustments, who will manage the process, checks to ensure the plan is put into practice, and review dates. A good return to work plan will ease a transition back to work and maintain a good working relationship.

Disability Discrimination

The Equality Act 2010 prohibits discrimination in the workplace on the grounds of disability. Disability is defined as 'a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities'. The definition is very wide in scope. The effect of the Act is that employers have to make 'reasonable adjustments' to accommodate a person with a disability.

Adjustments that may be required include:

- Making physical adjustments to the workplace;
- Allocating some duties to another person;
- Appointment to a different role;
- Altering working hours;
- Providing special equipment.

If you think an employee may be covered by the Equality Act, it is essential that you contact your Law At Work legal or HR advisor before taking any disciplinary action relating to absence.

Grievances

A grievance is the means by which employees can discuss matters causing them concern. Even in well run workplaces there are occasional disagreements. The majority of issues can be resolved informally if they are dealt with promptly. However, in circumstances where this is not the case an employee must be able to utilise a formal grievance procedure.

Grievances are serious matters and should be dealt with promptly. If ignored, a grievance can escalate, lead to an employee feeling ignored, and even result in a tribunal claim.

Informal grievances

An employee may not want to utilise a formal procedure, preferring to take a more informal approach to resolving an issue. It may not always be appropriate to raise a formal grievance in the first instance. Quite often, an employee simply wants to let off steam or a chat. In these cases the grievance can be resolved quickly, normally through discussion with the parties involved.

It is important to note that a manager may sometimes need to instigate the formal procedures even where an employee does not feel it necessary. In particular, cases of alleged harassment, bullying and discrimination should always be dealt with formally.

Formal Grievances

Where a grievance is in writing, an employee states that they are raising a grievance, or it is identified that the grievance process is appropriate, it is important that the formal grievance procedure is utilised.

However, it should be noted that grievances may not always be set out in a letter. Emails, appraisal notes, text messages or any other communications may constitute a grievance.

Some employees may be hesitant to come forward with their grievance. This may be due to a fear of the potential repercussions, because they lack the confidence to do so, or simply because they are unaware of the grievance procedure.

Therefore, managers should also be aware of the less obvious ways of airing a grievance such as:

- A grievance concerning one employee reported by another employee. In this situation the Manager could ask the person who has made them aware of the issue to tell their colleague to come forward in person. The Manager could suggest that both employees come forward together if that would help;
- The Stage Whisper. A common way of making a Manager aware of a problem is to say it loud enough for them to overhear. The Manager will then need to use his or her judgement to determine whether it is worth pursuing. The Manager may choose to make a few discreet enquiries of their own to find out if there is substance to the complaint or ask the employee if they would like to utilise the grievance procedure. The onus is then on the employee to brief the Manager in more detail. The employee may decide not to take this opportunity;
- Social event. Some employees use social gatherings as an opportunity to let a Manager know there is a problem. As it is a less formal environment they may feel that the Manager is more approachable. The Manager will need to use his or her judgement as to how to deal with the issues raised.

Sometimes it may not be clear whether a communication is a grievance or not. In these cases, a Manager should schedule a meeting with the employee to discuss their concerns and establish whether the formal grievance procedure would be appropriate.

ACAS Code of Practice

The ACAS Code of Practice on Discipline and Grievance sets out what an employer should do in the event that a grievance is raised.

If a grievance is not dealt with in accordance with the Code and an employee subsequently wins a tribunal claim, the amount of compensation awarded may be increased by up to 25%. On the other hand, if an employee wins a tribunal claim but had failed to utilise the full grievance procedure prior to placing a claim their compensation may be reduced by up to 25%. This is a measure designed to encourage both parties to comply with the Code.

The Formal Procedure

Once it is established that there is a formal grievance, the employee should ideally put their grievance in writing. This is commonly referred to as 'step one' of the procedure. A Manager may need to ask the employee to put their concerns in writing, or even help them draft it in some circumstances.

Please note that where the grievance is not in writing, a Manager may still need to treat it as a grievance.

The employee must then be invited to a grievance meeting. This is commonly referred to as 'step two' of the procedure. The employee must be given at least 24 hours' notice of the meeting and be advised of the right to be accompanied. The purpose of the meeting is to gather facts and ask any relevant questions. The aim is to find out as much information as possible so that an equitable solution can be found.

Ideally, the employee should outline their grievance and suggest how they think the grievance could be resolved. A Manager should avoid telling the employee what he/she thinks the problem is and what the employee should do about it.

Tips for an effective grievance meeting include:

- Plan well. Where possible a Manager should gain a basic understanding of the problem and consider how they will handle it. A Manager should be prepared with a list of questions to ask the employee and have a clear understanding of the procedure. It is also important to be mindful that these situations can be unpredictable and sometimes emotional;
- Listen attentively. Employees are more likely to open up if they are being listened to. If the employee is having trouble explaining their grievance, they should be asked to give examples of incidents/ behaviours that are causing them concern;
- Clarify the situation. At the end of the meeting the Manager should summarise the concerns and ensure that he/she has a full understanding of the issues. Asking questions such as 'is this what you mean' or 'am I correct in thinking that….' will ensure there are no misunderstandings;

- Ask for solutions. An employee will normally have an idea of how their grievance can be resolved. They may also be willing to make some compromises to reach a resolution;
- Tell the employee what happens next. The meeting should be concluded by advising that the concerns will be investigated, of any timescales involved, and an estimated date by which they can expect to receive an outcome.

Once the meeting is complete, a Manager will need to investigate any points made and decide upon a course of action.

Prior to making a decision, a Manager must investigate the points raised in full. This may involve holding investigation meetings, taking witness statements, seeking paperwork or other records, or any other investigations as required.

The Manager should make a decision as soon as possible after carrying out investigations. It is important to consider all angles and the implications of any decision.

For example:
- How will the employee perceive the decision?
- How will other employees be affected?
- What precedents are being set and could they lead to problems in the future?
- Will the decision contradict other policies/procedures?

The outcome can be communicated to the employee in person, but it must always be followed up in writing. The employee should be advised of whether their grievance has been upheld and of any action points moving forward. It is essential that the employee is advised of the right to appeal – this is 'step three' of the process. If an appeal is requested, a further meeting must be arranged with a more senior Manager. Again, the employee should be given at least 24 hours' notice of the meeting and be advised of the right to be accompanied.

