Employing and engaging people in the UK

Driven by results

Shulmans LLP

Introduction

The UK is among the least regulated labour markets in the world. Its labour market is also significantly less regulated than any other major economy in the European Union. This was confirmed again by the Office for Economic Cooperation and Development (OECD) publishing their data on protection legislation for most countries. Our chart of the OECD data (overleaf) for selected countries, but showing the relevant position of the UK, is set out below.

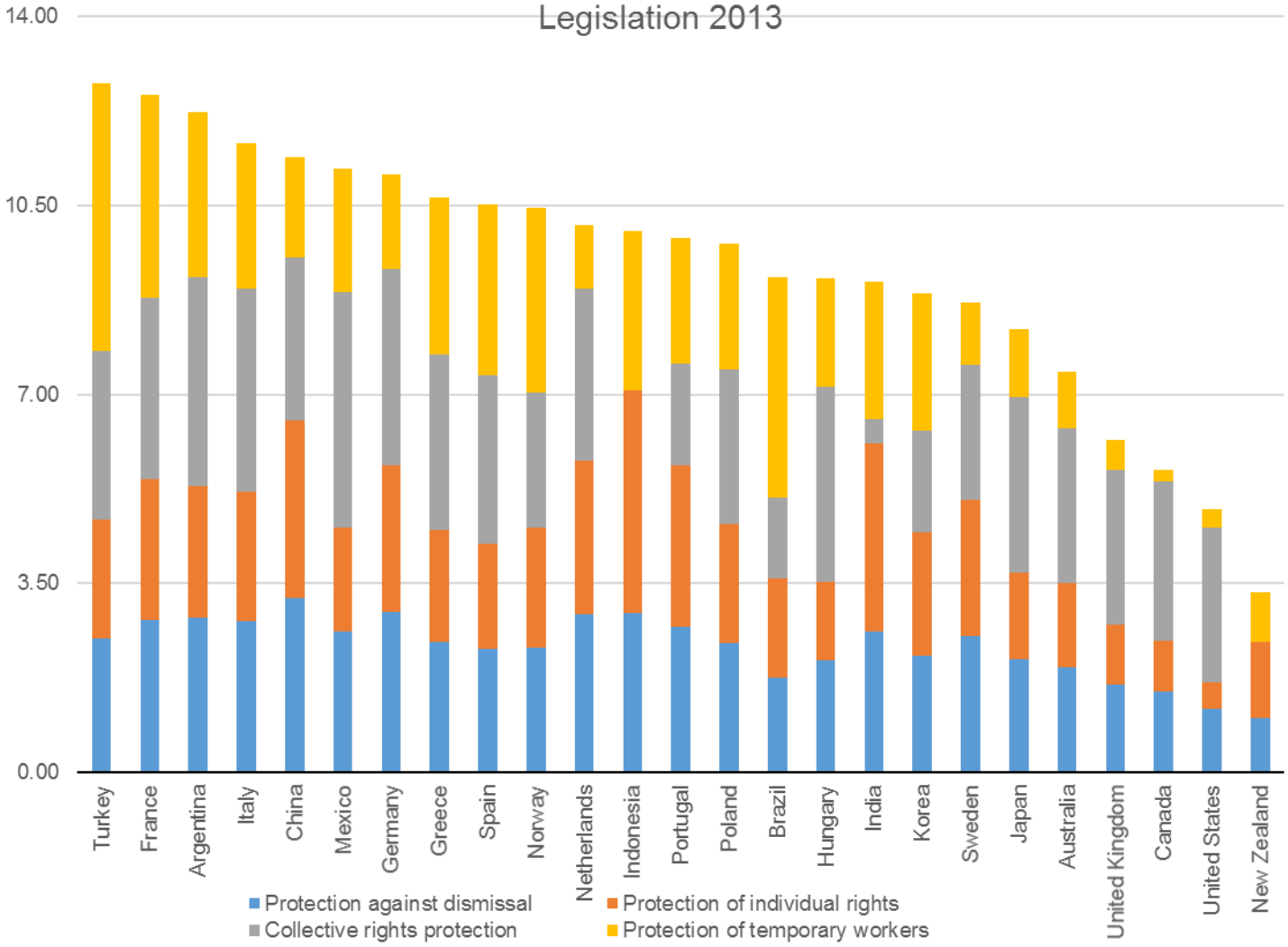
While the current UK government, elected in 2015, is seeking to reduce employment protections further, it is worth employers considering engaging people in the UK, or those who already do so, understanding the background and the key areas of regulation. There are a few areas that may cause liabilities for the unwary employer. This note aims to give a degree of the understanding of those issues but is no substitution for taking legal advice. It is, by its very nature, general.

