NEATHOUSE PARTNERS

Employment Law and HR Guide

for Business Managers

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1. Introduction to Employment Law

This Manual is designed to assist Managers in handling employee issues effectively.

Employment legislation is vast and complex, and there is an endless list of Claims that employees can make against the Company. Managers, therefore, need to ensure that they are following the procedures that are set out in this Manual when dealing with any employee issues that arise.

Guidance from HR should also be sought when handling any such issues, but in any event, always follows some 'golden' HR rules:

1. Deal with everyone you come into contact with fairly and equally;
2. Always ensure that you fill in the gaps when using template letters!
3. Ensure everything is accurate and that you use the exact words used; do not re-word from the original meeting/investigation because you consider, for example, the grammar to be incorrect;
4. You **MUST** always print the letter on headed paper or insert the proper Company logo;
5. You must always sign it or get it 'pp'd' for you;
6. Always take time to make your decision; do not rush;
7. Use adjournments;
8. Get someone else to 'sanity' check your final letter;
9. **ALWAYS** refer to HR before dismissing anybody; and
10. **ALWAYS** ask if you are unsure of anything.


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2. Overview of Employment Tribunals and Potential Claims

2.1. Background

Employment Tribunals (known until 1998 as 'Industrial Tribunals') are the principal forum for adjudicating disputes between employees and employers.

Tribunals are drawn from 3 panels:

1. Judges who are appointed by the Lord Chancellor and must have a seven-year legal qualification;
2. Persons appointed by the Secretary of State for Trade and Industry after consulting organisations representative of employees (often Trade Union Officials); and
3. Persons appointed after consultation with organisations representative of employers.

The majority of Tribunal Hearings will be heard by a panel of three composed of these categories of people. Occasionally, cases can be heard by a Judge sitting alone.

2.2. Commencing Proceedings

A person who wishes to bring a claim ('The Claimant') commences proceedings by issuing a Claim Form (ET1) to the appropriate Regional Office. The Regional Office is determined by the postcode of the employee's place of work.

It should be noted that in order to qualify to bring a Claim, an employee must have been employed by the Company for two continuous years. This does not apply to claims of discrimination or breach of contract claims. If dismissing an employee who does not have two years continuous service, there is more leeway to deal with the dismissal, but caution should always be taken if any potential discrimination factors are present (for a full list of potential discrimination factors, see 8.1).

All Claims presented to an Employment Tribunal must be presented within a certain time, which varies according to the particular Claim. The most common time limit is that for unfair dismissal, which must be presented within 3 months (less one day) of the date of the dismissal (the 'effective date of termination' or 'EDT').

Once the Tribunal receives the Claim, they will register the Claim and forward a copy of the Claim Form to the Respondent, along with form ET3 (Response to Claim Form) which the employer must complete, setting out their defence, within 28 days of the date the Claim was sent to the employer.

It should be noted that this time limit is quite stringent, and if the limitation period is missed, then the employer (or Respondent at this point) may be prevented from defending the Claim.

It is imperative that as soon as a Claim is received, it is sent on to the HR Department. Managers should also collate all paperwork relatingto the particular employee and the Claim and send to the HR Department with the Claim Form.

2.3. Tribunal Hearings

While the initial intention was that Employment Tribunals be fairly informal, these days they are much more formal, and Managers should be aware of this when dealing with employee issues.

In the event of a Claim resulting from Management actions, Manager's should be aware that they will be required to attend the Hearing and give evidence on behalf of the Company. It is imperative therefore those Managers are confident in decisions they make, and that they are also certain that they have followed a fair procedure, as you will be required to justify your actions at the Hearing.

3. Potentially Fair Reasons for Dismissal, and Handling Disciplinary and Grievance Issues

The first test that will be applied by a Tribunal when hearing a Claim will be whether there was a potentially fair reason for the dismissal. The burden of proving that there was a potentially fair reason lies with the Employer.

Managers should, therefore, ensure that when dismissing an employee that the reason for the dismissal falls within one of the following categories.

1. Conduct;
2. Performance;
3. Capability;
4. Redundancy; or
5. Some Other Substantial Reason.

There is scope to deviate from a full and legally fair process if the employee in question is under two years' service; however there could be other legal risks, and so you should take advice from HR before proceeding with a dismissal.

It should also be noted that there are some specified reasons which are automatically unfair reasons for dismissal and therefore dismissal should never be considered on the basis of any of these reasons, namely:

1. Trade Union membership, participation or non-union membership;
2. Health and safety related issues;
3. Asserting a statutory right;
4. Family-related dismissals;
5. Shop Workers and betting workers who refuse Sunday working;
6. Working time cases;

7. Unfair selection for redundancy if the selection was made on any of the grounds that would render a dismissal automatically unfair;
8. Dismissals on a transfer of undertaking;
9. Spent convictions;
10. National Minimum Wage cases;
11. Public Interest Disclosure cases (whistleblowing);
12. Dismissals connected with union recognition;
13. Right to be accompanied at disciplinary and grievance hearings;
14. Protected industrial action;
15. Dismissals for asserting the rights of part-time workers; and
16. Dismissals for asserting the right to request flexible working.

If a Manager is unsure as to whether any of these reasons would apply, they should refer to the HR Department for further guidance.

Once you have identified a potentially fair reason for dismissal, you must then ensure that a full and fair procedure is followed. The Tribunal will not only look at the reason for the dismissal, but whether the employer acted fairly in carrying out that dismissal. When making their decision, the Tribunal will also consider whether the dismissal was fair or unfair in all the circumstances of the case taking into account 'the size and administrative resources of the Company. It, therefore, stands to reason that larger companies have a higher burden to reach than small to medium enterprises.

When deciding whether the decision to dismiss was reasonable, the Tribunal apply a 'band of reasonable responses test'. They will, therefore, consider whether the dismissal was a reasonable decision in the particular circumstances.

3.1. Conduct

In order to warrant dismissal, conduct must be extremely serious (referred to as gross misconduct) or if not extremely serious, then repeated on more than one occasion.

While it is impossible to define each and every example of gross misconduct, in order to justify summary (immediate) dismissal, the offence must be so serious that the employer loses all trust and confidence in the employee in question. A non-exhaustive list of actions that may constitute gross misconduct are set out in the Company Staff Manual.

3.1.1. Handling Misconduct Issues

The Company's Disciplinary Procedure should be set out in the Company Employee Handbook. This section is intended to provide Manager's with the practical knowledge and tools to carry out a reasonable and fair dismissal in line with current Codes of Practice and therefore protecting the Company in the event that a Claim is made.

3.1.2. Investigations and Disciplinary Hearings

Where an employee has committed an offence of misconduct, Manager's should in the first instance determine whether the offence is potentially so serious that it warrants a suspension.

If a suspension is deemed necessary, the employee should be informed that they are suspended on full pay and that they should not attend their normal workplace or contact any colleagues until the period of suspension is over. A letter confirming the reason for the suspension should be sent out to the employee.

Once this initial decision has been taken, the Manager should conduct a full and thorough investigation. The extent of the investigation will depend on the particular case, but generally, the following steps should be taken:

1. An investigatory manager should be appointed (this will often be the Manager who has discovered the misconduct);
2. Statement to be made by the Manager that has discovered the misconduct;
3. Statements should be taken by any potential witnesses to the misconduct;
4. Any other relevant evidence should be produced (so for example, if the misconduct was a clocking offence, clocking records should be printed).

It is essential that all the investigation notes, statements or evidence are thorough and leave no stone unturned.

Once the investigation is complete, the investigating officer should determine whether there is a case to answer and therefore whether formal disciplinary action should be taken. A report should be compiled and then passed to another Manager.

It is important that once the investigation is complete, the investigatory officer has no further involvement in the disciplinary process. This will show to the Tribunal that the process has been conducted impartially and no influence has been made on the person making the ultimate decision.

The disciplinary officer should then consider the investigatory report and consider whether, on balance, formal disciplinary action should be taken. They should not form a decision as to the outcome at this stage. While the Manager can (and should) consider the possible outcome if the allegations are proven, no firm determination should be made as yet as this can potentially render the dismissal unfair.

If the Manager considers that a disciplinary hearing should be convened, they should write to the employee and invite them to attend a disciplinary hearing:

1. The employee should be given at least 48 hours' notice of the meeting. This is not a set timeline, and reasonable notice should be given of the hearing. So for example, if there has been an extensive investigation that has generated a great deal of paperwork, then longer notice should be given.
2. Set out the allegations fully. The employee must be made aware of the allegations that are made against them in order that they can prepare their defence to the allegations properly.
3. Enclose a copy of all of the evidence collated in the course of the investigation, again, so the employee is made aware of the case they have to answer. Any evidence not included cannot be relied on to draw conclusions at a later date, and to do so would undermine the fairness of the decision.
4. Inform them that they have the right to be accompanied by a work colleague or accredited trade union representative.
5. Inform them of the possible outcome of the meeting should the allegations be proven.

At the disciplinary hearing, the disciplining officer should have someone accompany them to take minutes of the meeting. This person should have no input into the meeting but is there purely to minute the discussions.

It is usual and preferable to take written minutes of the disciplinary meeting. A recording can be made of the disciplinary meeting (for example in the eventuality that no one is available to take notes, or the meeting content is vast and therefore minuting this would be problematic), however you will need to seek consent from the employee before doing so. If doing so remember that this will be an exact reflection of the meeting, and will record the tone of the meeting, so should the meeting become heated for any reason, this will reflect on the recording. There would also be a requirement to make a transcript of this recording to continue the process and if this matter was to progress to a tribunal, a Tribunal would not accept the recording in evidence, and would require a transcript in any event.

Minutes should be taken in a 'script like format'.

At the outset of the meeting, the disciplining officer should:

1. Ensure that the employee is aware of their right to be accompanied (if they have nobody with them, check they do not require a colleague to attend with them. If they request a colleague, then every effort should be made to get the colleague to the meeting).
2. Set out everybody's roles; chair of the disciplinary, minute taker, the role of the employee's witness (i.e. they can make representations on behalf of the employee, but they cannot answer questions for the employee).
3. Check that the employee received the formal disciplinary invite and that they are aware of why the meeting has been called (i.e. that they understand the allegations).
4. Once these formalities are dealt with, move on to the allegations. Run through each allegation in turn; put the allegation to the employee, and give them the opportunity to respond to that allegation.
5. Once you have gone through all of the allegations, inform the employee that you will not be making an immediate decision. Inform them that you will go away and consider everything and you will then confirm your decision in writing to them.
6. If the employee has been suspended, inform them that they will remain suspended until you have reached your decision.

Following the meeting, the disciplining Manager should consider all the evidence and whether the employee's responses to the allegations were adequate. The Manager should then make a decision as to the outcome.

3.1.3. Potential Outcomes

a) Verbal Warning

This is the lowest level of formal warning that can be given, and should only be considered where the misconduct is so minimal that it does not warrant a higher sanction. Even though this is known as a 'verbal warning' this should still be confirmed in writing to the employee which would take the form of what is known as a letter of concern. This is not a formal disciplinary sanction, but is just a note of the Manager's concern at the employees' actions. This should only be considered if the misconduct is either minimal or perhaps accidental.

b) First Written Warning

The Company Disciplinary Procedure does permit Manager's to 'skip' a level of warning if the actions of the employee warrant it. So, if the conduct was serious enough, the Manager could issue a first written warning immediately.

c) Final Written warning

Again, the Company Disciplinary Procedure does permit skipping stages if the action is so serious as to warrant a higher level of warning. A final written warning can be considered where for example, the conduct complained of is potentially considered to be gross misconduct, but the Manager is not inclined to dismiss, perhaps because the employee has a long-standing clean disciplinary record with the Company.

d) Dismissal

This should only be considered where the conduct is considered to be gross misconduct, or where the employee is already subject to a final written warning which is still live on their record.

When considering which is the appropriate sanction, the Manager should always bear in mind the 'band of reasonable responses' test; that is, would a reasonable employer reach that decision based on the evidence before them.

3.2. Performance

In situations where employees are not performing their duties to the standard required by the Company, it is essential in the first instance to determine whether it is a performance issue or a conduct issue as the two are often closely linked. The most effective way to determine the reason for the issue is whether the employee won't do (so, they are aware of what they are supposed to do and the standards they have to meet, but they simply cannot be bothered, in which case, this is a conduct issue and should be dealt with as in the previous section) or they can't do, that is, they do not know how to carry out their duties, or additional training is required.

As with conduct dismissals, an employee must have two years continuous service to bring a complaint of unfair dismissal in the Employment Tribunal, so for those employees that have less than this length of service, a shortened process can be considered. Reference should always be made to the HR Department when dismissal is being contemplated however regardless of an employee's length of service.

In these types of cases, a Tribunal would look to the Company to show:

1. What was required of the employee;
2. That the employee was informed about what was required of them;
3. That the employee was aware of what was required of them;
4. That they were given adequate warnings regarding their performance and that following each warning, they were given the appropriate level of training / support to enable them to achieve those standards; and
5. Despite all of the above, the employee still fell short of the standards required by them.

3.2.1. Performance Management

In the first instance, Managers should ensure that all employees are given appropriate training when they take a new role within the Company. Whatever the form of the training, there should always be a written record, whether that be a checklist or a simple acknowledgement from the employee that they have received training. Without this evidence, then it is almost impossible to embark on a performance management plan with an employee as there is no proof that they even know what is required of them.

Training should also be given on an ongoing basis commensurate with the role involved, and again records should be kept when training is carried out.

All training records should be kept in each employee's personnel file both on site, and a copy should also be sent to the HR Department.

If an employee's performance is falling short in any aspect, Managers should always try and ascertain in the first instance whether they can deal with the matter informally. If this is possible, then the Manager should do so. Even though no formal sanction would be given in this instance, a note should be made on the employee's personnel file that informal action has been taken, and what action has been taken. If preferred, an informal letter of concern can be issued to the employee setting out what is required of them.

3.2.2 Investigations and Capability/Performance Management Hearings

In the event that it is not possible to manage the employee's performance informally, then the Manager should consider starting formal performance management proceedings.