Don'ts!

- Never ignore a grievance. Grievances are very serious matters and should always be dealt with immediately. Ignoring a grievance may lead to employees feeling that their views are not relevant, and this will impact upon morale, performance, attitude and retention. Failing to deal with a grievance properly can lead to a very costly tribunal case – particularly where there is a concern relating to discrimination and/or harassment. Failing to follow the procedure may also lead to an increase in any tribunal award of up to 25%;
- Pre-judge. A Manager should have all the facts and have spoken to relevant parties prior to making any decisions;
- Take sides. If the grievance is against another employee, be impartial and stick to the facts.

Bear in mind that even relatively simple grievances can escalate quickly, especially if an employee chooses to talk about it to other members of staff. A business will therefore need to be mindful of the potential for unfavourable publicity, management time spent on putting things right, and the financial consequences of a decrease in productivity.

Workplace Mediation

Workplace mediation is a professional and alternative approach to resolving workplace disputes.

Conflict is an everyday fact of life – in the workplace, it can impact negatively on individuals, teams and organisational efficiency unless it is handled in a constructive way. Workplace mediation is a professional and alternative approach to assist our clients in resolving disputes.

Clients are often faced with breakdowns in working relationships or 'personality clashes'. Law At Work has developed its own team of accredited workplace mediators in response to client requests for support to help deal with these difficult situations.

Mediation is cost effective and at an early stage, can prevent conflict spiralling and becoming entrenched. It is recognised as an effective business tool and through its cathartic effect, it can help individuals identify the underlying issues in any conflict (thereby giving the best possible chance of success).

Mediation is primarily future focused and encourages the parties to identify how they can work together in the future. Most people don't like conflict but need skilled support to sit down and talk to the other person in a safe and confidential forum.

Handling a Disciplinary

The following section provides clear guidance on how to manage disciplinary issues. It cannot be over emphasised how important it is to handle a disciplinary correctly. It is therefore important that you contact your Law At Work legal or HR advisor to seek advice at an early stage and throughout the process if you are considering disciplinary action against an employee.

Informal Procedure

Some issues can be resolved informally, in which case there is no need to instigate a formal disciplinary process. An informal meeting with an employee can often serve to highlight an issue early enough for the employee to take steps to resolve things.

However, it is important to bear in mind that you may need to rely on evidence of informal discussions and meetings at a later stage if the issues are not resolved. For this reason, detailed notes of conversations regarding potential disciplinary issues should always be taken and kept on file.

Minor breaches of workplace rules or less serious performance issues can often be dealt with by an informal warning. A note of an informal warning can be kept on file and referred to in the future if things do not improve.

ACAS Code of Practice

The ACAS Code of Practice on Discipline and Grievance sets out what an employer should do in the event that the disciplinary procedure is instigated.

If a disciplinary issue is not dealt with in accordance with the Code and an employee subsequently wins a tribunal claim, the amount of compensation awarded may be increased by up to 25%. On the other hand, if an employee wins a tribunal claim but had failed to comply with the full disciplinary procedure prior to placing a claim their compensation may be reduced by up to 25%. This is a measure designed to encourage both parties to comply with the Code.

Did you know...

You don't have to issue a verbal warning (AKA – informal warning / letter of concern). The ACAS Code of practice does not require employers to use an informal warning before initiating the formal disciplinary process. Therefore, unless your Disciplinary Policy stipulates differently, there is no requirement to issue such warnings in the first instance. While this effectively adds a fourth stage to the disciplinary process, employers can choose to use an informal warning and they can be useful for minor incidents of misconduct where you do not want to commence a formal disciplinary process straight away.

Formal Disciplinary Procedure

There may be occasions where it is necessary to instigate the formal disciplinary procedure. The reasons for disciplinary action normally fall within two categories – conduct or capability.

It's important to be sure that disciplinary action is appropriate in the circumstances. Prior to taking disciplinary action the following must be carried out:

1. Gather facts

The Manager should gather all the relevant facts promptly before memories fade. Details such as the employee's age, length of service and current disciplinary record should all be taken into account when handling disciplinary issues. It may also be necessary to obtain training records and other paperwork relevant to the issue.

2. Investigation

There should be a full investigation into any allegations. This is because Employment Tribunals consider the extent and thoroughness of an investigation. An investigating officer should be appointed. This should be someone different from the Manager who will conduct the disciplinary hearing. A more senior Manager must also be available to hear any potential appeal.

A full investigation will normally involve talking directly to the person who is responsible for the alleged misconduct as well as any witnesses and other relevant parties.

All relevant information disclosed during the investigation stage will need to be seen by the employee prior to their disciplinary meeting to allow them the opportunity to consider the evidence against them and seek advice, so it is essential that accurate records of investigation meetings etc. are kept.

3. Witness statements

Any witnesses to the alleged disciplinary issue should be asked to provide a written statement or a minute should be taken at the investigation meeting. Witnesses should be asked to respect the need for confidentiality and made aware that any breach of confidentiality may result in disciplinary action. It is possible to use anonymous statements in limited circumstances, but signed statements are preferred. Always seek advice before using anonymous statements.

4. Suspension

A Manager will also need to decide whether to suspend an employee. Suspension should not automatically be imposed, even in cases of suspected gross misconduct and should be carefully considered and kept as brief as possible. Suspension should be kept under review and it should be made clear that this is not a disciplinary sanction. Suspension without pay may be a breach of contract so employees should normally be paid during this time.

5. Decide on outcome

Once all investigations are complete, the Manager will need to decide whether to proceed with

disciplinary action. It is possible that investigations reveal that informal action would be suitable, or that there is no foundation to the allegations. In this case the employee should be advised of the outcome.

If the decision is taken to proceed with disciplinary action, the next stage is to invite the employee to a formal disciplinary meeting.

The Disciplinary Meeting

Inviting the employee to a disciplinary meeting is referred to as 'step one' of the procedure. The invite must be in writing, advising the employee of the allegation, time and date of the meeting, and the potential consequences if the allegations are proven. All evidence relating to the case should be enclosed with the letter. The employee must be given at least 24 hours' notice of the meeting to allow him/her to seek advice and consider the case against them. The letter should also advise the employee of their right to be accompanied by a work colleague or an accredited trade union representative.