Broadly, an employee's rights in the UK are created in a contract of employment, representing the bargain reached between employer and employee. Other than in certain circumstances required by statute, such contracts can give and/or take away rights of employees. It is also possible to contract with individuals on a basis that does not amount to a contract of employment where the reality of the situation is different from an employment relationship.

The enforcement of most employment rights is also usually by way of a legal process, for which employees must pay a fee, but the sanction is usually only a loss based financial award. Other than laws design to protect the physical health and safety of employees, there are very limited circumstances (e.g. breaches of immigration laws) where an employer is criminally liable in respect of employee issues. The current government maintains that low regulation and low financial penalties for most employment law breaches helps maintain the UK as a destination for investment from other countries.

It should be noted that the UK has common, but not identical laws across all parts of the UK, namely England, Northern Ireland, Scotland and Wales. There are some variations. Unless expressly mentioned, we have stated the position for England which accounts for over 82% of those employed in the UK as a whole.

Fig 1: OECD indicators on Global Employment Protection Legislation 2013



Pre-employment Issues

Immigration

Immigration and visa requirements play a key part in the recruitment process and it is becoming increasing common for employers to recruit individuals from outside of the UK and Europe. This is particularly the case where there is a skills shortage in the UK labour market.

PRATICAL QUESTION:

Q: DOES THE EMPLOYER NEED TO BE A UK COMPANY?

A: No. It can be a foreign entity such as a US Inc., a Dutch BV or a Russian ZAO. If the employer wishes to bring non-UK nationals in the country it may, however, need to apply for a UK bank account.

The UK has strict immigration rules and regulations in place which employers must follow when recruiting migrant workers and these are set out, in detail, within the immigration rules. Although complex and complicated for employers to follow, failure to comply can be regarded as illegal working under the Immigration, Asylum and Nationality Act 2006. For example, a failure to identify a migrant worker who requires UK immigration permission (and undertake the required document checks) could result in criminal and/or civil penalties of imprisonment of up to 2 years and/or fines, currently a maximum fine of £20,000 for each illegal worker.

In summary, there are two broad categories of foreign national workers, namely:

- foreign nationals from within the European Economic Area (EEA) and Switzerland; and
- foreign nationals from outside the EEA and Switzerland.

In general, migrant workers who come from within the EEA and Switzerland (with the exception of Croatia) will have an unrestricted right to live and work in the UK and therefore the Immigration Rules will not apply to those individuals. The position is however different for any individual who comes from outside of the EEA and Switzerland and wishes to work in the UK and the Immigration Rules will need to be followed.

Temporarily working in the UK (e.g. business trips) is easier to achieve, and the below relates to working in the UK for more than a few months.

The points-based system

The UK operates a points-based system (PBS) for all foreign nationals applying to work or study in the UK from outside the EEA and Switzerland, which fall under five tiers, namely:

- Tier 1: high-value migrants, such as entrepreneurs, investors, graduate entrepreneurs and exceptional talent.
- Tier 2: highly skilled migrants with job offers who are coming to the UK to fill a gap in the UK labour market.
- Tier 3: low skilled workers (not operational).
- Tier 4: students.

- Tier 5: youth mobility and temporary workers.

The PBS requires migrant workers to obtain a set number of points, based on the five different tiers, to demonstrate that they possess certain attributes before they can get permission to enter or remain in the UK. For example, each tier requires a migrant worker to score a sufficient number of points and points are awarded for various criteria specific to each tier. This includes criteria such as the migrant's age, qualifications and prospective earnings together with the ability to fund the migrant's initial stay in the UK and their ability to speak English will be a requirement under most tiers.

Sponsorship

With the exception of Tier 1, a migrant worker must be sponsored by either an employer before they can enter the UK to work or study. Accordingly, an employer wishing to employ a migrant worker under any one of those tiers will therefore need to apply for and obtain a sponsor licence from the UK Visas and Immigration (UKVI) before it can do so.