If embarking on this procedure, the Manager should follow the Company Poor Performance Capability Procedure, namely:

1. Conduct an investigation where possible and evidence any issues where performance has fallen below standard;
2. If an investigation has been undertaken, then the investigating manager should ask a different Manager to carry out the formal performance capability hearing; and
3. Invite the employee to attend a meeting, giving at least 48 hour's notice of the meeting (more if a dismissal is being considered) giving the right to be accompanied.

The letter should set out:

1. The respects in which the employee falls short of the required standards noting whether formal training has been given in this respect; and
2. Set out the possible outcome of the meeting, which could be a first improvement notice, a final improvement notice or dismissal.

It is rare that dismissal should be considered in the first instance in cases of poor performance. The only possible scenario where dismissal should be considered in the first instance is where the employee's actions are potentially negligent and have had serious consequences. In this instance, dismissal should be considered either under the Conduct Procedure or dismissal for Some Other Substantial Reason.

Once the meeting has been held (in accordance with the Company's Poor Performance Capability Procedure), the Manager should issue the employee (usually) in the first instance with a first improvement notice, then a final improvement notice, then dismissal. This notice is similar to the format of a written warning issued in misconduct cases but must include:

1. The respects in which the employee's performance has fallen below standard;
2. The time within which his performance is expected to improve;
3. Whether any additional training/support etc. will be given to help the employee achieve the standards required and how this will be provided; and
4. The fact that if he still fails to improve within that timeframe, he will receive a final improvement notice, and thereafter dismissal.

Prior to dismissing an employee on the grounds of poor performance (having gone through the improvement notice system), the Manager should also take into consideration whether or not there are any alternative roles which would be more suited to the employee instead of terminating their contract.

As with other disciplinary procedures, the employee should always be given the right to appeal against any decision.

3.3. Ill Health Capability

Capability dismissals can mean capability assessed by reference to skill, aptitude, health or any other physical or mental quality. In practice, however, the main reason for a capability dismissal will be on the grounds of ill health.

Dismissals on the grounds of ill health capability are applicable to both long-term absences and persistent short-term absences. However, Managers need to be aware with capability dismissals (particularly in the case of long-term health issues) that the employee may attract additional protection against dismissal by virtue of the disability discrimination provisions as set out in the Equality Act.

3.3.1. Handling Capability Issues

Before dismissing an employee on the grounds of ill health, Manager's should always determine what the current medical position is. This will involve obtaining medical reports, either via the employee's general practitioner or consultant, or through an occupational health assessment. For further guidance as to which route is more appropriate, Managers should speak with HR.

Once this evidence has been gathered (the procedure is set out more fully below), Managers should consider the prognosis, including whether the employee is likely to be able to return to work in the foreseeable future, and then consider the requirements of the business, the employee's past sickness record and whether the employee could be offered an alternative position more suitable to his state of health. It is not considered unreasonable to offer the employee a lower paid job role if this is the only alternative available.

In the case of persistent short-term absences, there is no requirement to obtain medical evidence, as this would serve little purpose. In this instance, a simple disciplinary hearing should be convened, and the employee should be informed of the levels of attendance that are required of them. A formal warning should then be given, and the employee should be given time to improve. If the attendance does not improve, then Manager's should take the employee through the formal written warnings, until they reach the point of dismissal.

3.3.2. Gathering Evidence and Capability Hearings

Before considering dismissal on the grounds of long-term ill health capability, medical evidence should be obtained from the employee's GP or consultant. In the first instance, a letter should be sent to the employee explaining that you wish to contact their medical professional, and asking them to sign a consent form.

Once you have the consent form back to the employee, a letter should be sent to their doctor to determine:

1. The prognosis;
2. Whether the employee is likely to be able to return to work in the foreseeable future, and if so, when;
3. Whether the employee will be able to return to their current role;
4. Whether in the opinion of the medical professional, the employee meets the definition of 'disabled' as set out in the Equality Act;
5. If so, whether there are any reasonable adjustments that can be made in order to facilitate a return to work.

Once in receipt of this evidence, a formal capability invite should be sent to the employee, giving the usual right to be accompanied by a work colleague or trade union representative. The employee should, where appropriate be informed that one of the potential outcomes of the meeting could be the termination of their employment. A copy of all the medical evidence to be discussed should be included with the invite letter.

At the meeting, Managers should inquire as to the employee's perception of whether they feel that they will be able to return to work in the foreseeable future, and then discuss the contents of the medical report with them.

It is also important to discuss with the employee whether there are any alternative roles that they feel that they would be able to undertake at that time, or in the foreseeable future, and then the Manager must consider whether they can accommodate such a request.

It is notable that when considering whether a dismissal on the grounds of ill health is fair or unfair, a tribunal is not concerned with whether the ill health was caused by actions of the employer, i.e. an accident at work.

In the event that the medical evidence received from the employee's own doctor is inadequate to enable the Manager to make a decision with regard to whether employment should be terminated, an occupational health assessment should be arranged. Guidance should be sought from HR to determine whether an occupational health assessment is appropriate in each case.

Once the meeting has been concluded, the Manager should consider all the evidence available to them, and also make enquiries about alternative positions where appropriate. Once everything has been considered, and a decision has been made, the Manager should confirm their decision in writing to the employee giving them the usual right of appeal. If the contract is to be terminated, then this should be with notice.

3.4. Redundancy

An employee is potentially redundant if:

- you stop (or intend to stop) carrying on business for the purpose for which that employee is employed by you; or
- you stop (or intend to stop) carrying on business at a place where the employee is employed; or
- your requirement for employees to carry out the type of work carried out by the employee either ceases or diminishes; or
- your requirement for employees to carry out the type of work carried on by that employee at the place where he is employed either ceases or diminishes.

If the circumstances do not fit the above definition, then the employee is not redundant.

3.4.1. Handling Redundancies

If an employee makes a claim for unfair dismissal against you, in order to successfully defend that claim you will have to show:

- redundancy was the reason for dismissal; and
- that you followed a fair procedure prior to dismissal.

It is therefore essential that in any redundancy situation you pay great attention to the procedure you adopt and ensure that it is fair and reasonable.

If the procedure adopted in making an employee redundant is deemed to be unfair, then this will render the dismissal as being held to be unfair.

The procedure that you must adopt depends upon whether you are dismissing or proposing to dismiss less than 20 employees by reason of redundancy or 20 or more employees.

3.4.2. Dismissing Less Than 20 Employees

If you are dismissing less than 20 employees by reason of redundancy then the essential ingredients of a fair redundancy procedure are as follows:

- As soon as you contemplate the possibility of redundancy dismissals, if you recognise a trade union, you must warn it about that possibility and discuss the matter with trade union representatives.

- You should hold a group meeting with all affected employees (and their union representatives, if any), warning about the **possibility** of redundancy. At the meeting, it is important to emphasise that redundancy is only a **possibility** at this stage and you must **not** be seen to have in any way pre-determined the outcome before you have completed the consultation procedure. You should tell the employees that you will consider all possible alternatives to redundancy, e.g. short time working, work sharing, employment elsewhere within the Company or Group, and asking for volunteers for redundancy prior to making any final decision as to compulsory redundancies.

- You should also tell the employees what objective selection criteria you intend using, who will carry out the selection, should it become necessary to choose whom to make redundant, and on what date the selection will be carried out. You should consider agreeing on the criteria with any union representatives, if there are any.

- You should tell the employees that all employees who are selected for redundancy will be consulted individually about the redundancy and ways of either avoiding them completely, or minimising the need for them. Advise all selected employees that they have the right to be accompanied at the individual consultation meetings by either a work colleague or an accredited trade union representative.

- You should follow up the meeting with **an advance warning letter** to all affected employees confirming what you said at the meeting.

- You must then carefully define the redundancy selection pool and then apply the section criteria **objectively**. It is suggested that you use a simple matrix so that you score each employee in the redundancy selection pool in respect of certain key requirements for your business. Those with lower scores will be those selected as potentially redundant. **An employer must be careful not to discriminate when applying the selection criteria, e.g. if the absence is used in the selection criteria you should disregard absences due to disability or pregnancy related.**

- After carrying out the selection procedure, you must inform the employees selected at the earliest opportunity and hold a **first individual consultation meeting** with each of the selected employees. At the first consultation meeting, you should explain the reasons for redundancies and explain your selection criteria. You should give employees a copy of his/her scores, and allow him/her the opportunity to contest the scores. If they request to see the scores other employees were given, you should allow this, but blank out the names of the other employees.

- You should consider comments made by employees at individual consultation meetings and investigate possibilities of offering alternative employment within the Company or your group (if applicable).

- You must arrange **a second individual consultation meeting** with each affected employee (not less than 3 working days after the first consultation meeting) in order to discuss matters again, including the possibility of alternatives to redundancy dismissal.

- If, after further consideration, you are satisfied that those employees selected as potentially redundant have been selected fairly (taking into account comments made by them at individual consultation meetings)and if you have not been able to find any alternatives to dismissal then you should be in a position confirm the dismissal on the grounds of redundancy by proceeding to the next stage below.

- Write to the employees inviting them to attend a **final consultation meeting**, and advising them of their right to be accompanied by either a work colleague or an accredited trade union representative.

- At the final meeting, you should advise the employee that no other alternative has been found and that he/she is now being dismissed on the grounds of redundancy. You should give the employee his/her redundancy notice, which will advise the employee of his/her redundancy payment and other financial entitlements. You should then confirm the redundancy dismissal by letter informing the employee of their right to appeal.

- If employees are asked to work their notice periods before being made redundant, then they will be entitled to time off to find new employment.

- On termination of employment, you will need to pay salary up to termination date, pay in lieu of accrued untaken holiday, any sums due in lieu of any unworked part of the notice period and (subject to qualification) a statutory redundancy payment.

3.4.3. Dismissal of 20 or More Employees by Reason of Redundancy

In this case the **statutory consultation and notification** requirements will apply.

If it is proposed to dismiss 20 or more employees within a period of 90 days or less, you must consult with “appropriate representatives” of affected employees.

Please note that affected employees include not only those who may be dismissed but also any employee affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals.

Appropriate representatives are representatives of a recognised trade union (if any) or (if there is no recognised trade union) employee representatives appointed or elected by affected employees. This means that if you have no recognised trade union and no pre-elected employee representatives, you will have to organise a ballot to appoint some employee representatives at the start of the consultation process.

It is important to note that you must begin consultations **before** giving any individual notices of dismissal. The purpose of the consultation exercise is to avoid dismissals, and therefore the exercise might be deemed a sham if "consultation" takes place after individuals have been given notice of redundancy dismissal!

The purpose of the consultation with the appointed representatives is to give them fair and proper opportunity to understand fully the matters about which they are being consulted and to express opinions and to put forward proposals. Those opinions and proposals must then be carefully considered by you before taking any action. However, there is no obligation upon you to adopt any or all of the views expresses by the appointed representatives.

You must begin consultation with appointed representatives as soon as you propose redundancies. There are however certain statutory requirements as follows:

- if you are proposing to dismiss more than 100 employees at one establishment within a period of 90 days or less, the consultation must begin at least **45 days** before the first of the dismissals take effect and
- if you are proposing to dismiss between 20 and 99 employees at any one establishment within a period of 90 days, consultation must begin at least **30 days** before the first dismissal takes effect.

For the purposes of consultation you must disclose in writing to the appropriate representatives:

- the reasons for the proposals
- the number and description of employees whom it is proposed to dismiss as redundant
- the total number of employees of any such description employed by you at the establishment in question
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals with due regard to any procedure, including the period over which the dismissals are to take effect
- the proposed method of calculating the amount of redundancy pay.

The consultation with appropriate representatives will include discussion about ways of avoiding dismissals, reducing the number of employees to be dismissed, mitigating consequences of dismissal and trying to agree selection criteria for redundancy dismissal.

It is important to note that if you fail to consult with appropriate representatives or to do so within the stipulated time periods, you may be liable to pay each employee a **protective award.** The protective award is an amount to compensate the employee for loss of days of consultation and will be a period considered just and inequitable by the Tribunal. **It can be up to 90 days' pay per employee.**

You are under a duty to **notify the RPS** at least 45 days before the first dismissal takes effect if you are proposing to dismiss 100 or more employees within a period of 90 days or less at one establishment. If you are proposing to dismiss 20 or more employees, then you must give at least 30 days' notice to the RPS.

Following consultation with the appropriate representatives, once individuals have been selected as redundant then, in so far as reasonably practicable, you should seek to consult individually with affected employees. Follow the procedure set out above for dismissal of fewer than 20 employees.

3.4.4. Redundancy Pay

A person is entitled to a redundancy payment if the following conditions are met:

- He/she was an employee;
- He/she has been dismissed from his employment;
- the reason for dismissal was redundancy; and
- he/she had been employed for 2 years as at the date of dismissal.

The amount of redundancy payment is calculated by reference to the length of service, age at dismissal and "weeks pay".

The amount of "weeks pay" is capped at a statutory maximum which changes on an annual basis.

The amount of redundancy pay is calculated as follows:

- 1.5 weeks pay for each complete year of employment when the employee is 41 years or over; and
- 1 weeks pay for each complete year of employment below 41 years old and not below the age of 22; and
- 0.5 weeks pay for each complete year of employment not falling within either of the above two paragraphs.

The maximum number of years that can be taken into account is 20.

3.4.5. Offers of Suitable Alternative Employment

As mentioned above, the purpose of the redundancy consultation procedure is to try to find alternatives to redundancy dismissal. If an employee is made an offer of suitable alternative employment, then he might lose his right to redundancy payment if he rejects that offer.

For this purpose, the offer of suitable alternative employment:

- must be made by you
- must be made before his/her employment ends
- be oral or in writing
- must take effect immediately on the ending of his/her employment under his previous contract or after an interval of not more than 4 weeks; and
- must be on either the same terms and conditions or terms that are suitable in relation to the employee.

The question of suitability of an offer of alternative employment is an objective matter, whereas the reasonableness of the employee's refusal depends on factors personable to him/her and is a subjective matter to be considered from his point of view.

3.4.6. Lay Off

If an employer is experiencing a temporary shortage of work, they may decide to lay off employees temporarily as an alternative to commencing redundancy. A lay off is where there is no work provided to the employees, and they are paid no salary. Short-time working occurs when an employee receives less than half a normal week's pay.

An employer cannot lay off employees without pay unless the contract states that there is a right for the employer to do so. In the absence of any express or implied contractual right (or collective agreement) an employer must obtain an employee's express agreement to implement a lay off otherwise it will amount to a breach of contract. This could lead to claims for damages or complaints of unfair constructive dismissal.