Remember... no decision should be made until after the meeting has taken place. Do not make assumptions or do anything that indicates that the outcome is inevitable e.g. recruit new staff!

The disciplinary meeting is referred to as 'step two' of the procedure. Prior to the meeting, a Manager should ensure they are fully prepared.

This includes:

- Ensure the employee has received their invite letter at least 24 hours before the start of the meeting;
- Be aware of all the relevant facts of the case;
- Have details of any previous warnings and/or disciplinary warnings on file;
- Have all relevant evidence and paperwork to hand;
- Arrange for a minute taker to be present;
- Find out whether the business has set any precedents for similar incidents.

A Manager not previously involved at the investigation stage should conduct the disciplinary meeting.

The Manager should begin the meeting by introducing those present and explaining their roles. It's also useful to explain the structure and format that the meeting will take.

The Manager must then:

- State what the allegation is and outline the case by going through the evidence. The employee should have been provided with this information with his/her invite letter;
- Establish whether the employee accepts the evidence. If not, allow them to explain what evidence they disagree with;
- Give the employee the opportunity to state their case, ask questions, present evidence, and call witnesses;
- Ask the employee if they would like to explain anything or suggest mitigating circumstances;
- Encourage the employee to speak freely with a view to establishing the facts. The meeting should be a two-way process, not a conflict;

- All parties should remain calm and professional. If the employee becomes upset or agitated adjourn the meeting so that he/she can recompose themselves;
- End the meeting by clarifying the main points and summarising what has been said by both parties;
- If at any point it becomes clear that the employee has provided a sufficient explanation or there is not enough evidence to support the allegation, stop the meeting and confirm that the employee will be advised of the outcome.

Disciplinary Sanctions

Once all investigations and the disciplinary meeting is complete, the Manager will need to decide what form of disciplinary action would be appropriate in the circumstances. In particular, a Manager should consider whether the disciplinary procedure indicates likely penalties, what penalties have been imposed for similar incidents in the past, any mitigating circumstances, any disciplinary warnings on file, and most importantly – is the penalty REASONABLE in view of all the circumstances?

Although previous decisions and sanctions should be taken into consideration, each case must be considered on its own merits as there may be special circumstances which make this case different from previous cases.

An informal warning may be issued for first instances of minor disciplinary breaches. There is no requirement to give an employee the right to appeal against an informal warning.

A written warning is normally appropriate for more serious offences or where there has been a repeat of a minor offence.

A final written warning is normally issued when an offence is serious enough to justify only one written warning, but does not justify a dismissal, or where there is a repeat of a minor offence and the employee is already in receipt of a written warning. A final written warning must always advise that any further disciplinary issues will result in dismissal.

Warnings are normally disregarded after a 12 month period.

Dismissal will be appropriate in cases of gross misconduct, or where the employee has a current final written warning on file. Gross misconduct is restricted to very serious offences such as theft or violence. It must be so serious that continuation of the working relationship is impossible. Note that care must be taken to ensure that a dismissal is reasonable in all the circumstances and that it is not used for a minor offence (perhaps due to a dislike of the employee). In such cases, an employment tribunal will decide that the dismissal was unfair.

An employee should normally be advised of a disciplinary sanction in person. The reasons for the decision should be explained and they should be in no doubt as to what action has been taken. They must be advised of the right to appeal the decision to issue a formal sanction. This should be followed up in writing since this will provide evidence that they have been advised of the outcome and their right to appeal the decision.

Appeal

An employee must be advised of the right to appeal against any formal disciplinary sanctions. This is known as ‘step three’ of the procedure.

- The appeal must be made to a more senior Manager than who conducted the disciplinary meeting (where possible);
- Employees should appeal in writing within a reasonable period of receiving written notification of the disciplinary sanction (this is usually defined in your disciplinary procedure and should not be less than 5 days);
- The employee should be invited to an appeal meeting within a reasonable period of receiving notification of the appeal;
- The employee must be given at least 24 hours advanced notice of the meeting, be given the right to be accompanied, advised that the decision made at the appeal stage is final.

PLEASE NOTE THAT WHERE THERE IS A CONTRACTUAL DISCIPLINARY PROCEDURE IN PLACE, THIS MUST BE COMPLIED WITH IN ADDITION TO THE ABOVE.

Capability or Qualification

Capability

For the purposes of a dismissal, 'capability' should be assessed by reference to an employee's skill, aptitude, health or any other physical or mental quality. The capability must relate to the work that the employee was employed to do (or a significant part of the job which he was employed to do).

In practice, capability dismissals fall into two main groups:

- Dismissal because of an employee's poor performance;
- Dismissal because of an employee's ill health.

Dismissals for these reasons are potentially fair, as they relate to the employee's capability to do the job that they were employed to do. In cases of dismissal for ill health, if the illness amounts to a disability under the Equality Act 2010, the dismissal may amount to unlawful disability discrimination under that Act, therefore it will be important to seek more detailed guidance prior to dismissing an employee on the grounds of capability.

Qualifications

A dismissal will relate to an employee's qualifications if it relates to any degree, diploma or other academic, technical or professional qualification relevant to the employee's position. This can include qualifications awarded by the employer.

Qualification dismissals usually arise:

- Soon after recruitment, where it emerges that the employee does not have the necessary qualifications;
- When the employee is employed on the understanding that they will obtain certain qualifications and they fail to do so;
- Where the employer's requirements change;
- Where the employee loses their qualifications during employment (most commonly, their driving licence).

For more guidance on dealing with capability dismissals, contact your Law At Work legal or HR advisor.

Right to be Accompanied

Employees have a statutory right to be accompanied by a colleague or an accredited union representative at:

- Formal disciplinary and appeal meetings;
- Formal grievance and appeal meetings;
- Any meeting that may result in dismissal including capability meetings;
- Meetings held in accordance with the right to request flexible working (colleague only).

Employees should be advised of the right to be accompanied in the letter inviting them to the meeting. Note that an employee's request to be accompanied does not have to be in writing.

Employees do not have the statutory right to be accompanied at redundancy consultation meetings, but this is good practice and recommended to demonstrate a fair procedure.