If a lay off situation lasts for more than 4 consecutive weeks or more than 6 weeks in any 13 week period, the employee is entitled to serve a notice on the employer demanding a redundancy payment and terminate the contract treating himself as having been made redundant.

If such a notice is served the employer can accept that a redundancy situation exists and pay the redundancy payment or serve a counter-notice stating that he expects to be able to provide the employee with at least 13 weeks continuous work. If the employee does not withdraw his/her claim to a redundancy payment the matter is referred to the Employment Tribunal who will decide whether there is a reasonable prospect that work will be provided for 13 weeks.

3.4.7. Guarantee Payments

During a period of lay off, an employee may be entitled to a guarantee payment for days when he would normally be required to work under his contract of employment, but no work is actually available for him to do. Such a day is referred to as a "workless day". A day on which an employee does some work (even if it is only for a few minutes) is not a workless day.

Guarantee payments are only required to be made for complete working days lost.

An employee is not entitled to a guarantee payment in respect of a workless day if:

- they unreasonably refuse alternative work that is offered;
- the failure of the employer to provide work is caused by industrial action;
- the employee does not comply with reasonable requirements imposed by the employer with a view to ensuring that his or her services are available (i.e. to remain "on standby").

To qualify for a guarantee payment, the employee must have been employed for at least one month.

An employee is not entitled to guarantee payments in respect of more than the "specified number" of days in any three-month period. The specified number of days is the number of days, not exceeding five, on which the employee normally works in a week under the contract of employment.

Therefore, in most cases the maximum guarantee payment payable for a workless day is £35.00 (from 6 April 2023) a day for 5 days in any 3-month period - to a maximum of £175.00.

If an employee earns less than £30.00 a day then they will get their normal daily rate of pay. For employees who work on a part-time basis their entitlement is worked out proportionally.

Where the number of days worked varies from week to week, the specified number of days is the average number of days, not exceeding five, worked over the preceding 12 weeks.

Self-employed workers are not entitled to a guarantee payment.

3.5. Handling Grievances

3.5.1. Overview

Grievances are complaints by employees either concerning other employees or their employer. All such grievances should be dealt with in accordance with your grievance procedure.

Both employees and employers should aim to settle grievances, if possible, informally.

If the grievance cannot be resolved informally, then the employee must raise it formally in accordance with your stated grievance procedure.

A fair grievance procedure (and the requirements of the statutory procedure) involves three basic steps as follows:

Step 1: The employee should inform you of his grievance.

Step 2: You must invite the employee to a meeting to discuss his grievance. The employee has the right to be accompanied by a work colleague or trade union representative. You must consider the grievance and all evidence in detail and notify the employee of its decision in writing.

Step 3: The employee must be given a right to appeal. If an appeal takes place, the employee must be notified of the employer's final decision in writing.

3.5.2. Dealing with grievances informally

If the employee has a grievance or complaint regarding their work or the people they work with, the manager should, wherever possible, invite the employee to an informal discussion at first instance. The manager and the employee may be able to agree on a solution informally.

Issues that could cause grievances may include:

- terms and conditions of employment;
- health and safety;
- work relations;
- bullying and harassment;
- new working practices;
- working environment;
- organisational change; and
- discrimination.

3.5.3. Formal Grievance

If the matter is serious and/or the employee wishes to raise the matter formally, the employee should set out the grievance in writing. Where their grievance is against a manager whom the employee feels unable to approach, the employee should be directed to another manager or the owner.

The written grievance should contain a brief description of the nature of the employee's complaint, including any relevant facts, dates, and names of individuals involved.

If the manager determines that there are insufficient details, the employee can be asked to provide further information.

3.5.4. Investigations

It may be necessary to carry out an investigation into the employee's grievance. The amount of any investigation required will depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from the employee and any witnesses, and/or reviewing relevant documents.

The employee must co-operate fully and promptly in any investigation. This may include informing the manager of the names of any relevant witnesses, disclosing any relevant documents to and attending interviews, as part of the investigation.

The manager may initiate an investigation before holding a grievance meeting where this is considered. In other cases, the manager may hold a grievance meeting before deciding what investigation (if any) to carry out. In those cases, the manager will be required to hold a further grievance meeting with the employee after the investigation and before a decision is reached.

3.5.5. Right to Be Accompanied

The employee may bring a companion to any grievance meeting or appeal meeting. The companion may be either a trade union representative or a colleague.

At the meeting, the employee's companion may make representations and ask questions, but cannot answer questions on the employee's behalf. The companion may talk privately with the employee at any time during the meeting.

Acting as a companion is voluntary, and the employee's colleagues are under no obligation to do so. If they do agree, they must be allowed reasonable time off from duties without loss of pay to act as the companion.

If the employee's chosen companion is unavailable at the time a meeting is scheduled and will not be available for more than five working days afterwards, the manager may ask the employee to choose someone else.

The manager may at their discretion, allow the employee to bring a companion who is not a colleague or union representative (for example, a member of the employee's family) if this will help overcome a disability, or if the employee has difficulty understanding English.

3.5.6. Grievance Hearing

On receiving a formal grievance, you must write to an employee and invite him to a formal grievance meeting as soon as possible. The employee should be reminded of his right to be accompanied by a fellow worker or trade union representative at the grievance meeting.

At the outset of the meeting, you should introduce all the parties and explain to the employee that the purpose of the meeting is solely to hear their grievance. You should tell them that you will need to go away and investigate further and you will then let them have your findings at the earliest possible time. In particularly sensitive issues, such as allegations of sexual harassment, bullying etc, you should assure the employee that the matter will be totally confidential and check that they are comfortable with how the matter will proceed.

You should also remind the employee at the outset of the meeting of their right to be accompanied by a trade union representative or a work colleague. If they do not have someone with them, check that they are happy to proceed on that basis. This should also be logged into the minutes of the meeting.

You should also have someone attend the meeting with you to take minutes of the meeting. This person is not present to take any part in the proceedings; they are there purely to take notes of the meeting. You should also outline this to the employee at the outset of the meeting.

The minute taker should make every effort to report the minutes as accurately as possible. This should be done in a script format, i.e.:
JK: Please outline your grievance for me.
SL: My grievance is...

At the conclusion of the meeting, where possible, all parties should be given the opportunity to read through the minutes and should sign them at the end of the document to indicate that they are happy that they are an accurate reflection of what has been discussed.

You must listen carefully to the employee's complaint and consider all evidence presented by him. It may be necessary to adjourn a grievance hearing in some cases in order to carry out further investigations into those complaints made by the employee.

After a grievance hearing, you should consider matters in detail and try to make a decision within 5 days of the hearing. You must then write to the employee in writing confirming the outcome of the grievance hearing. If an employee is unhappy with a decision made at a grievance hearing, then he should be given the right to appeal to a more senior manager.

3.5.7. Appeal

If the employee is unhappy with the manager's decision and the employee wishes to appeal, they should be invited to an appeal meeting, within 5 days, which will be heard by a more senior manager (or the company owner). The employee has the right to be accompanied by a colleague or trade union representative at this meeting if they make a reasonable request.

After the appeal meeting, the manager (or company owner) will give the employee a decision, which should be without reasonable delay. This decision is then final.

4. Family Friendly Rights

The area of parental rights and family-friendly provisions has undergone an extensive and significant period of expansion. In this section, we shall have an in-depthlook at all the relevant rights and the necessary information that you need to be aware of.

4.1. Maternity

4.1.1. Recruitment and Pregnancy

Refusing to recruit a woman for a pregnancy-related reason is likely to be sex discrimination.

Questions about a woman's intentions at interview in relation to starting a family should be **avoided** although they are not automatically unlawful. Such questions may also infringe the right to private life under the Human Rights Act.

Provided that a woman will be able to attend work for some of the period for which she is recruited, it is unlawful not to employ a pregnant woman on the basis that she will be on maternity leave for some or even the majority of her contracted period.

4.1.2. Health & Safety and Pregnancy

Employers are under a duty to take reasonable care for the health and safety of employees.

Employers must adopt a step by step approach to address the health and safety of new or expectant mothers:

Step 1 - Risk Assessment

Employers are obliged to carry out a risk assessment if people working in its undertaking include women of childbearing age and the work done is of a kind which could involve risk, by reason of her condition, to the health and safety of a new and expectant mother or to that of her baby, from any processes or working conditions, or physical, biological, or chemical agents.

Step 2 - Preventative or Protective Measures

If the assessment reveals a risk, the employer's obligation is to take whatever preventative or protective action is required by any specific legislation which covers the hazard concerned.

Step 3 - Alteration of Working Conditions

If preventative or protective action would not avoid the risk and if it is reasonable to do so and would avoid the risk, the employer must alter the woman's working conditions or hours of work.

Step 4 - Suitable Alternative Work

If it is not reasonable to alter the woman's working conditions or hours of work or doing so would not avoid the risk, then the employer must consider whether it would be possible to offer the woman suitable alternative work. Factors affecting what is likely to be suitable include the status of the post that is being offered, the nature of the work, the place of work, travelling time, pay, hours and working conditions generally.

Step 5 - Suspension

If no suitable alternative work is available, then the woman must be suspended from work for as long as is necessary to avoid the risk. If she is suspended from work, the employee is entitled to her normal remuneration except during any period during which she has unreasonably refused to perform any suitable alternative work offered to her.

The employer's obligation to alter a woman's working conditions or suspend her where necessary only apply where the employee has notified the employer of her pregnancy in the appropriate form.

4.1.3. Assessments and Pregnancy

An employer must assess all risks to which **expectant and new/breastfeeding mothers** are exposed. You must ensure that they are not exposed to such risks and offer alternative employment (or give paid leave if alternative work is not available) if the risk remains despite measures being taken by you to avoid it.

The Health and Safety Executive has identified several risks to pregnant women in the workplace. By way of guidance only, those risks include the following:

- standing or sitting for long periods
- lifting or carrying heavy loads
- long working hours
- temperature
- working at height
- workstation and posture issues
- work-related stress

4.1.4. Antenatal Care

A pregnant employee has the right not to be unreasonably refused paid time off during working hours to keep an appointment to receive antenatal care. The expectant mother's partner will be also entitled to unpaid time off to attend up to two antenatal appointments with the expectant mother.

The appointment must be made on the advice of a registered doctor, midwife or health visitor. After the first appointment, the employee must be prepared to produce a certificate confirming her pregnancy and her appointment card. Time off for antenatal appointments must be paid at the appropriate hourly rate, the calculation of which depends on whether or not the employee has regular hours. Please note that employees should not have to make up their time by working additional hours as this would not amount to time off work.

If a woman is refused paid time off, she can present a complaint to an Employment Tribunal within three months of the day of the appointment.

It is automatically unfair to dismiss a woman because she has in good faith enforced her right to time off or alleged that her employer has infringed this right to time off. A dismissal relating to time off for antenatal care is also automatically unfair as the reason relating to pregnancy. It is also unlawful to subject an employee to any detriment for a reason relating to antenatal care.

4.1.5. Maternity Leave

All pregnant employees with babies, regardless of their hours of work or length of service have the right to 52 weeks maternity leave.

4.1.6. Ordinary Maternity Leave (OML)

An employee's ordinary maternity leave period begins:

- on the date that the employee tells her employer, she intends her leave to begin, which cannot be before the beginning of the **eleventh week** before the EWC (expected week of confinement).
- on the first date on which the employee is absent from work wholly or partly because of her pregnancy or childbirth if that date falls after the beginning of the **fourth week** before her EWC.
- on the date of the baby's birth if leave has not already commenced on that date, **e.g. in the case of premature birth.**

An employee's ordinary maternity leave period ends **26 weeks** after it begins or, if later, two weeks after the day of birth or four weeks after the day of birth for women employed in a factory (this is to take account of the compulsory maternity leave period).

A woman returning to work after ordinary maternity leave is entitled to benefit from any general improvements to the rate of her pay (or other terms and conditions) which may have been introduced for her grade or class of work whilst she was away. There is no obligation upon a woman on ordinary maternity leave to confirm her return to work at the end of the ordinary maternity leave period.

If an employee wishes to change the start date of her maternity leave she must give at least 28 days notice before the date she originally intended to start her leave, or 28 days before the new date, whichever is the earliest. If this is not possible a shorter period of notice can be given.

4.1.7. Additional Maternity Leave (AML)

All employees are entitled to a further 26 weeks additional maternity leave.

During the additional maternity leave period, the employer is bound by its implied obligation of trust and confidence and by any terms and conditions relating to the termination of the contract by the employer, compensation in the event of redundancy and disciplinary and grievance procedures.

During additional maternity leave a woman is covered by all the terms and conditions that would have applied to her had she not been absent, except for “remuneration”. Remuneration includes only “sums payable to an employee by way of wages or salary”. It is not clear on the authorities whether this remuneration includes PRP, bonuses etc.

4.1.8. Notice

It is assumed in the absence of other alternative arrangement being discussed that a woman will take her full maternity leave. It is, therefore, assumed she will return after 52 weeks. There is no provision for an employer to write out requesting notification of return to work.

If a woman intends returning to work at the end of her 52 weeks maternity leave no notice is required. If however, she wishes to return earlier she must give 8 weeks notice. The same premise applies where she initially outlines that she wishes to take for example 39 weeks leave, but then later decides to extend this and perhaps take the full 52 week entitlement. This notice requirement applies during her ordinary and additional maternity leave. (see below)

4.1.9. Keeping in Touch Days

Employees may by agreement with the employer carry out up to 10 days work under their contract of employment during the maternity leave period. The type of work to be undertaken is to be agreed in advance by the employer and the employee.

If the employee carries out shift work and the shift straddles midnight it may be counted as one day for the purpose of the 10 keeping in touch days. Keeping in touch days must not be taken during the period of compulsory maternity leave. (See below)

4.1.10. Payment

The rate of pay during the keeping in touch days is a matter to be agreed prior to the commencement of the work.

It may be appropriate to include details of the rate of pay in a contract of employment or be dealt with on a case by case basis.

If the employee is receiving SMP, the employer should continue to pay this for the week in which any keeping in touch work is done and reclaim it as normal.