The Companion

It is important to check the employee's contract and any relevant policies/procedures because these may give an employee the right to be accompanied by persons other than a colleague or accredited trade union representative.

A Manager can use their discretion and does not have to restrict the employee to a colleague or accredited trade union representative. For example, a Manager may decide to allow an employee to be accompanied by a parent if they are young or vulnerable.

Colleagues do not have to agree to accompany an employee, and they should not be pressurised to do so. A colleague that has agreed to accompany an employee to their meeting is entitled to take a reasonable amount of paid time off work to fulfil that responsibility. This should cover the time spent at the meeting, but it is also good practice to allow them time to familiarise themselves with the case and confer with the employee before and after the meeting.

Employees may ask an official from any trade union, regardless of whether the union is recognised by the employer. However, where a union is recognised in a workplace, it is good practice for employees to ask an official from that union to accompany them.

A trade union official may be employed by a union or a lay trade union official, as long as they have been certified in writing by their union as having experience of or having received training in accompanying employees at meetings. Certification may be in the form of a card or letter which a Manager can request to see at the beginning of a meeting.

Applying The Right

An employee should tell the Manager that they intend to be accompanied at a meeting and provide details of who their companion will be. If the companion is unable to attend the meeting at the scheduled time, the employee can suggest an alternative time and date as long as it is reasonable and within 5 working days of the original date. In some circumstances it can be helpful for the companion and Manager to make contact before the meeting.

The companion can also confer with the employee during the hearing. It is good practice to allow the companion to participate as fully as possible in the hearing, including asking questions. The companion has no right to answer questions on the employee's behalf, to address the hearing if the employee does not wish it, or to prevent the employer from explaining their case.

Sanctions

Employees that are not advised of or given the right to be accompanied at meetings will be in a good position to assert that their dismissal was unfair. Employees whose employers fail to comply with a request to be accompanied and/or fail to rearrange a meeting so that a companion may attend may present a complaint to an Employment Tribunal. The tribunal may award up to 2 weeks' pay on these grounds. This could be increased if the employee also wins their unfair dismissal case.

Bullying & Harassment

Bullying and harassment are not in anyone's interest. It's not just the victim and perpetrator that are affected; in fact, it can impact upon an entire workforce resulting in a serious downturn in productivity.

Employees are increasingly aware of their rights in the workplace and tribunal claims based on bullying and harassment are particularly expensive.

If it appears that an employee is being harassed or bullied, action must be taken to stop this.

Definitions

The Equality Act 2010 makes harassment in the workplace unlawful. The Act defines harassment as:

"Unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual."

The Act does not specifically define bullying, but ACAS has stated that bullying is:

"Characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate, or injure the recipient."

Specific Policy

It is crucial to have a policy that specifically deals with bullying and harassment because:

- The implementation of a good bullying and harassment at work policy will help prevent these occurring in the first place;
- In the event of an employment tribunal claim, the fact that a policy has been implemented will place the employer in a much stronger position in terms of defending the claim. Demonstrating that a good policy has been implemented will demonstrate that all reasonable steps have been taken to prevent bullying and harassment in the workplace.

Having a policy in place is, of course, not enough on its own to ensure that an employer will avoid liability for claims of harassment. Generally, tribunals will examine whether such policies have management backing, whether they are supplemented by adequate training, and whether effective disciplinary procedures are in place to deal with offenders.

A policy can be a self-contained separate document, part of an equal opportunities policy, or be contained within a larger document such as a handbook.

All managers are responsible for preventing harassment at work, for setting a good example and for dealing promptly and sensitively with any complaints of bullying and harassment.

In Practice...

It is important to recognise that it is the recipient's view that is important in these cases, because what one person finds acceptable, another may not. Those who allege bullying and harassment should always be supported and given guidance in raising a grievance. Managers must ensure that the employee is not victimised for having made a complaint.

If there is a finding of bullying and harassment, it is crucial that Management takes formal action against the perpetrator. This will normally mean invoking the company disciplinary procedure. Due to the seriousness of the allegation, it may be necessary to treat the offence as gross misconduct. As with any disciplinary offence, it is important to follow the full disciplinary procedure.

No matter how serious an allegation appears to be, an employee still retains the right to be treated fairly and to be afforded the opportunity to explain their version of events. One of the key factors that an Employment Tribunal will take into account when hearing a complaint of unfair dismissal for alleged gross misconduct is the extent and thoroughness of the investigation into the alleged misconduct.

Family Friendly Rights

There are various family friendly rights that employers need to be aware of.

These include:
- Maternity
- Paternity
- Adoption
- Shared Parental Leave
- Parental Leave
- Flexible working
- Time off for dependants

Maternity Rights

The rules relating to pregnant employees are very complex and this section represents a general guide. Please don't hesitate to seek more detailed advice from your Law At Work legal or HR advisor.

Pregnant employees are entitled to a reasonable amount of paid time off work to attend antenatal appointments made on the advice of a registered medical practitioner, midwife, or health worker. An appointment card can be requested as evidence of appointments made.

The partner of a pregnant employee is also entitled to unpaid time off to attend two antenatal appointments with their partner.

1. Maternity Leave

Please note that eligibility for maternity leave and maternity pay are completely separate. All pregnant employees are entitled to maternity leave, regardless of how long they have been working or how much they are paid.

Entitlement is a total of 52 weeks leave, which is separated into 26 weeks of Ordinary Maternity Leave followed by 26 weeks of Additional Maternity Leave. Additional Maternity Leave begins on the day immediately following the day on which Ordinary Maternity Leave ends.

All terms and conditions of employment continue to operate during maternity leave, with the exception of remuneration. This means that those on maternity leave continue to accrue annual leave as if they are still at work.

By at least the 15th week before the expected date of childbirth, the employee must notify the employer of:
- Expected date of childbirth;
- The date on which they would like to start maternity leave;
- Provide medical evidence of pregnancy (MAT B1 certificate) if requested. The assumption is that employees will take their full entitlement of 52 weeks maternity leave. If they wish to return to work sooner, they must provide at least 8 weeks' notice of the intended return to work date.