The employer may count the amount of SMP payable for the week in which work is done as part of the contractual or agreed payment.

4.1.11. Holiday Entitlement

A woman continues to accrue both their full statutory annual leave entitlement of 5.6 weeks and any additional contractual entitlement throughout maternity leave.

An employee may not take annual leave during maternity leave. You should instead allow the employee to take any untaken annual leave before and/or after her maternity leave.

4.1.12. Compulsory Maternity Leave

For health and safety reasons, an employee may not work for her employer immediately after childbirth. This period of compulsory maternity leave lasts for:

- two weeks from the date of childbirth; or
- four weeks from the date of childbirth if she works in a factory; or
- until some later date, if another statutory requirement exists which prohibits the employee from working due to the fact that she has recently given birth.

If an employee has taken all of her ordinary maternity leave before the baby was born or had less than two weeks remaining, the period of ordinary maternity leave is extended until the end of compulsory maternity leave. All entitlements and conditions which apply during ordinary maternity leave continue throughout the compulsory maternity leave period.

4.1.13. Returning to Part-Time Work, Job Shares and Other Flexible Working Arrangements

Employees returning from maternity leave are entitled to return to their old job which includes their old working hours.

If returning in the OML period, she is entitled to her same job back, if returning within or at the end of the AML period, then she is still entitled to her same job back, but if that exact role is not available perhaps through a reorganisation, she is entitled to a similar role on no less favourable terms and conditions.

However, in practice, some women who previously worked full time may not be able to balance the demands of a full-time job with childcare responsibilities. They may, therefore, want to change their working patterns by working shorter hours, job sharing, working the same hours but at different times, working on a flexitime basis or working from home. In addition, they may no longer be able to work overtime or to respond to their employer's request to be flexible about when their hours are worked. Any requested changes to their previous working pattern would take the form of a Flexible Working Request and would need to be dealt with through the flexible working procedure.

If an employer refuses to accommodate an employee's request to alter her working patterns on return from maternity leave, this will not amount to direct sex discrimination unless the employer would have treated a similar request from a man more favourably. It may, however, amount to indirect sex discrimination.

Indirect discrimination arises when an employer imposes some form of requirement or condition on its employees but such requirement is one with which a considerably smaller proportion of women than of men can comply, and one which cannot be justified. The woman alleging discrimination must be able to show that she cannot comply with the requirements and that it is to her detriment that she cannot do so.

4.1.14. Notification of Start and End of Maternity Leave

There are notification requirements in relation to both commencement and early return from maternity leave. To take advantage of the right to maternity leave and/or statutory maternity pay, the employee must:

- Notify her employer of her pregnancy and of the EWC which may be evidenced by a medical certificate. This notification should be made by the end of her 15th week before her EWC, unless reasonably practicable.

- Notify her employer of the date she intends to start maternity leave and/or receiving statutory maternity pay.

- The above notifications may be given at different times but both must be at least 28 days before the employee intends to commence maternity leave.

If the employee gives birth before the EWC or before she has notified a date, her maternity leave period starts automatically on the date of birth. As soon as reasonably practicable, she must then notify her employer of the date of the birth.

An **employer must notify** an employee of the date that her maternity leave entitlement will end. This will be 52 weeks. The employer has to **respond within 28 days** of the date on which he receives notification from the employee.

An **employee does not** have to give her employer advance notice if she intends to return to work immediately after the end of her ordinary maternity leave period or additional maternity period if she qualifies. However, if the employee **wishes to return early**, she must give 8 weeks notice to the employer specifying the day upon which she proposes to return.

4.1.15. Statutory Maternity Pay

Statutory Maternity Pay (SMP) is a Social Security benefit administered by employers, who are responsible for making the payments to eligible employees.

A woman who is continuously employed by the same employer for 26 weeks continuing into the 15th week before her EWC is entitled to up to **39 weeks SMP** provided her average weekly earnings in the eight weeks prior to that qualifying week were at least the lower earnings limit for SMP purposes.

The first six weeks' SMP is payable at the higher rate (90% of normal earnings), followed by a lower, flat rate for the remaining 33 weeks of the maternity pay period. If the employee takes the full maternity leave entitlement, there is no pay due for the remaining 13 weeks.

A woman who is ill in the four weeks before the week her baby is due is still entitled to Statutory Sick Pay, unless her illness is pregnancy related, in which case she becomes entitled to SMP.

Employees who return to work early and then go off sick at a time when their SMP period has not yet ended are entitled to SMP rather than Statutory Sick Pay (although they may still be entitled to any company sick pay).

Employers are reimbursed for most of the SMP they pay.

4.1.16. Detrimental Treatment and Dismissal

Women have a right not to be subjected to any detriment for pregnancy or maternity-related reason.

If a woman feels she has suffered a detriment for one of the prescribed reasons, her remedy is to bring a complaint in the Employment Tribunal. The Tribunal may award whatever compensation it considers just and equitable in all the circumstances having regard to the detriment imposed and the employee's loss.

It is **automatically unfair** to **dismiss** any woman regardless of her hours or length of service on various pregnancy-related grounds set out below.

It is **automatically unfair** to **dismiss** any woman if:

- The reason or principal reason for dismissal is connected with her pregnancy.
- If she is dismissed during her ordinary or additional maternity leave and the reason or principal reason for her dismissal is that she has given birth or is any other reason connected with her having given birth.
- The reason or principal reason for her dismissal is that she took, sought to take or availed herself of the benefits of maternity leave. However, a woman who is dismissed for a reason relating to additional maternity leave is not protected by this provision if she has not responded to her employer's request to confirm that she intends to return to work.
- The reason or principal reason for her dismissal is that she took or sought to take time off for antenatal care.
- The reason or principal reason for her dismissal is a requirement or recommendation to suspend her on health and safety grounds.
- The reason or principal reason for her dismissal is that she did not agree to work keeping in touch days.

It is automatically unfair to dismiss a woman, regardless of her length of service or hours of work, where redundancy is the reason or principal reason for her dismissal, and she is selected for dismissal while other employees in similar positions are not and the reason for her selection is one of those listed above.

Where a **redundancy situation arises** during a woman's ordinary or additional maternity leave period, she must be offered any suitable and appropriate alternative work which is available. The offer must be made before the end of her original contract, and the alternative work may be with her employer or its successor or an associated employer. The new contract must take effect immediately and on terms and conditions which are not substantially less favourable than those of her original contract. If these requirements are not fulfilled, her dismissal will be automatically unfair. In effect, this means that pregnant employees may have greater rights in respect of the offer of alternative employment than other employees.

In addition, the argument that the business has coped without the employee whilst they have been on maternity leave as a business case to support a redundancy will not be sufficient to evidence a redundancy and will be held to be discriminatory due to the fact that this would not have been realised if the employee had not gone on maternity leave. Therefore, alternative unconnected business reasons would be required.

If no alternative work is available, the woman is still entitled to a redundancy payment in the normal way and is entitled to claim unfair dismissal. If the woman unreasonably refuses an offer of suitable alternative work that is made before the end of her original contract and provided the new contract is to begin on the ending of her original contract of within four weeks thereafter, she may lose her right to a redundancy payment.

You should follow proper redundancy procedures to the letter, ensuring that any selection for redundancy is not for pregnancy or maternity-related reason, applying objective criteria to a relevant pool of employees. This criterion should not include attendance records if that would adversely impact on women on maternity leave.

If an employee is dismissed while she is pregnant or in circumstances where her dismissal ends her ordinary maternity leave period, she is entitled to **written reasons for dismissal** without needing to request them, regardless of the length of service or hours of work.

4.2. Flexible Working

Whilst there is no automatic right to flexible working, employees do have the statutory right to request flexible working. A qualifying employee's request must be dealt with in a reasonable manner and their employer must notify the outcome to the employee within a three-month decision period.

4.2.1. Qualification

To be eligible to make a flexible working request under the statutory regime , the employee must:

- have worked for the employer continuously for at least 26 weeks at the date the request is made; and
- not have made a flexible working request during the last 12 months (even if this was withdrawn).

4.2.2. What is a Flexible Working Request?

A flexible working request generally means a request to do any or all of the following:

- to reduce or vary your working hours;
- to reduce or vary the days you work;
- to work from a different location (for example, from home).

A flexible working request should be submitted to the appropriate Manager in writing and dated. It should:

- state that it is a flexible working request being made under the statutory procedure
- explain the change being requested and propose a start date;
- identify the impact the change would have on the business and how that might be dealt with; and
- state whether the employee has made any previous flexible working requests.

Any agreed change to the employee's terms and conditions will be **permanent** unless the employer and employee agree otherwise.

Where the employer is inclined to grant a request for flexible working but wishes to reduce the benefits of the affected employee in line with, say, the number of hours worked, great care must be taken to ensure any corresponding changes to terms and conditions are not considered a detriment. Any change must be on a pro rata or proportionate basis to avoid any suggestions that changes are punitive in nature or the employee could take a complaint to an Employment Tribunal.

4.2.3. The Employee's Application

Only one application per year may be made under the right to apply. If the employee has made a previous application to the employer for flexible working arrangements, then the application must state this and give the date on which the previous application(s) are or were made.

4.2.4. The Employer's Response

An employer who receives a flexible working request under the statutory scheme must, deal with it in a reasonable manner and notify the employee of its decision within the three-month decision period, unless extended by agreement.

The employer should arrange to meet with the employee as soon as possible after receiving their written request, unless the employer intends to approve the request, in which case a meeting will not be necessary.

4.2.5. The Meeting

The employee is entitled to bring a companion to the meeting. The companion can address the meeting but not answer questions on the employee's behalf. The companion should be a trade union representative or colleague of the employee's choosing.

At the meeting, the employer and employee discuss the work pattern suggested and how best it might be accommodated. If there are problems in accommodating the request, the parties should consider alternative working patterns.

4.2.6. After the Meeting

It is recommended that within 7 days of the meeting, the employer must write to the employee to either agree on a new working pattern and a start date or, where the decision is to refuse the variation, to:

- set out the grounds for the refusal
- give a specific explanation as to why those grounds apply
- set out the appeal procedure.

The grounds on which the employer can reject the request are one or more of the following:

- burden of additional costs
- detrimental effect on the ability to meet customer demand
- inability to reorganise work amongst existing staff
- inability to recruit additional staff
- detrimental effect on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes
- any other ground allowed by regulations.

4.2.7. The Appeal Procedure

All requests, and any appeals, must be considered and decided on within the three-month decision period, unless the employer and employee agree to extend it. The employee's notice of appeal should be in writing, signed and dated as before, and set out the grounds of the appeal. Upon receipt of the notice of appeal, the employer must either hold a meeting with the employee to hear the appeal as soon as possible.

It is recommended that within 7 days of holding the meeting to hear the appeal, the employer must give the employee notice of its decision on the appeal. Where the employer upholds the appeal the notice must specify the variation in terms and conditions agreed and the date from which it is to take effect.

Where the employer dismisses the appeal, the notice must set out the grounds on which the dismissal is based.

4.2.8. Trial Periods

An employer may want to use a trial period, rather than rejecting the request, where it is unsure whether the arrangements requested are sustainable in the business or uncertain about the possible impact on other employees' requests for flexible working.

However, the employee cannot insist on a trial under the statutory provisions, although in appropriate cases an employee may be able to argue that an employer should have offered a trial period as part of dealing reasonably with their request.

An employer may therefore need to consider use of trial periods and be ready to explain why a trial period was not feasible in cases where it rejects a request, particularly where the employee has suggested that a trial period would have been possible. The length of any trial period should be no longer than required to make a reasonable assessment of the proposed new flexible working arrangements.

It is sensible for the parties to agree an extension to the decision period where, taking account of the trial period and the possibility of an appeal if the employer considers the trial to have been unsuccessful, more than three months will be required for the employer to notify a final decision to the employee.

4.2.9. Withdrawing Requests and Treating Requests as Withdrawn

An employee can withdraw a request for flexible working at any time after it has been made. However, they will be unable to make another request under the statutory scheme for 12 months from the date of their initial request (same where the initial request is technically invalid).

An employer will be entitled to notify an employee that it has decided to treat the employee's conduct as a withdrawal of the employee's flexible working request where either of the following apply:

- The employee, without good reason, has failed to attend both the first meeting arranged by the employer to discuss the employee's request and the next meeting arranged for that purpose.

- The employer has allowed the employee to appeal against the rejection of their request, or to make a further appeal, and the employee, without good reason, fails to attend both the first meeting arranged by the employer to discuss the employee's appeal and the next meeting arranged for that purpose.

It is recommended that an employer should find out and consider the reasons for the employee failing to attend both meetings before reaching any decision to close their request.

The employer must notify the employee of its decision to treat the conduct of the employee as a withdrawal of the application. There is no statutory definition of what amounts to a "good reason". However, tribunals are likely to take a common-sense approach to whether an employee's explanation is credible and excusable in the circumstances.

4.2.10. Making a Complaint to the Employment Tribunal

If the employee believes the regulations have not been properly followed, and/or disputes facts on which the decision has been based, he or she has the right to complain to an Employment Tribunal.

The complaint must be made within 3 months of the date on which the employee is notified of the employer's decision on the appeal or of the date on which any breach of the regulations is committed.

The Tribunal's role is to verify that the employer followed the correct procedures and to examine any disputed facts. A Tribunal does not have the power to question the commercial validity of the employer's decision or to substitute its own judgment on business reasons.

4.3. Parental Leave

To qualify for parental leave, an employee must be a parent (including adoptive parents) or anyone who has obtained formal parental responsibility for a child under the Children Act or its Scottish equivalent.

The employee must also have completed **one year's service.**

4.3.1. Entitlement

The entitlement is to 18 weeks parental leave in respect of each child.

Parental leave is for each child, and so if twins are born, each parent will get 18 weeks leave for each child.

4.3.2. Time Limit on the Exercise of the Right

Leave can be taken up until the child's 18th birthday.

4.3.3. Employee's Rights Whilst on Leave

There is **no entitlement to pay** whilst on parental leave, i.e. the leave is **unpaid**.

Whilst on leave, the employee remains employed, i.e., the employee is guaranteed the right to return to the same job as before, or, if that is not practicable, a similar job which has the same or better status, terms and conditions as the old job.

Where the leave is taken for four weeks or less, the employee will be entitled to go back to the same job.