2. Maternity Pay

Not all pregnant employees are entitled to maternity pay. In order to qualify for maternity pay, an employee must:

- Have been continuously employed for at least 26 weeks by the 15th week before the Expected Week of Childbirth (EWC);
- Have average weekly earnings of at least the figure set by the Government for the payment of National Insurance contributions;
- Still be pregnant on the 11th week before the EWC or have given birth by that time;
- Provide at least 28 days' notice that they intend to stop work and provide evidence of the EWC if requested.

The first 6 weeks of Statutory Maternity Pay is paid at the rate of 90% of normal earnings. The next 33 weeks are paid at the rate set by the Government. This rate is reviewed each year and an increase is normally applied each April. The remaining 13 weeks of maternity leave are unpaid.

If employees do not qualify for Statutory Maternity Pay they may be entitled to Maternity Allowance (MA) which is paid by the Department for Work and Pensions for up to 39 weeks.

3. Return to Work

An employee who returns to work during or at the end of ordinary maternity leave is entitled to return to the job she occupied immediately before her maternity leave began. That right prevails even if the employee takes up to four weeks parental leave immediately after her ordinary maternity leave.

An employee who takes additional maternity leave is entitled to return to work in the job in which she was employed before her absence began, with seniority, pension and other rights intact. If that is not reasonably practicable the employee is entitled to return to another job that is both suitable and appropriate for her to do in the circumstances. The terms and conditions of the new job must be no less favourable to her than those that would have prevailed but for her absence from work on maternity leave.

4. Keeping in Touch (KIT) Days

Those on maternity leave can work for up to 10 days during their leave period without it ending their maternity leave period. Work may include training, or any other activity undertaken to assist in keeping in touch with the workplace. KIT days do not extend the period of maternity leave.

Did you know...

You can refuse a flexible working request. There are a number of potentially lawful reasons to refuse a flexible working request and you should be able to demonstrate you have reasonably considered the request.

Paternity Rights

1. Paternity Leave

Paternity Leave is time off work given to eligible employees to allow them to support a new mother or care for a new-born child.

Eligible employees can take either one week or two weeks' leave (not odd days) if they:

- Have worked continuously for the employer for 26 weeks ending in the 15th week before the EWC or the end of the week which the child's adopter is notified as being matched with the child;
- Have given notice of the intention to take leave on or before the 15th week before the EWC specifying the EWC, length of period and date chosen to start the leave.

A partner is defined as a person, regardless of gender, who lives with the mother and child in an enduring family relationship.

2. Paternity Pay

In order to qualify for paternity pay the employee must have average weekly earnings of at least the figure set by the Government for the payment of National Insurance contributions.

Statutory Paternity Pay is paid at a rate set by the Government or 90% of average weekly earnings if this is less. This rate is reviewed each year and an increase is normally applied each April.

Adoption Leave

Adoption leave gives a statutory right to 26 weeks ordinary adoption leave and 26 weeks additional adoption leave, giving a total of 52 weeks leave. Leave may be taken by either parent.

Shared Parental Leave

Eligible employees are entitled to a maximum of 50 weeks leave and 37 weeks statutory pay upon the birth or adoption of a child, which can be shared between the parents. Shared Parental Pay (SPP) has specific eligibility requirements and is paid at the same rate as Statutory Maternity Pay.

Mothers must still take at least the first two weeks compulsory leave, following which they can choose to end the maternity leave and the parents can opt to share the remaining leave as shared parental leave.

Both parents must give their respective employers 8 weeks' notice to begin Shared Parental Leave (SPL) and claim Statutory Sick Pay (SPP). If they wish to take several blocks of leave, they must give their employers eight weeks' notice in respect of each period of leave. The eight weeks will include a 2-week discussion period between the employer and employee.

Employees must provide a non-binding indication of their expected pattern of leave when they notify their employer of their intention to take SPL.

Parents can take SPL at the same time as each other or separately. They are limited to make up to 3 requests to take leave or change their leave requests. However, employers are not obliged to agree to the SPL pattern proposed by their employees. The parents' respective employers do not need to contact each other to discuss their employees' leave entitlements. The default position where agreement cannot be reached is for a parent's portion of leave to be taken in one continuous block, to start on a date of their choice.

Each parent taking SPL is entitled to 20 KIT-style days, in addition to the entitlement to 10 KIT days during maternity/adoption leave (known as Shared Parental Leave 'in touch' (SPLIT) days).

An employee returning to work from SPL has the right to return to the same job no matter how many periods of shared parental leave they have taken, as long as they have taken 26 or fewer weeks leave in total. This 26-week total includes periods of maternity, adoption, paternity and shared parental leave. Once they have exceeded 26 weeks leave, they only have the right to return to the same or a similar job.

The scheme is complicated, and you can obtain further advice from Law At Work.

Parental Leave

Those who have been continuously employed for one year and have formal responsibility for a child may be entitled to take parental leave. This includes parents, adoptive parents, unmarried parents who have a formal agreement or court order, and guardians. Parental leave can be taken by either parent and is unpaid.

At least 21 days' notice should be provided of intention to take parental leave. Employers do have the right to postpone parental leave depending on the needs of the company (except where it is taken immediately after birth or adoption).

Parental leave may be taken as follows:

- Up to 18 weeks leave for each child, to be taken up until the child is 18;
- Leave must be taken in blocks of at least 1 week except where the child is disabled;
- Leave is limited to 4 weeks in each year for each child.

Flexible Working

This right aims to facilitate discussion and encourage both parties to consider flexible working in a reasonable manner.

The ACAS Code of Practice for Handling Requests to Work Flexibly sets out how to deal with requests.

Note that the legislation does not provide an automatic right to work flexibly as there may be circumstances where it is not possible to accommodate the desired work pattern.

There are various eligibility criteria for those wishing to make a request, including that they must have been continuously employed for 26 weeks at the date the application is made, and that they can only make one formal request per year.

An accepted application will mean a permanent change to terms and conditions of employment.

The legislation requires that all requests, including any appeals, must be considered and decided on within a period of three months from first receipt, unless it is agreed to extend this period with the employee.

Note that although the law only confers a right to request flexible working rather than to be automatically granted it, there are risks involved in not accommodating a request. For example, failing to have evidence to back up a decision to turn down a request for flexible working from a parent whose request was based on their need to care for a child may lead to the risk of a sex discrimination claim.