4.3.4. Parental Leave Agreements

The Regulations intend to give employees and employers the option of making their own agreements about how parental leave will operate in the workplace. This can be done through individual, workforce, or collective agreements but must form part of the employee's contract of employment. These agreements can be used to improve upon the key elements set out here but if you have not entered into an agreement the default scheme will apply.

4.3.5. The Default (or Fall Back) Scheme

Unless you agree on an alternative scheme, the following rules will apply:

- 4.3.5.1. - employees to take parental leave in blocks or multiples of 1 week (blocks of one day for parents of disabled children)
- 4.3.5.2. - the employee is required to give 21 days' notice
- 4.3.5.3. - where the leave is to be taken immediately after the birth or placement for adoption the employee should give notice 21 days before the beginning of the expected week of childbirth, or placement. In rare cases where it is not possible to give 21 days notice of the date of placement for adoption, an adoptive parent should give the notice as soon as reasonably practicable
- 4.3.5.4. - a maximum of four weeks leave in any year
- 4.3.5.5. - leave is subject to postponement by the employer for up to 6 months where the business cannot cope but leave cannot be postponed when the employee gives notice to take it immediately after the time the child is born or is placed with the family for adoption.

4.3.6. Postponement of Leave

If you consider that an employee's absence will unduly disrupt the business, you can postpone the leave for no longer than 6 months from the beginning of the period that the employee requests to start his or her parental leave.

Reasons which might justify an employer postponing parental leave include:

- 4.3.6.1. - work is at a seasonal peak
- 4.3.6.2. - a significant proportion of the workforce applying for parental leave at the same time
- 4.3.6.3. - the employee's role is such that his or her absence at a particular time would unduly harm the business.

You should discuss the matter with the employee and confirm the postponement arrangements in writing no more than 7 days after the employee's notice to take leave. The notice should set out the reason for the postponement and the new dates of the parental leave.

If leave is postponed, the length of the leave should still be equivalent to the employee's original request.

4.3.7. Record Keeping

Employers are not required to keep statutory records of parental leave taken, although it is suggested that this be done. When an employee changes jobs, you are free to make enquiries of a previous employer and to seek a declaration from the employee as to how much parental leave has been taken by the employee.

4.3.8. Evidence that the Employee is Entitled to Take Parental Leave

An employer is entitled to make a reasonable request for evidence that the employee is the parent or a person with parental responsibility.

Such evidence could include:

- 4.3.8.1. - child's birth certificate
- 4.3.8.2. - papers confirming a child's adoption or date of placement
- 4.3.8.3. - the award of disability living allowance

4.3.9. Refusal of Parental Leave

Where an employer prevents or attempts to prevent an employee from taking parental leave, the employee will be able to make a complaint (within 3 months of the matter giving rise to the complaint) to the Employment Tribunal. An employee will also be protected from victimisation, including dismissal, for taking parental leave.

4.4. Paternity Leave

4.4.1. Qualification for Paternity Leave

Paternity leave is available to an employee who:

- has worked continuously for the company for not less than 26 weeks by the 15th week before the child is expected to be born; and
- is the biological father of the child or the mother's husband or partner or the adopter's husband, wife or partner; and
- has or expects to have responsibility for the child's upbringing; and
- gives appropriate notification; and
- gives you a self-certificate to support his entitlement to paternity leave (if requested by the employer).

"Partner" means a person (whether of the same sex or different sex) who lives with the mother in an enduring family relationship but who is not a blood relative.

Women can, therefore, take advantage of the right to paternity leave where:

- they are the mother's partner (i.e. in a same sex relationship)
- they are the female partner of a man with whom a child has been placed for adoption
- they are the female partner of a woman with whom a child has been placed for adoption.

An employee is not entitled to take both adoption leave and paternity leave in respect of the same child. Therefore it is up to an adopting couple to decide who will take adoption leave and who will take paternity leave.

4.4.2. Duration of Paternity Leave

Up to 2 weeks' leave can be taken by qualifying employees.

The leave must be taken either as 1 week or 2 consecutive weeks' leave. The leave cannot be taken as 2 separate weeks' leave. Only one period of leave is available, irrespective of whether more than one child is born at the same time. Therefore, if twins are born, the entitlement is still up to 2 weeks' leave and not four weeks.

4.4.3. When Paternity Leave Can Be Taken

The employee can choose to start their leave:

- from the date of the child's birth (or date of placement in adoption cases); or
- from a chosen number of days or weeks after the date of the child's birth or placement; or
- from a chosen date.

Although the leave can start on any day of the week on or following the child's birth, the leave must be completed:

- within 56 days (8 weeks) of the actual date of birth of the child; or
- if the child is born early, within the period from the actual date of birth up to 56 days after the expected week of birth.

4.4.4. Notification

Employees must inform their employer of their intention to take paternity leave by the 15th week before the baby is expected. If this is not reasonably practicable, employees must give notice as soon as reasonably practicable and should provide a written explanation for the delay.

Employees must also inform their employer:

- of the Expected Week of Childbirth (the week the baby is due)
- whether they wish to take one or two weeks' paternity leave
- of the date on which they want their leave to start.

Employees may change their mind about the date they want their paternity leave to begin, provided that they give the employer at least 28 days' notice, ending at the original start date or new start date, whichever is the earlier. If this is not reasonably practicable, employees must give notice as soon as reasonably practicable and should provide a written explanation for the delay.

It is not necessary for the employee to give notice of expected return date, since the leave is only one or two weeks in duration.

4.4.5. Late Notice from Employee

If any notice is given late, the employer should consider the circumstances and explanation and decide whether the delay was reasonable. The employee should be informed of the employer's decision.

If notice is given late and the explanation for the delay is inadequate, the employer may be entitled to postpone the start of the paternity leave until the 29th day after receipt of the notice.

4.4.6. Self Certificate

If required by their employer, employees must give their employer a completed self-certificate as evidence of their entitlement to paternity leave and Statutory Paternity Pay (SPP).

The issue of self-certification is covered by the implied mutual duty of trust and confidence which exists between employer and employee. Consequently, the employer should not make overly intrusive demands for evidence of qualification, e.g.: DNA evidence of parentage or relationship with the child's mother.

4.4.7. Right to Return to Work

An employee has the right to return to the same job following an absence of 1 week or 2 weeks' paternity leave.

It is not sufficient for the employer merely to offer the employee a similar job on no less favourable terms and conditions.

4.4.8. Contractual Benefits

Employees are entitled to benefit during paternity leave from their normal terms and conditions of employment, save for those relating to wages or salary.

It is perfectly possible for the contract of employment to provide for the payment of full salary or such other rate over and above Statutory Paternity Pay. If the employee has a contractual right to paternity leave and/or pay in addition to the statutory right, the employee can take advantage of whichever is the more favourable.

Any paternity pay which an employee receives reduces the amount of SPP which the employee receives. It, therefore, would be sensible to provide in the contract of employment that any contractual paternity pay is inclusive of SPP (to allow the employer to reclaim that part of the payment from the HM Revenue and Customs).

4.4.9. Protection from Detriment & Unfair Dismissal

Employees are protected by law from detrimental treatment and unfair dismissal in connection with taking paternity leave.

If an employee believes he or she has been treated unfairly on the basis of taking or proposing to take paternity leave, the employee has the right to complain to an Employment Tribunal.

4.4.10. Absence for Ante-Natal Appointments

Expectant fathers, or the partner of the mother are allowed time off to attend notified scans.

4.4.11. Statutory Paternity Pay

Subject to an employee satisfying the qualifications set out below, Statutory Paternity Pay (SPP) will generally be payable for paternity leave taken within 56 days of the date of the child's birth (or placement for adoption).

To qualify for SPP, an employee must:

- have continuous service with the same employer for not less than 26 weeks by the 15th week before the child is expected to be born (or placed for adoption); and
- have continuous service with the same employer from that 15th week up to the child's date of birth (or placement); and
- be the biological father of the child or the mother's husband or partner or the adopter's husband, wife or partner; and
- have or expect to have responsibility for the child's upbringing; and
- give appropriate notification to the employer; and
- give the employer a self-certificate to support the employee's entitlement to SPP (if requested by the employer); and
- have average weekly earnings equal to or above the Lower Earnings Limit applying to National Insurance Contributions.

4.5. Adoption Leave

Adoptive parents now enjoy similar rights to biological parents, one of whom can take leave similar to maternity leave, and the other, paternity leave.

These rights apply where the child being adopted is under 18 years. The rights are available only where the child is newly placed with an adoptive parent and do not apply to step-family adoptions or adoptions by a child's existing foster carers where there is no placement.

4.5.1. Adoption Leave

4.5.1.1. Qualification

Adoption leave and pay are available to individuals who adopt or one member of a couple where a couple adopt jointly. Where a couple adopt jointly, they may choose which partner takes adoption leave with the option of paternity leave and pay for the other member of the couple provided he or she meets the qualifying requirements for paternity leave.

Both paid adoption leave and paid paternity leave are available to employees who qualify where an approved adoption agency notifies the adopter of a match with a child.

To qualify for adoption leave, an employee must:

- have been notified that **he or she has been matched by an adoption agency with a child for the purposes of adoption; and**
- have been continuously employed by the same employer for a period of not less than 26 weeks ending with the week on which the notification was given; and
- give his or her employer appropriate notice; and
- give his or her employer a Matching Certificate as evidence of entitlement to adoption leave.

4.5.1.2. Notification

Adopters are required to inform their employers of their intention to take adoption leave within 7 days of being notified that they have been matched with a child for adoption, unless this is not reasonably practicable. If not reasonably practicable, adopters should notify their employer as soon as reasonably practicable with a written explanation for the delay.

The notice must include the following information:

- when the child is expected to be placed with the adopter
- when the adopter wants to start the adoption leave.

Adopters can change their mind about the date they want their leave to start provided they give at least 28 days notice in advance (again unless this is not reasonably practicable). If 28 days notice is not reasonably practicable, the adopter should give notice as soon as reasonably practicable with a written explanation of the delay.

The employer must respond within 28 days of receipt of their employee's notification. The employer must write to the employee setting out the date on which they expect the employee to return to work if the full entitlement to adoption leave is taken. This date is the Expected Return Date.

4.5.1.3. Matching Certificate

If the employer so requires, the employee must provide a completed matching certificate of qualification.

4.5.1.4. Duration of Leave

Adopters will be entitled to a maximum of 52 weeks Adoption Leave.

4.5.1.5. When Leave Can Be Taken

Adopters can choose to start their leave either:

- from the date of placement (whether this is earlier or later than expected); or
- from a fixed date which can be up to 14 days before the expected date of placement.

Only one period of leave is available regardless of whether more than one child is placed for adoption as part of the same arrangement.

Sometimes the placement ends during the adoption leave period, for instance when the adoption agency that matched the employee with the child notifies the employee that the child will not in fact be placed with him or her or if the child dies or the match is considered unsuitable. If this happens, the adopter is entitled to continue the adoption leave for up to 8 weeks after the end of the placement.

It should be noted that adoption leave is in addition to parental leave.

4.5.1.6. Returning to Work

During Ordinary Adoption Leave (26 weeks) the adopter has the right to return to the same job as he or she left and to be treated as if he or she had never been absent.

Where an adopter takes Additional Adoption Leave (a further 26 weeks), the adopter has the right to return to the same job or, if that is not reasonably practicable, to another job which is both suitable and appropriate in the circumstances. The employee is entitled to return on terms and conditions no less favourable, with his or her seniority, pension and similar rights that would have been applicable to him or her had he or she not been absent from work at any time since commencing adoption leave.

Where, during an employee's Ordinary or Additional Adoption Leave period, it is not reasonably practicable to continue to employ them because a redundancy situation has arisen, then if there is a suitable alternative vacancy the employee is entitled to be offered it before the end of his or her employment under the existing contract.

4.5.1.7. Notice of Return

Where the employee intends to return to work on the Expected Return Date given in the employer's letter to the employee, no notice is required to be given to the employer.

4.5.1.8. Returning Early

Where the employee wishes to return to work before the Expected Return Date, the employee must give the employer at least 8 weeks notice of the date he or she intends to return. This notice may be verbal.

If the employee fails to give at least 8 weeks notice, then the employer is entitled to postpone the employee's return and is not obliged to pay them their normal remuneration until the agreed return date.

4.5.1.9. Protection from Detriment and Unfair Dismissal

Employees are protected by law from detrimental treatment and unfair dismissal in connection with taking adoption leave.

If an employee believes he or she has been treated unfairly on the basis of taking or proposing to take adoption leave, the employee has the right to complain to an Employment Tribunal.

4.5.2. Adoption Pay

4.5.2.1. Eligibility

Statutory Adoption Pay (SAP) is available to an employee who:

- meets the service qualification, being continuous service with the same employer for at least 26 weeks by the week in which the employee is notified by an approved adoption agency that match has been made with a child; and
- gives appropriate notification to his or her employer; and
- gives the employer a completed Self Certificate; and
- has average weekly earnings of not less than the lower earnings limit apply to National Insurance Contributions.

4.5.2.2. Notification

Adopters must give the employer at least 28 days' notice of the date upon which the adopter expects any payment of Statutory Adoption Pay to begin unless this is not reasonably practicable.

Adopters can change their mind about the date they want their SAP to start provided they give at least 28 days' notice in advance (again unless this is not reasonably practicable).

If 28 days' notice is not reasonably practicable, the adopter should give notice as soon as reasonably practicable with a written explanation for the delay.

4.5.2.3. Late Notice from Employee

If any notice is given late, the employer should consider the circumstances and explanation and decide whether the delay was reasonable. The employee should be informed of the employer's decision.

If notice is given late and the explanation for the delay is inadequate, the employer may be entitled to postpone the start of the adoption leave and/or the payment of adoption pay until the 29th day after receipt of the notice.

4.5.2.4. Amount Paid

The rate is the same as Statutory Maternity Pay and Statutory Paternity Pay.

4.5.2.5. Alternative/Additional Financial Help for Adopters

Adopters who have average weekly earnings below the lower earnings limit for National Insurance Contributions purposes do not qualify for SAP but may be eligible for income support whilst on adoption leave.

4.5.2.6. Administration and Recovery of Payments of SAP by Employers

Employers should administer SAP in the same way as Statutory Maternity Pay.