This is a brief guide to flexible working. Please contact Law At Work if you receive a request for flexible work.

Time Off For Dependants

There is a right to take a ‘reasonable’ amount of time off work to deal with emergencies involving dependants.

A dependant is defined as a husband, wife, child, parent, or someone who lives in the same household as the employee. Specifically excluded are those who live in the same household as an employee as a tenant, lodger or boarder. A dependant may also include someone who reasonably relies on the employee for assistance when that person is ill, injured or assaulted or to make arrangements when that person is ill or injured.

The entitlement is to a “reasonable” amount of time-off. It is intended to cover the time needed to deal with the immediate problem and to arrange alternative longer-term care where applicable.

The amount of time-off, which is reasonable, will vary according to the circumstances but in most cases time off should not exceed 1 or 2 days. There is no limit on the number of times an employee can be absent from work under this right.

For time-off to be "justifiable", the employee's presence or attendance must be crucial to resolving the problem or where the incident affects someone other than the employee to the welfare and/or recovery of that person.

Examples of situations where leave may be given are:

- To provide assistance when a dependant falls ill, gives birth, is injured or assaulted;
- To make arrangements for the provision of care for a dependant who is ill or injured;
- Upon the death of a dependant;
- Due to unexpected disruption or termination of the arrangements for the care of a dependant;
- To deal with an unexpected incident involving the employee's child during school hours.

Note that leave within this category is unpaid.

Did you know...

Employees on maternity leave are entitled to all normal employee benefits? This can include a company car and health insurance.

Agency Workers Regulations 2010

There are an estimated 1.3 million workers in the UK who are paid by agencies but work for the agencies' clients or other end users. The implementation of the Agency Workers Regulations 2010 represented a big shake up of rights of agency workers.

Summary of Rights

The regulations cover agency workers supplied by a temporary work agency to a hirer. This includes most agency workers that people refer to as 'temps'.

The regulations also cover agency workers supplied via intermediaries.

- All agency workers must be able to access the hirer's collective facilities and amenities, and have access to information about its job vacancies from the first day of their assignment;
- After a 12-week qualifying period, agency workers are entitled to the same 'basic working and employment conditions' that they would have been entitled to had they been recruited directly by the hirer;
- Should there be a breach of the Regulations, an agency worker has the right to bring a claim to an Employment Tribunal and be awarded compensation which is 'just and equitable' in the circumstances;
- The regulations don't cover the genuinely self-employed, individuals working through their own limited liability company, or individuals working on managed service contracts;
- Agency Workers (regardless of their employment status) will also be entitled to paid time off to attend ante-natal appointments during their working hours and unpaid time off to attend a partner's ante-natal appointment.

The Regulations are fairly complicated so if your business uses agency workers please contact Law At Work to discuss whether the workers may be covered by the Regulations.

Data Protection/GDPR

Data protection legislation regulates the way in which employees' personal data is held and used, both in paper or electronic form. In the UK the main sources of legislation governing this area is the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR).

Throughout employment and for as long as is necessary after the termination of employment, employers need to process data about employees for a range of purposes connected with their employment, including recruitment and termination of employment. Processing includes the collection, storage, retrieval, alteration, disclosure or destruction of data.

The kind of employee personal data that an employer will process includes:

- Any references obtained during recruitment;
- Details of terms of employment;
- Payroll details;
- Tax and national insurance information;
- Details of health and sickness absence records;
- Details of holiday records;
- Information about performance;
- Details of any disciplinary investigations and proceedings;
- Training records;
- Contact names and addresses;
- Correspondence with the employer; and
- Other information that employees have given the employer.

It is important that way in which this information is gathered, stored and used is consistent with the data protection principles contained in the DPA and GDPR. Employers must also tell employees (and prospective employees) what data they hold, why they hold it and how long it will be held for. This can be done through a Data Protection Policy in the Employee Handbook or a separate "Privacy Notice". Employees have various rights under the DPA and GDPR, including the right to access their personal data and to complain to the Information Commissioner's Office if their rights have been breached. Breach of data protection legislation can leave employers open to fines of up to 4% of annual worldwide turnover or €20 million, whichever is greater.

Bribery Act 2010

The Bribery Act 2010 covers all commercial organisations that are either registered in the UK or have operations in the UK. It is important to note that the Act has extraterritorial powers meaning that it covers the bribing of foreign officials.

Offences

The Act introduced two new types of offences - active bribery and passive bribery. This covers the giving and receiving of bribes. It is also an offence if a business fails to take adequate measures to prevent bribery.

The Act does not rule out genuine business expenditures such as promotional goods or corporate hospitality. However, the introduction of the Act does mean that it is important to keep good records of such expenditure and evidence that it was proportionate and reasonable in the circumstances.

Financial penalties for a breach of the Act are unlimited and can include up to 10 years imprisonment.

Defence

Businesses will be able to defend themselves against sanctions if they can demonstrate that it has ‘adequate procedures’ in place designed to prevent bribery. It’s therefore crucial that businesses can demonstrate that steps have been taken to prevent bribery. Implementing an anti-bribery policy will go some way towards showing that steps have been taken. Policies relating to gifts, hospitality and expenses should also be checked.

TUPE

TUPE refers to the "Transfer of Undertakings (Protection of Employment) Regulations 2006" as amended by the "Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014".

The TUPE rules apply to organisations of all sizes and protect employees' rights when the organisation or service they work for transfers to a new employer.

TUPE impacts both the employer who is making the transfer (also known as the **outgoing employer** or the **transferor**) and the employer who is taking on the transfer (also known as the **incoming employer**, the 'new employer' or the **transferee**).

TUPE is a specialised area of employment law and there is not sufficient room in this guide to cover its intricacies.

If you think that your business or your employees may be affected by a transfer under the TUPE regulations, please get in touch with the Law At Work support team as early as possible to avoid any expensive errors.

Minimum Wage

National Minimum Wage and National Living Wage

Workers must be at least school leaving age to get the National Minimum Wage. Different rates apply for 16-17-year olds, 18-20-year olds and 21-24-year olds and for apprentices. Contracts for payments below the minimum wage are not legally binding.