Employers are able to recover a percentage of the amount of SAP they pay out (limited at the time of printing in most cases to 92%). Small employers who are entitled to Small Employers Relief are able to claim 100% and an added payment to compensate for employer's share of NICs payable in respect of SAP.

Employers are required to:

- keep appropriate records of payments of SAP and to make periodic returns to HM Revenue and Customs
- produce those records for inspection on request by the HM Revenue and Customs
- provide appropriate information on request by the HM Revenue and Customs
- provide information about entitlement to their employees

4.6. Time off for Dependants

4.6.1. Introduction

Situations arise where an employee needs to take time off work to deal with an emergency involving someone who depends on them. Provided the reasons for such a request are genuine, and the employee informs you as soon as possible that they need this time off, they should be allowed reasonable unpaid time off work to deal with such emergencies.

4.6.2. Dependants

A dependent is the employee's husband, wife or partner, child or parent, or someone living with them as part of their family whom can be considered as depending on the employee. Others who rely solely on the employee for help in an emergency may also qualify.

4.6.3. Emergency

The right to time off only covers emergencies. If the employee knows in advance that they're going to need time off, they may be able to arrange this with the Company by taking another form of leave, such as parental, maternity, paternity or adoption leave.

For these purposes, an emergency is an unexpected situation that arises where someone who depends on the employee:

- is ill and needs their help
- is involved in an accident or is assaulted
- needs the employee to arrange their long term care
- needs the employee to deal with an unexpected disruption or breakdown in care, such as a childminder or nurse failing to turn up
- goes into labour.

Employees can also take time off if a dependent dies and they need to make funeral arrangements or attend the funeral.

4.6.4. Length of Time Off

Employees can only take off as long as it takes to deal with the immediate emergency. For example, if a dependent is ill, they can take enough time off to deal with their initial needs, such as taking them to the doctor and arranging for their care.

Employees **cannot take time off work** under Dependant Leave to provide that care themselves and will need to make alternative arrangements for such care. If the employee wants to stay off work longer to provide the care they will normally need to take this as part of their annual leave entitlement.

As a general benchmark, no more than a day or two should be necessary in most usual circumstances.

4.6.5. Notice

The employee must tell the Company as soon as possible why they are away from work and how long they expect to be off. In extreme cases of emergency where employees cannot inform the Company of their absence before their return to work, on their return they should still inform their supervisor or line manager why they were absent.

4.7. Shared Parental Leave

4.7.1. Introduction

Shared parental leave (SPL) is a flexible form of leave available to both parents designed to encourage shared parenting in the first year of a child's life. It allows a more flexible pattern of leave than the traditional arrangement under which the mother takes extensive maternity leave and the father takes a short period of paternity leave.

Employees who give birth or adopt remain entitled to take the full 52 weeks of leave if they choose to do so and the arrangements described above for maternity and adoption leave continue to apply. However, an employee may choose to share part of that leave with their partner provided that certain qualifying conditions are met.

When leave is shared in this way, there is no need for the 'primary' leave taker to have returned to work. Both parents can be on leave at the same time, provided that the combined amount of leave taken by the parents does not exceed 52 weeks and provided that all of the leave is taken before the end of 52 weeks following the birth of the child or its placement for adoption.

Generally, parents will qualify for shared parental leave provided that both are working and that each has at least 26 weeks' service with their respective employers. To exercise the right, both parents must inform their employer that they intend to take shared parental leave – usually at the same time as the employer is notified that an employee is pregnant or plans to adopt. They must also give an indication of the pattern of leave that they propose to take.

A parent proposing to take a period of shared parental leave must give the Company 8 weeks' notice of any such leave. Depending on the circumstances, it may be possible for the Shared Parental Leave to be taken in intermittent blocks, with one parent returning to work for a time before taking another period of shared parental leave. Such an arrangement can only be made with the agreement of the Company. While every effort will be made to accommodate the needs of individual employees, the Company may insist on shared parental leave being taken in a single instalment. Any decision as to whether to permit intermittent periods of leave is entirely at the Company's discretion.

An employee absent on shared parental leave will be entitled to a weekly payment equivalent to the lower fixed rate of SMP. The number of weeks for which payment will be made will vary depending on the amount of SMP paid to the mother while on maternity leave. Essentially, if the mother ends (or proposes to end) her leave with 10 weeks of SMP entitlement remaining, the parent taking shared parental leave will be entitled to be paid for the first 10 weeks of leave.

4.7.2. Eligibility

Sometimes only one parent in a couple will be eligible to get Shared Parental Leave (SPL) and Statutory Shared Parental Pay (ShPP). This means that they cannot share the leave.

If your employee is eligible then they can use SPL to book their leave in separate blocks.

4.7.3. Shared Parental Leave

To qualify for SPL, your employee must share responsibility for the child with one of the following:

- their husband, wife, civil partner or joint adopter
- the child's other parent
- their partner (if they live with them)
- Your employee or their partner must be eligible for maternity pay or leave, adoption pay or leave or Maternity Allowance.

They must also:

- still be employed by you while they take SPL
- give you the correct notice including a declaration that their partner meets the employment and income requirements which allow your employee to get SPL
- have been continuously employed by you for at least 26 weeks up to any day of the 'qualifying week', or the week they are matched with a child for adoption in the UK
- The 'qualifying week' is the 15th week before the baby is due.

4.7.4. Statutory Shared Parental Pay

They can get ShPP if they're an employee and one of the following applies:

- they're eligible for Statutory Maternity Pay (SMP) or Statutory Adoption Pay (SAP)
- they're eligible for Statutory Paternity Pay (SPP) and their partner is eligible for SMP, Maternity Allowance (MA) or SAP
- They can also get ShPP if they're a worker and they're eligible for SMP or SPP.

4.7.5. Refusing SPL or ShPP

You can refuse SPL or ShPP if the employee does not qualify. You must tell the employee the reason if you refuse ShPP and you do not have to give a reason for refusing SPL.

4.7.6. Entitlement

If an employee is eligible and they or their partner end maternity or adoption leave and pay (or Maternity Allowance) early, then they can:

- take the rest of the 52 weeks of leave (up to a maximum of 50 weeks) as Shared Parental Leave (SPL)
- take the rest of the 39 weeks of pay (up to a maximum of 37 weeks) as Statutory Shared Parental Pay (ShPP)
- A mother must take a minimum of 2 weeks' maternity leave following the birth (4 if she works in a factory).

ShPP is paid at the rate of £172.48 a week or 90% of an employee's average weekly earnings, whichever is lower.

4.7.7. Starting Shared Parental Leave

For Shared Parental Leave (SPL) to start, the mother or adopter must do one of the following:

- end their maternity or adoption leave by returning to work
- give you 'binding notice' (a decision that cannot normally be changed) of the date when they'll end their maternity or adoption leave
- end maternity pay or Maternity Allowance (if they're not entitled to maternity leave, for example they're an agency worker or self-employed)
- A mother must take a minimum of 2 weeks' maternity leave following the birth (4 if she works in a factory).

The adoptive parent getting Statutory Adoption Pay must take at least 2 weeks' adoption leave. They can take it from the day of the placement, or up to 14 days before the placement starts.

The mother must give you notice (at least 8 weeks) to end her maternity pay, or tell Jobcentre Plus to end her Maternity Allowance. Adopters must give you notice to end adoption pay.

SPL can start for the partner while the mother or adopter is still on maternity or adoption leave if she's given binding notice to end her leave (or pay if she's not entitled to leave).

4.7.8. What the Employee Must Do

The employee must give you written notice if they want to start SPL or Statutory Shared Parental Pay (ShPP). They can do this using forms created by the Advisory, Conciliation and Arbitration Service (Acas).

After receiving this notice, you can ask for:

- a copy of the child's birth certificate
- the name and address of their partner's employer
- You have 14 days to ask for this information. Your employee then has a further 14 days to provide it.

4.7.9. Notice Period

An employee must give at least 8 weeks' notice of any leave they wish to take. If the child is born more than 8 weeks early, this notice period can be shorter.

Your employee has a statutory right to a maximum of 3 separate blocks of leave, although you can allow more if you wish.

4.7.10. Cancelling the Decision to End Maternity or Adoption Leave

The mother or adopter may be able to change their decision to end maternity or adoption leave early if both:

- the planned end date has not passed
- they have not already returned to work

One of the following must also apply:

- it's discovered during the 8-week notice period that neither partner is eligible for either SPL or ShPP
- the employee's partner has died
- it's less than 6 weeks after the birth (the mother gave notice before birth)

4.7.11. Shared Parental Leave In Touch (SPLIT) Days

Your employee can work up to 20 days during SPL without bringing it to an end. These are called 'shared parental leave in touch' (or SPLIT) days.

These days are in addition to the 10 'keeping in touch' (or KIT) days already available to those on maternity or adoption leave.

Keeping in touch days are optional - both you and your employee must agree to them.

4.7.12. Blocks of Leave

An employee taking Shared Parental Leave (SPL) can split their leave into up to 3 separate blocks instead of taking it all in one go, even if they are not sharing the leave with their partner.

If both parents are taking SPL then they can take their leave at the same time as each other or at different times.

The employee must give you at least 8 weeks' notice before a block of leave begins.

4.7.13. Splitting Blocks

If you agree, the employee can split a block of leave into shorter periods of at least a week. For example they could work every other week during a 12-week block, using a total of 6 weeks of their SPL.

You cannot turn down a request for a block of leave if the employee is eligible and gives you the right notice. You do not have to agree to the employee breaking the block of leave into shorter periods.

4.8. Parental Bereavement Leave (PBL)

4.8.1. Introduction

The Parental Bereavement Leave and Pay Act grants all Qualifying Parents who have Qualifying Service and given Notice the right to **2 weeks' leave** when they suffer Loss of a Child under the age of 18. Loss of a Child by the way of stillbirth may qualify for Maternity Leave for the mother rather than PBL but would qualify for PBL if the stillbirth occurs after 23 weeks.

The 2 weeks' leave can be taken either;

- A one week block of two weeks straight; or,
- Taken any time within 56 weeks of the date of the child's death (to allow for anniversaries, birthdays and other emotionally difficult periods)

A **"Qualifying Parent"** is defined as a blood related parent and/or primary carer which is to be inclusive of adopters, foster parents, guardians and kinship carers who may be close relatives or family friends that have assumed responsibility for looking after a child in the absence of parents.

Statutory requirement for notice to take Parental Bereavement Leave is that the employee gives the employer notice of their intention to take this leave by specifying;

- The date of the child's death; and
- The date on which the employee chooses any period of absence to begin; and
- Whether the employee intends that period of absence to be a period of one or two weeks' parental bereavement leave; and
- If the period is intended to be split, Period A is the initial period following the Loss of a Child, Period B is a further break once returned to work. Period B or further must be notified by at least a weeks' notice.

The **"Qualifying Service"** period is any employee who has been employed for a continuous period of 26 weeks prior to suffering the Loss of a Child.

4.8.2. Parental Bereavement Pay (“PBP”)

Any eligible PBL will be paid at the relevant statutory rate at the time, or 90% of the employee’s weekly salary, whichever is lower.

4.8.3. Further Discretionary Bereavement Leave

It may be appropriate to discuss and agree additional discretionary Bereavement Leave with an employee in certain circumstances. This would be at the employer’s discretion but subject to any policy in place. Usually longer term continuing absence would be considered as sickness absence.

5. Working Time Regulations

These regulations apply to employees and other individuals who personally perform work or provide services for you, **unless** genuinely self-employed.

Agency workers, who might not otherwise be covered are specifically given protection under the Regulations.

The Regulations apply in respect of **"working time".** This covers any period during which an employee is carrying out his duties but it also includes periods of "relevant training", working lunches, business travel time, and time spent "on call" (even if asleep!) if the worker is required to be at his or her place of work during that period.

Working time does not include travel from the home to place of work, rest breaks when no work is done, time spent travelling outside normal working time and non-job related training.

The general rule is that an adult worker cannot be required to work more than **48 hours on average** in each working week. The average is worked out over a 17 week period. In some cases, the period over which the average is worked out can be extended to up to 52 weeks.

When calculating average hours, some days are excluded including days taken as statutory annual leave, periods of sick leave and maternity, paternity, adoption or parental leave and any hours in respect of which an individual opt-out agreement applies.

5.1. Opt-Out Agreements

In some cases, a Company can contract out of the normal 48-hourcap on working time if the worker agrees to do so in writing.

The opt-out can be for a specified period, or it can apply indefinitely. It is prudent to include an opt-out in the standard contract of employment.

If an opt-out is in place, then an employee has a right to terminate it at any time. The employee is required to give at least 7 days notice, but the Company can extend the notice period to up to 3 months. It is therefore prudent to state in the standard contract of employment that the employee must give 3 months notice if he wishes to end the opt out.

It is not necessary to maintain records of hours actually worked by a worker who has opted out in this way.

5.2. Night Work

Employers are required to take all reasonable steps to ensure that "night workers" normal hours of work do not exceed an average of 8 hours in each 24 hour period, during a 17 week reference period.

For this purpose, a **"night worker"** is a worker who normally works at least 3 hours during **"night time"**. For this purpose "night time" means a period of 7 hours which includes midnight to 5am. In the absence of any agreements to the contrary, the default 7 hour night time period is 11pm to 6am. Thus, if a worker normally works at least3 hours of daily working time between the hours of 11pm and 6am he will be a "night worker".

Whilst it is normally possible to work out an average of hours worked during night time over a 17 week reference period, no averaging of hours is permitted if the worker's job involves special hazards or heavy physical or mental strain. In that case, an employer must ensure that the worker never works more than 8 hours in a 24 hour period which includes night work.

Before assigning a worker to night work, an employer must ensure that the worker has an opportunity for a **free health assessment.** Free assessments must also be offered at regular intervals once the night work has started.

It is not necessary for the health assessment to take the form of a full medical assessment. Rather, workers can simply be asked to complete a questionnaire which asks about health issues relevant to the particular type of night work. If, following the completion of that questionnaire, there is any uncertainty about the worker's fitness for night work, then a full medical examination should be arranged.

5.3. Daily Rest Periods

Workers are entitled to a rest break of at least 11 consecutive hours in each 24 hour working period. However, this rule does not apply to shift workers when they change shift and cannot take a daily rest between the end of one shift and the start of the next. Similarly, this rule does not apply to workers, such as catering staff, whose activities involve periods of work split up over the day.

A worker is also entitled to a rest break of at least 20 minutes after 6 hours work.

5.4. Weekly Rest Periods

Workers are normally entitled to at least 24 hours rest every 7 days. This rest period can be taken as either one 24 hour break each week or as an uninterrupted period of 48 hours rest each 2 weeks.

The weekly rest period is a stand-alone right in addition to daily rest periods. This means that the combined effect of daily and weekly rest entitlements is that a worker has a minimum right to 35 hours rest each week or 59 hours rest in each 14 day period.

5.5. Sunday Working

The Sunday working rules apply to shop workers and betting workers. A shop worker is somebody who works at retail premises. A betting worker is somebody who may be required to do “betting work”. Betting work means work at a track in England or Wales for a bookmaker and working at a licensed betting shop.

A shop worker or a betting worker has the right not to be dismissed or subjected to any detriment because he refuses to work on Sundays.

Employers are required to give any shop workers and betting workers who are required to work Sundays (but not those employed only to work on Sundays) a written statement setting out their right to opt out of working Sundays and not to be dismissed or subjected to any detriment as a result of doing so.

6. Recruitment

Great thought and care is required in the recruitment process not only to ensure that you get the best person for the job but also to ensure that you do not fall foul of the law.

6.1. Discrimination

The danger of discrimination claims is one of the biggest risks during the recruitment process.

The recruitment process can be very subjective, and it is therefore important that you take steps to make the process as objective as possible.

It is unlawful to discriminate, either directly or indirectly, on the following grounds:

- Sex;
- Age;
- Gender reassignment;
- Race;
- Disability;
- Marriage and Civil Partnership;
- Pregnancy and Maternity;
- Religious or similar philosophical belief; and
- Sexual orientation.

If you do not employ somebody because of their particular sex, age, gender reassignment, marital status, race, disability, religious/philosophical belief or sexual orientation, then you will commit **direct discrimination.**

Equally, if the company makes recruitment subject to some sort of provision, criteria or practice which it applies equally to all applicants but which has a **detrimental effect** on one particular group then the company might commit unlawful **indirect discrimination.**

Thus, if the company requires applicants to comply with criteria that are not strictly necessary for a job and which make it difficult for certain ethnic groups or a particular sex to comply, it will commit indirect discrimination. For example, a requirement that applicants should have a certain level of expertise in English, if the job does not require such expertise, might be indirectly discriminatory.

When placing a job advertisement, when making a selection for interview and when deciding whom to choose for employment you must, therefore, ensure that your decision is in **no way** based on sex, age, pregnancy/maternity, gender reassignment, marital status, disability, religious/philosophical belief or sexual orientation.

Furthermore, you must ensure that you do not apply any provision, criteria or practice to the recruitment process, unless justifiable, that has a disproportionately adverse effect on one particular group.

6.2. Right to Work in the UK

It is a criminal offence to employ anyone who does not have permission to work in the UK. The good news is that there is a defence to this crime if you have carried out the required checks.

From 30 June 2021, new rules apply to the right to work check procedure as an EU national's passport or identity card is no longer a valid form of documentation to evidence their right to work in the UK.

To have the right to live and work in the UK, EU nationals must now:

- Have settled or pre-settled status under the EU Settlement Scheme;
- Be sponsored under the points-based immigration system; or
- Have another status giving them the right to work.

You can either conduct a physical document check or an online check to establish an employee's right to work.

6.2.1. Physical document check

Physical right to work checks comprise three easy steps:

Step 1 – Copy Required Original document(s)
You must obtain original documents from either List A or List B of acceptable documents (below) for a manual right to work check.

Step 2 – Check the documents presented to you
You need to satisfy yourself that the person you intend to employ is the rightful holder of the document in question by checking photos, dates of births, expiry dates and check stamps or endorsements to ensure the type of work in question is covered.

Step 3 – Take a photocopy or scan of the document(s)
It is safest to copy the whole of the document and then keep a record of it in case of a visit by the Immigration Service.

Checks on all documents should be conducted prior to employment commencing. If you have correctly carried out the 3 steps outlined above you will have a statutory defence if the person is found working for you illegally.

You need to be aware of the type of defence you have as this determines how long it lasts for, and if, and when you are required to do a follow-up check:

- **List A documents** – You have a continuous statutory defence for the full duration of the individual's employment with you. You are not required to carry out any repeat right to work checks.

- **List B: Group 1 documents** – You have a time-limited statutory defence which expires when the individual's permission to be in the UK expires. You should carry out a follow-up check when the document evidencing their permission to work expires.

- **List B: Group 2 documents** – You have a time-limited statutory defence which expires six months from the date specified in your Positive Verification Notice. This means that you should carry out a follow-up check when this notice expires.

List A

- **Passport** (current or expired) showing holder or a person named in the passport as child of holder, is a **British citizen or a citizen of the UK and Colonies having the right of abode in the UK.**
- Passport/passport card (current or expired) showing holder is a national of **the Republic of Ireland.**
- Current **document issued by the Home Office to a family member of an EEA or Swiss citizen**, and which indicates that the holder is permitted to stay in the UK indefinitely.
- **Document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man**, which has been verified as valid by the Home Office Employer Checking Service, showing that the holder has been granted unlimited leave to enter or remain under Appendix EU to the Jersey Immigration Rules, Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008 or Appendix EU to the Isle of Man Immigration Rules.
- Current **Biometric Immigration Document** (biometric residence permit) issued by the Home Office to holder indicating that the person named is allowed to stay indefinitely in the UK or that there is no time limit on their stay.
- Current **passport** endorsed to show that holder is **exempt from immigration** control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK.
- Current **Immigration Status Document issued by the Home Office** to holder with an endorsement indicating that the named person is allowed to stay in the UK indefinitely and there is no time limit on their stay when produced together with an official document giving their permanent National Insurance Number and their name issued by a Government agency or previous employer.
- **Full birth or adoption certificate** issued in UK together with an official document giving their permanent National Insurance Number and name issued by a Government agency or previous employer.
- **Full birth or adoption certificate issued in the Channel Islands, the Isle of Man or Ireland**, when produced together with an official document giving their National Insurance Number and their name issued by a Government agency or previous employer.
- **Certificate of registration or naturalisation as a British Citizen** when produced together with an official document giving their permanent National Insurance Number and their name issued by a Government agency or previous employer.

List B - Group 1

Documents that provide a time-limited defence which expires when the person's permission to be in the UK expires:

- **Passport or travel document** saying person can stay in UK and can do the work in questions providing no work permit required.
- **Biometric Immigration Document** issued by the BIA indicating they can stay indefinitely and can do the work in question.
- **Work permit** or other approval to take employment issued by Home Office, UKBA or BIA **when produced together with** either a passport or another travel document endorsed to show the holder is allowed to stay in the UK to do the work in question or a letter from the Home Office or BIA to the employer stating the same.
- **Certificate of application** issued by the Home Office, UKBA or the BIA to or for a family member of an EEA or Swiss national which is less than 6 months old stating the holder can take employment **when produced together with** evidence of verification by the BIA Employer Checking Service.
- **Residence card** or document issued by Home Office, UKBA or BIA to family member of National of EEA or Switzerland.
- **Application Registration Card** issued by Home Office, UKBA or the BIA stating holder is permitted to take employment **when produced together with** evidence of verification by the BIA Employer Checking Service.
- **Immigration Status Document** issued by the Home Office, UKBA or the BIA to the holder with an endorsement indicating that the person named can stay in the UK and is allowed to do the type of work in question **when produced together with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or previous employer.
- **Letter from the Home Office, UKBA or the BIA** to the holder or the employer or prospective employer indicating person named can stay in the UK and is allowed to do the work in question **when produced together with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or previous employer.

List B - Group 2

Documents that provide a time-limited defence which expires six months from the date specified in your Positive Verification Notice. When checking these documents you must also contact the Home Office Employer Checking Service to obtain a Positive Verification Notice:

- **Document issued by the Home Office** showing that the holder has made an application for leave to enter or remain under the Appendix EU to the immigration rules on or before 30 June 2021 **together with a Positive Verification Notice** from the Home Office Employer Checking Service.

- **Document issued by the Bailiwick of Jersey or the Bailiwick of Guernsey,** showing that the holder has made an application for leave to enter or remain under Appendix EU to the Jersey Immigration Rules or Appendix Eu to the Immigration (Bailiwick of Guernsey) Rules 2008 on or before 30 June 2021 **together with a Positive Verification Notice** from the Home Office Employer Checking Service.

- **Application registration card** issued by the Home Office stating that the holder is permitted to take the employment in question, **together with a Positive Verification Notice** from the Home Office Employer Checking Service.

- **Positive Verification Notice** issued by the Home Office Employer Checking Service to the employer or prospective employer, which indicates that the named person may stay in the UK and is permitted to do the work in question.

6.2.2. Home Office online checking service

Currently, you can use the online checking service when the individual holds:

- A biometric residence permit; or
- A biometric residence card; or
- Status issued under the EU Settlement Scheme; or
- Status issued under the points-based immigration system; or
- British National Overseas (BNO) visa; or
- Frontier Worker permit.

The online right to work check process involves 3 simple stages:

Step 1 – Use the Home Office online right to work checking service
You should access the online right to work checking service (available at https://www.gov.uk/view-right-to-work) in respect of the individual by providing their date of birth and share code. You should only employ them or continue to employ an existing employee if the online check confirms they are entitled to do the work in question.

Step 2 – Check the individual's identity
You need to satisfy yourself that any photograph on the online right to work check is of the individual presenting themselves for work.

Step 3 – Make a copy of the response
You should retain a clear copy of the response provided by the online right to work check and store that response securely electronically or in hardcopy) for the duration of employment and for two years afterwards.

Remember if you only ask those who appear to be non-British, you run the risk of potential race discrimination claims for which **compensation** in the Employment Tribunals is **unlimited**. Therefore, you should carry out the above checks on **every new employee,** even where you do not believe that nationality would be an issue.

6.3. Past Criminal Convictions

After a certain period of time, people who have been convicted of some criminal offences and have served their sentences are not obliged to disclose those convictions. Such convictions are said to be spent, and the person is treated as “rehabilitated”.

A rehabilitated person is treated at law just like a person who has not committed or been charged or convicted with a criminal offence. Failure to disclose a spent conviction is not a fair ground for dismissing an employee or for refusing him employment.

The effect of these rehabilitation laws is that if, for example, you ask a job applicant whether he has any criminal convictions, a negative answer may mean that:

- They have no previous convictions
- They have convictions, but they are spent
- They have convictions which are not spent, and they are lying!

If, after the company has employed a person, it discovers that they do have previous convictions then:

- if those convictions are not spent you may consider the applicant for dismissal if such a dismissal would be fair in all the circumstances; or
- if those convictions are spent the company can take no action.

If, in either the company’s job application form or at interview, a job applicant reveals previous convictions then:

- if the convictions are spent they do not form a good reason for refusing employment; or
- if they are not spent then, the Company can refuse to offer employment if it is reasonable to do so.

If there is a requirement to undertake a DBS check prior to recruiting an employee, and this details convictions or even spent convictions which cause the character of the individual to be questioned as unsuitable for the required role for example, a charge of assault with the intention of working within the care sector, the employer would be in a position to withdraw the offer, or end the employment if continuing with it posed a risk.

6.4. Medical History and Illness

Under the Equality Act 2010, it is no longer permitted to ask any questions relating to medical history or ill health in the pre-employment questionnaires unless for a specific prescribed reason. This is designed to prevent Disability Discrimination in the recruitment process.

The prescribed reasons are:

1. To identify reasonable adjustments – To establish whether the applicant will be able to comply with a requirement to undergo an assessment (e.g. an interview or other process designed to give an indication of the applicant's suitability for the work concerned) or to establish whether you (the potential employer) will have to consider making reasonable adjustments to assist the applicant in the assessment;
2. Intrinsic to the role – Establishing if the applicant will be able to carry out a function that is intrinsic to the work concerned;
3. Monitoring – Monitoring diversity in the range of persons applying to the employer for work;
4. Positive action – Asking whether a person is disabled so they can benefit from any measures aimed at improving disabled people's employment rates. A main example of this would be the guaranteed interview scheme, whereby any disabled person who meets the essential requirements of the job is offered an interview; and
5. An Occupational requirement – If you had a requirement for the applicant to have a particular disability, and so being able to establish whether the applicant has that disability.

The Equality Act makes it **unlawful to discriminate** against a person who is disabled by either treating him differently to a non-disabled person, subjecting him to a detriment because of his disability (e.g. by not offering him a job) or by failing to make reasonable adjustments in order to accommodate his employment.

For this purpose, a person is **disabled** if he has a physical or mental impairment (which can, therefore, include depression and other **mental illness**) that has a substantial (more than trivial) and long-term (i.e. has lasted or is likely to last at least 12 months) adverse effect on his ability to carry out **normal day to day** activities.

If a job applicant is disabled, then you must not refuse that person employment unless refusal is absolutely justified.

Rather, the company is under an obligation to explore the possibility of making adjustments to its working environment in order to facilitate the disabled person's employment. Such adjustments could, for example, include:

- alterations to your premises and/or site;
- alterations to working hours, duties and equipment;
- provision of certain assistance to the disabled person;
- alterations to procedures or instruction manuals; and
- ·permitting certain absence or flexibility in working hours.

The company's obligation is only to make **reasonable** adjustments in order to accommodate the disabled person. What is reasonable will depend upon factors such as the practicality of the change, cost and availability of finance/resources.

When dealing with a job application from a person who is (or might be) disabled, it is therefore very important for the company to ensure that it has an adequate paper trail in place before rejecting the job application.

For example, the company should record in writing the changes that might be required in order to accommodate the disabled person and the reasons why it concludes (if it does so) that those changes are not reasonable in the particular case. In such cases, prior to rejecting an application, you are advised to discuss the issue with the Disability Rights Commission and to consult the Access to Work Scheme which can provide advice, assistance and funds to subsidise up to 80% of the cost of making certain alterations.

6.5. Interviewing

In order to avoid subjectivity and in order to ensure that you recruit the sort of people that the company needs it is suggested that those people responsible for interviewing are given both training in the techniques of interviewing and guidance regarding the sort of questions that should be asked.