National Living Wage

The National Living Wage was implemented in April 2016. The wage applies to those aged 25 and over. The National Living Wage is legally enforceable in the same way as the NMW for other age brackets. This is different from the Living Wage set by the Living Wage Foundation which is voluntary and based on the basic cost of living.

Rate Changes

The National Minimum Wage and National Living Wage rates are set in October of each year and come into force the following April.

Non-Payment of the NMW or NLW

It is against the law for employers to pay workers less than the NMW or NLW, or to falsify payment records. If HMRC find that an employer hasn't paid at least the NMW, they can send a notice of arrears plus a penalty for not paying the correct rate of pay to the worker.

The maximum fine for non-payment will be £20,000 per worker. However, employers who fail to pay will be banned from being a company director for up to 15 years.

How to determine whether the NMW has been paid

The NMW regulations require that NMW is paid on average across all hours worked. The NMW calculation divides the pay over the pay reference period by the number of hours worked in that period. In order to calculate the number of hours worked, it is necessary to understand what is considered working time under the NMW regulations. Law At Work can advise on what types of work count as working time for these purposes.

National Minimum Wage and Salary Deductions

Where an employer makes a deduction to salary, this cannot reduce normal pay below the NMW, even if the employee agrees to it, except in limited circumstances. This also applies to salary sacrifice schemes, so you should put in place procedures to cap salary sacrifice deduction and ensure that NMW and NLW rates are maintained.

Work Experience Placements

Employers may wish to provide work experience or internships to students but must consider whether they might be entitled to NMW. Where the placement is for less than one year and is part of a student's higher education or further education course it is automatically exempt from NMW regulations.

Where the higher education exemption does not apply, the student's entitlement to the minimum wage will depend on whether the work experience offered makes the individual a worker for minimum wage purposes. Someone who is doing a placement that does not involve any work being performed, such as shadowing, does not fall under the National Minimum Wage legislation and therefore is not entitled to be paid the minimum wage.

If you want the individual to be able to carry out work rather than just observing, then you will need to consider whether they are doing a placement on a voluntary basis as volunteers are not considered workers for minimum wage purposes. If none of these exemptions apply, the individual on placement should receive NMW.

Unpaid Trial Shifts

Current legislation does not define a trial work period or state whether NMW or NLW should be paid for this. Factors that may be taken into account when considering whether to pay a trial shift include whether it is part of a genuine recruitment exercise, whether the length exceeds what would be considered reasonable to determine the individual's ability and whether the tasks relate to the job offered.

Redundancies

Did you know...

You can make a pregnant employee/ employee who is on Maternity leave redundant. However, they do have extra protection and you need to be mindful of potential discrimination risks, therefore you'd be wise to get advice in such circumstances.

A dismissal on the grounds of redundancy is a potentially fair reason for dismissal. However, the dismissal itself (and the procedures leading up to it) must be fair and reasonable in all the circumstances.

What is redundancy?

A redundancy is where there is no longer a requirement for work of a particular kind. It is not to be confused with performance issues since it is the role that is redundant, not the employee.

Redundancy is normally due to:

- The actual or intended closure of a business;
- The actual or intended closure of a business at a particular workplace;
- A reduction in the need for employees to carry out work of a particular kind.

The procedure

An employer must be able to demonstrate that the procedure has been fair and reasonable in the circumstances.

The circumstances will obviously vary in each case but in all cases, it is essential to ensure that:

- Employees have been given as much advanced warning as is practicable;
- The employees concerned have been consulted individually;
- The selection for redundancy has been made against a set of fair and objective criteria;
- Alternative employment has been offered if possible.

Selection

Where there is more than one employee carrying out work of a particular kind that has either diminished or reduced, it's essential to demonstrate that employees have been selected for redundancy on a fair basis. For example, there may be 5 employees carrying out admin work but only a requirement for 3 moving forward. All 5 will need to be placed in a 'selection' pool and selection criteria used to decide which 3 will be placed at risk of redundancy.

If there is no record of fair selection, this will lead to a risk of an unfair dismissal claim.

This means keeping a good paper record showing the criteria used for selecting an employee. A point scoring method is commonly used. Criteria may include performance, capability, conduct, attendance (excluding pregnancy, parental, paternity and/or disability related absences) skills and timekeeping.

The information must be capable of independent verification e.g. attendance records, disciplinary records, appraisal records etc. Criteria based on opinion are unlikely to be considered as fair and objective.

The criteria must not be discriminatory. For example, performance indicators must take into account part-time employees who may not produce the same volume of work as full-timers.

The selection criteria should be shared with all employees who are at risk of redundancy, preferably at the first consultation meeting.

Consultation

Regardless of the number of redundancies to be made, each employee at risk of redundancy must be consulted individually. At the consultation meetings the reasons for the redundancy should be discussed, possibilities for alternative work should be considered, and suggestions on how to avoid the redundancies completely must be explored. Each individual must be made aware of why they have been selected for redundancy.

An example consultation schedule:

- Place the employee 'at risk' of redundancy. This means meeting with the employee to inform them that the position is at risk of redundancy;
- The employee should be made aware that no final decision has been made and they will be consulted with at the earliest opportunity to seek views and ideas. Explain the reason for the redundancy situation. Confirm that they can make suggestions on alternatives to redundancy;
- Write to the employee confirming they are at risk and inviting them to the first consultation meeting;
- At the next meeting (the first consultation meeting), the employee needs to be given the opportunity to ask any questions and make suggestions about how the role could be preserved. Any alternative vacancy should also be discussed;
- At the next meeting (the second consultation meeting), give feedback on any suggestions proposed and answer any questions that the employee has about any alternative role.

Did you know...

Where it is proposed that 20 or more employees be made redundant within 90 days or less, there is a statutory obligation to consult with representatives of the employees and notify the Department for Business, Energy and Industrial Strategy. This is known as collective consultation.

Certain minimum time periods apply depending on the scale of the redundancies proposed. Where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect. For less than 100 redundancies, the consultation period is 30 days.

Note that the number of consultation meetings is not fixed. It may be necessary to have more if there are questions from the employee or ongoing discussions about alternatives to redundancy.

Alternatives

It is important to consider all potential alternatives to redundancy. It may be possible to reduce or avoid redundancies by reducing overtime, altering shift patterns, instigating short-time working or layoffs, offering alternative employment, or inviting volunteers. It is very common for these options to be discussed during the consultation stage. Any of these options can be agreed upon right up until notice of dismissal expires so it's crucial not to rule them out too early.

Alternative Employment

A Tribunal will consider whether there were any vacancies within the business or an associated business during the entire process. This includes during the notice period. If there are vacancies, the employee should be made aware of, and how to apply for them. It is important not to rule out vacancies for which the employee may require some training, or those that are very different in terms of status, pay or tasks from their existing role.

If an employee unreasonably refuses an offer of suitable alternative employment they will lose their entitlement to statutory redundancy pay. However, the offer must be suitable and the employee's refusal unreasonable for this to apply.

Note that an employee on maternity leave must be offered suitable alternative employment in preference to other employees where there are a limited number of vacancies available.

In the event that an employee is redundant from their existing role but opts to accept an alternative role within the business, they have the right to a 4-week trial period in their new role. During the trial period, the employee can decide against continuing with the role, and can request a redundancy payment instead.

The Dismissal

If consultation has been completed and there are no outstanding points, the next stage is to carry out the dismissal.

Invite the employee to a meeting at least 24 hours beforehand. Ensure that the invite letter advises the employee of the right to be accompanied by a work colleague or trade union representative, warns that the potential outcome of the meeting is termination of their employment, and provide any relevant paperwork (this can include redundancy payment and notice details).

During the meeting the reasons for the redundancy situation, the selection criteria, and consultation discussions should be summarized. The employee can use this opportunity to ask questions about any of these issues, as well as their notice period and redundancy.

Payment Entitlement

The employee will be entitled to notice as per the contract (this must be a minimum of 1 week for each completed year of service at normal weekly earnings). The employee will also be entitled to holiday pay accrued up to the end of the notice period. If the employee is required to work the notice period, they will be entitled to reasonable time off with pay to attend for interviews or to help secure another position. If the employee has more than 2 years' service they are entitled to a statutory redundancy payment.

The employee should be advised of the right to appeal the decision and they should be sent a letter confirming the details of the dismissal and right of appeal.

At all the meetings, full minutes must be taken for records – a third person should normally be present to do this. The time and dates arranged should be confirmed in writing.

Redundancy Pay

An employee is entitled to a statutory redundancy payment if they have been employed continuously for 2 years.

A statutory redundancy payment is calculated with reference to age, length of service, and the statutory weekly maximum.

It is based on a sliding scale dependant on each completed year of service and age:

- Up to the age of 21, an employee will receive half a week's pay per year of service;
- From the age of 22 up to 40, they will receive one week's pay per year of service;
- From the age of 41 and over, an employee will receive one and a half week's pay for each year of service.

The statutory limit for weekly pay is capped by the Government and normally increases each year on 5th April.

Retirement

Did you know...

Job application forms should not require applicants to state their age?

An employee can retire at a time of their choosing. There is no longer a fixed retirement age for employees.

An employee or employer may want to discuss plans for the future. There is no obligation for employers to hold discussions about an employee's future plans, but it may be mutually beneficial to do so. For example, this could be incorporated into an annual appraisal system.

During any workplace discussion it's important there is no assumption that the employee will want to retire at a certain age, and that no suggestions are made that they should consider retirement.

Employees must not be discriminated against or pressurised into retirement just because they are of a certain age.

Notice of Retirement

If an employee wants to retire they should ideally give the business as much notice as possible, but it should not be less than the notice period stipulated in the contract of employment. An employee is free to change their mind about retirement up until they have actually given notice to terminate their employment.

Employer Justified Retirement Age (EJRA)

It is possible to have an EJRA which sets the age at which employees must retire, but only if the set retirement age is a proportionate means of achieving a legitimate aim. This is a difficult test to satisfy. Examples of posts which have an EJRA include some emergency services roles which require a certain level of physical fitness. Advice from the Law At Work team must always be sought prior to considering an EJRA.

Notice Periods

The giving of notice by either party will normally signal the end of an employment relationship. The notice period that each party is obliged to provide will be dependent on statutory notice periods (i.e. stated in legislation) or contractual notice periods. The statutory notice periods are the minimum, so contractual notice periods will only apply if they are more favourable to the employee.

Statutory Notice Periods

The minimum notice to be given by an employer is as follows:

- Up to one month's service – nil;
- After 1 month's service but less than 2 years' service – 1 week;
- On completion of 2 years' service and beyond – 1 week for each completed year of service up a maximum of 12 weeks.

The minimum amount of notice that should be given by an employee is:

- After 1 month's service – 1 week.

Note that these are minimum notice periods. They can be longer if both parties agree. Ideally, longer notice periods should be agreed in advance and incorporated into the contract of employment.

Payment During Notice

An employee that continues to work during their notice period is entitled to be paid their normal pay and benefits. This includes any pay rises awarded during that time.

In the event that an employee opts not to work during their notice period, they should be paid up until their last day of work. However, note that this must be the employee's own decision.

Payment in Lieu Of Notice (PILON)

In some circumstances a business may prefer an employee not to work their notice period.

In this case, it may be best to make a PILON. This means that the employee does not need to work but will be paid a lump sum representing what they would have been paid if they had worked during their notice period. This sum will need to include all pay, bonuses, holidays and any other benefits that would have been accrued during the notice period. This will have the effect of bringing forward their termination date.

Note that there must be a clause in the contract of employment permitting a PILON payment, or the employee must agree to it.

Garden Leave

An alternative is to place the employee on what is known as garden leave. There must be a clause in the contract of employment stipulating that the employee can be placed on garden leave, or the employee must agree to it. Garden leave means that employment continues during the notice period, that the employee does not have to work, but that the employee cannot begin employment elsewhere without permission. All terms and conditions of employment will continue to operate meaning that the employee remains bound by the implied duty of fidelity and cannot disclose trade secrets or confidential information. The employee must continue to be paid their salary and given all normal employee benefits during the garden leave period.

No Notice?

The exception to all of the above is where the employee is dismissed for a gross misconduct offence. In this case, there is no obligation to give the employee any notice of termination. However, the full disciplinary procedure should always be followed prior to any termination. Please refer to the section relating to the disciplinary procedure for further information on this.

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