As a general rule, when interviewing one should **avoid questions** relating to sex, age, childbirth, marital status, race, disability, sexual orientation, religious belief or philosophical belief.

However, where it is necessary to assess whether personal circumstances will affect performance of the job such issues should be discussed objectively without detailed questions, for example, about marital status, children and domestic arrangements.

It is suggested that the company completes an interview assessment form if more than one person is being interviewed for a post as such forms will provide a standard format for a comparison of relative skills and experience – and help defend any discrimination claims.

7. TUPE

7.1. What is TUPE?

The purpose of TUPE is to protect employees if the business in which they are employed changes hands. Its effect is to move employees and any liabilities associated with them from the old employer to the new employer by operation of law.

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations. The Regulations were first passed in 1981 but overhauled in 2006. TUPE is a significant and often tricky piece of legislation adopted by the UK in order to implement the European Acquired Rights Directive.

7.2. Why Do You Need to Know Anything About TUPE?

TUPE applies every day to an enormous number of different business transactions, and it is essential that employers of all sizes understand what employment liabilities can arise. TUPE can apply (to name but a few of many examples) when employers:

- sell or buy part or all of a business as a going concern;
- outsource or make a "service provision change" involving either (a) an initial outsourcing of a service (e.g. where services transfer from the customer to an external contractor); (b) a subsequent transfer (e.g. where services transfer from the first external contractor to a different external contractor; and (c) bringing the service back in-house (e.g. where services transfer from an external contractor back to the customer);
- grant or take over a lease or licence of premises and operate the same business from those premises.

7.3. What Do You Need to Know About TUPE?

To protect your business from claims, you need to understand:

- when TUPE is likely to apply;
- what TUPE means legally;
- what you have to do to comply with TUPE and the penalties for failing to do so; and
- what other steps you can take to protect your business from the effects of TUPE.

7.4. When is TUPE Likely to Apply?

In essence, TUPE applies where there is a "relevant transfer". The 2006 Regulations clarified complicated case law to determine that a relevant transfer means the "transfer of an economic entity which retains its identity". In determining whether this has happened, the courts take into account factors such as:

- the type of undertaking being transferred;
- whether any tangible assets (buildings, moveable property etc) are transferred;
- whether any intangible assets are transferred and the extent of their value;
- whether the majority of the employees are taken on by the new employer;
- whether any customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period for which the activities were suspended, if any.

The question of exactly when TUPE does and does not apply is a very complex one. If you think a transaction you are involved in might be covered by TUPE, you should always take specialist legal advice. Virtually all service provision changes are covered, so it is safe to assume that TUPE applies to most outsourcing without the need for protracted legal argument. However, because of the uncertainty surrounding when TUPE applies, it is common for this issue to be regulated by contract.

7.5. What Does TUPE Mean Legally?

Employees who are employed in the undertaking which is being transferred have their employment transferred to the new employer. Employees can refuse to transfer (or "opt-out"), but depending on the circumstances of the case, they can lose valuable legal rights if they do. TUPE states that "all the transferor's rights, powers, duties and liabilities under or in connection with the transferring employees' contracts of employment are transferred to the transferee". This all-embracing concept encompasses rights under the contract of employment, statutory rights and continuity of employment and includes employees' rights to bring a claim against their employer for unfair dismissal, redundancy or discrimination, unpaid wages, bonuses or holidays and personal injury claims etc.

Employees, therefore, have the **legal right to transfer** to the new employer on their existing terms and conditions of employment and with **all their existing employment rights and liabilities** intact (although there are special provisions dealing with old age pensions under occupational pension schemes). Effectively, the new employer steps into the shoes of the old employer, and it is as though the employee's contract of employment was always made with the new employer. For this reason, it is essential that employers know all about the employees they might inherit if they are planning to take over a contract or buy a business and that they make sure that the contract protects them from any employment liabilities which arose before they became the employer. This is helped by the fact that the old employer is required to provide to the new employer written details of all employee rights and liabilities that will transfer (see below).

For example, if Armadillo plc has been carrying out a contract to supply an insurance company with IT services and then loses the contract to Bear Ltd, Bear Limited will not only take over the contract to supply IT services, but will also inherit all the employees of Armadillo plc who were formerly involved in supplying the IT services to the insurance company. If Armadillo plc has failed to pay its employees their wages for the past few weeks, Bear Limited will inherit the liability to the employees for the unpaid wages under TUPE.

Any **dismissals will be automatically unfair**, where the sole or principal reason for the dismissal is the transfer. This is also the case where the sole or principal reason for the dismissal is a reason connected to the transfer, unless it is for an economical, technical or organisational reason (an "ETO" reason) requiring a change in the workforce. This ETO defence is narrow in scope and can be difficult to rely upon. Even if the employer can rely upon an ETO defence and the dismissal is not automatically unfair, it may still be unfair for other reasons (such as a failure to consult properly in a redundancy situation).

As the new employer is required to take on the employees on their existing terms and conditions of employment, **it is prohibited from making any changes to the terms and conditions of employment** of the transferred employees if the sole or principal reason for the variation is the transfer. This is also the case where the sole or principal reason is connected to the transfer, unless there is an ETO reason for the change, usually requiring a change in number of the workforce. This often makes it difficult, if not impossible, for incoming employers to harmonise terms and conditions of employment of staff after a TUPE transfer.

Where an independent trade union has been recognised by the outgoing employer in respect of transferring employees, recognition will transfer to the incoming employer to the same extent.

7.6. What Do You Need to Do to Comply with TUPE?

1 - Outgoing Employer Must Inform and Consult with Staff

Employers involved in a business transfer must inform appropriate representatives of the affected employees of the transfer and any measures proposed, and must consult on any proposed measures. Certain specified information must be provided to the representatives long enough before the transfer to enable the outgoing employer to consult with them about it.

If there are any changes or proposals for changes following the transfer, these "measures" will have to be discussed with the representatives of the affected employees. The incoming employer is required to provide the outgoing employer with information on proposed measures to allow the outgoing employer to comply with its duty to inform and consult. There is no set timetable for consultation, but the larger the transaction and the more staff affected, the longer the timetable will need to be.

If there is a failure to inform and consult, a complaint can be made to the **Employment Tribunal**. If successful, the Tribunal can award whatever compensation it considers just and equitable having regard to the seriousness of the employer's failure up to a maximum of **13 weeks' pay** per affected employee. Information and consultation failures can result in joint and several liabilities between the outgoing and incoming employers, although the contract governing the transfer can cater for apportionment of liability here.

2 - Outgoing Employer Must Provide Employee Liability Information to Incoming Employer

The outgoing employer has a duty to provide the incoming employer with written details of the transferring employees (including identity, age, particulars of employment, disciplinary and grievance records, employee claims and collective agreements) together with all associated rights and liabilities that will transfer. This **information must be given not less than 14 days before the transfer**, although in practice the incoming employer will aim to attain this information much earlier.

If there is a failure to comply with this duty by the outgoing employer, the incoming employer can apply to the Tribunal for compensation which will be assessed with regard to the losses suffered with a **minimum award of £500 per employee**. A failure to comply with TUPE could, therefore, expose employers to claims large enough to undermine the entire transaction.

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H&S Service Experts

Peter Hobson

Peter is a respected health and safety professional with over two decades of leadership experience within MNCs.

Serving in pivotal roles such as Group Safety Manager, Group Safety Director, and Europe Safety Director, Peter brings to the table an in-depth understanding of multinational project intricacies. His knowledge spans a wide array of sectors including power projects, tunnelling, sea cabling, highways, retail, and housing association projects.

Since 1994, Peter has specialised in Planning Supervisor, CDM Coordinator and Principal Designer roles. He is a past Chairman and Chartered Fellow of IOSH, and holds the Safety Engineer Distinction – Examination. He is a Member of the Association for Project Safety and Diploma holder in Safety Management from the British Safety Council.

Mark Andrew

Meet Mark, an experienced Health & Safety advisor with a strong background in engineering. Mark holds an MEng and BEng (Hons) in Engineering, is a Practitioner of IEMA, and a Graduate Member of the Institute of Occupational Safety and Health (IOSH).

With a career spanning over 30 years, Mark has held positions at Ardagh Metal Beverage, Ball Packaging Europe, Continental Can Company, and Carlsberg.

His expertise includes overseeing health and safety objectives, incident investigation, risk management, and implementing integrated management standards. He has also been involved in engineering and construction projects, working closely with internal teams and external contractors.

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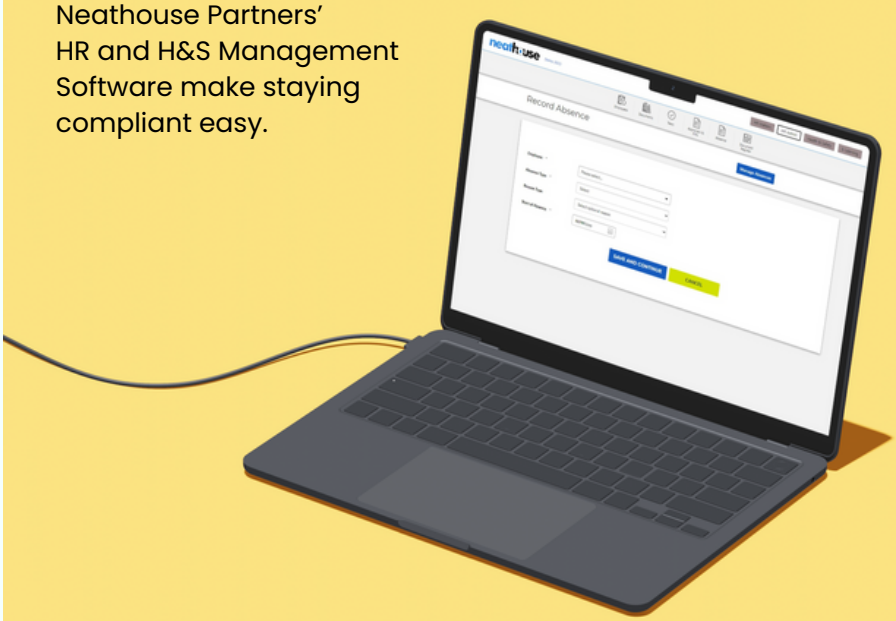
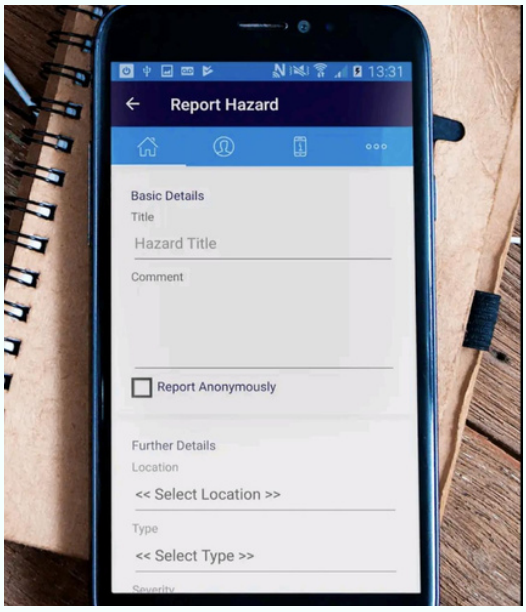
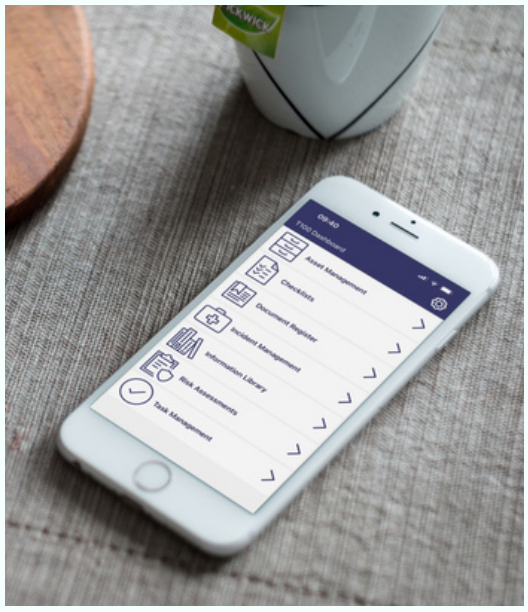
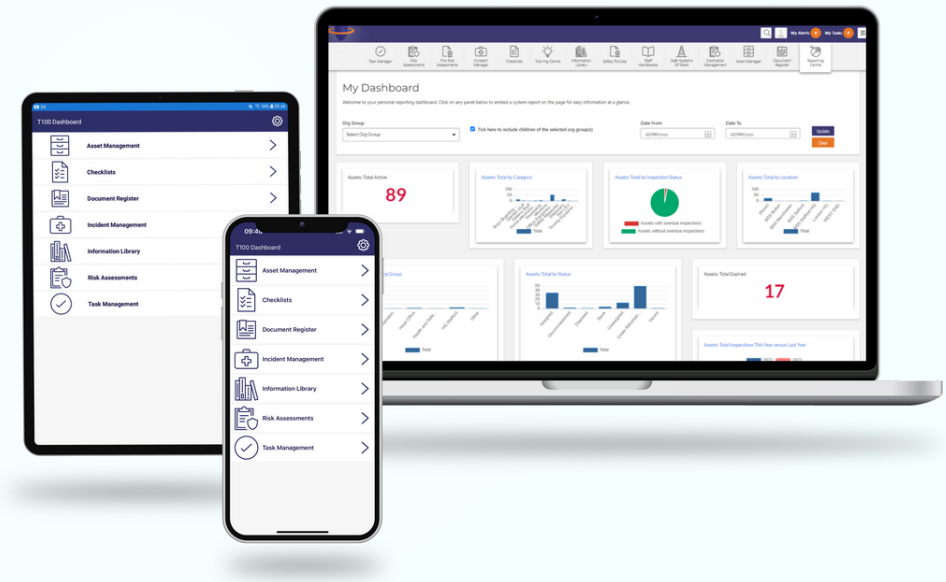
compliant easy.









Get in Touch

I'm your point of contact at Neathouse Partners. I'm here to answer any questions you have about the services we offer and guide you through the sales process. Don't be a stranger, let me know how I can help.

James Rowland
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Let's Talk

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