To obtain a sponsor licence, employers must register with the UKVI and submit an online application form. In general, the following requirements will need to be satisfied:

- Provide evidence to demonstrate that they are genuine employers based in the UK and operating lawfully;

- Be able to comply with employment and immigration law and good practice;

- Provide original or certified copies of the documents required to support their application for the relevant tier;

- Agree to take on a number of obligations and provide evidence that they are capable of carrying out their duties and responsibilities as a sponsor. This will also require the employer demonstrating that they have "key personnel" in place to manage, take responsibility for and ensure compliance with the immigration rules and procedures; and

- Pay the required sponsor licence fee, which varies depending on the tier that is being applied for and the size of the employer. The employer will also need to ensure that the sponsor licence is renewed every four years.

Once the sponsor licence has been obtained the employer can then obtain and assign a Certificate of Sponsorship for each migrant worker they employ. This is an electronic record and each certificate has its own unique ID number which the migrant worker can then use to apply for a visa.

It is also important for an employer to ensure that they fully comply with their sponsorship duties at all times throughout the sponsor licence as otherwise the licence could be revoked, suspended or downgraded to a lower rating. This will depend on a number of factors, including the seriousness and consistency of the failure, and if there has been any evidence of illegal working it could also result in a criminal and/or civil penalty (see above). It is therefore very important for employers to ensure that they comply with and act in accordance with the Immigration Rules when recruiting migrant workers as a failure to do so could be very costly.

Types of staff

Individuals who will supply services to you in the UK may belong to different legal categories with different protections, different obligations and differing tax treatment. Very broadly, individuals could be employees, workers or genuinely self employed.

Which category applies is not simply a question of contract form, it is a question of fact. In determining whether an individual is an employee, factors to be considered include:

- Is there an obligation on the individual to do the work and an obligation on you as a business to provide it?

- Does the business exercise day to day control over the individual, e.g. targets, objectives etc. This does not need to be day to day contact but that might more readily indicate an employment relationship.

- Is there a genuine right for the individual to send a substitute in his or her own place as an alternative? If there is, this is unlikely to be an employment relationship.

The simple passage of time does not indicate whether an individual is an employee, worker or is genuinely self employed.

Workers, as opposed to employees, have fewer statutory employment rights, particularly around termination. Such workers might be supplied by a third party temporary work agency or contract with you directly.

A further area is that certain individuals may choose to incorporate their own corporate entity and to have that entity supply the services of the individual. This has become more popular among contractors supplying professional services. The UK tax authorities are, however, making this less financially advantageous to such professionals.

Employees can also be engaged on an employee shareholder basis, whereby the employee holds shares in the employer in exchange for reduced employment rights on termination. There are tax advantages for the employee on the sale of the shares in such circumstances.

Pre-employment registration

There is no requirement to register as an employer with any works ministry. The employer also does not need to be a UK registered company. It is, however, a requirement to register with the UK tax authorities (HM Revenue & Customs – referred to as HMRC). The employer also needs to set up, or have a third party set up, basic payroll systems.

Industry specific regulations may require registration with specific regulators. Doctors, lawyers, financiers are all examples.

As mentioned above, registration with the immigration authorities may also be necessary if the employer wishes to become a sponsoring employee for immigration purposes.

Insurances

While the exact insurance policies that it would be advisable for an organisation to have in the UK vary according to function, it is a legal requirement to carry employers' liability insurance at a specified level. Public liability insurance will almost always also be required.

Contract requirements

UK law starts from the principle that a prudent employer may protect itself in a written contract of employment. If the employer chooses not to protect itself, or does so insufficiently, the UK legal system will not usually imply more than cursory protections for the employer. Certain basic information must be provided (e.g. name of employer, job title/role, pay rates and details, hours of work, termination notice periods, holiday and sickness absence rights) but the failure to provide such information has a very limited sanction.

UK law will require employees to obey reasonable instructions, serve the employer faithfully and exercise a degree skill and care, but these are limited unless the employer has protected itself further. As a consequence most well drafted UK employment contracts that protect the employer run to 10 pages or so.

Equally, UK law will, among other matters, imply that an employer will take care of the health and safety of its workforce, pay staff equally irrespective of gender and pay wages without deduction.

Contractual rights of employees also form over time and by precedent. If an employer has always acted in a certain manner, such a manner may become a contractual term. Again, a prudent employer will have a contract of employment that prevents such past actions becoming a binding precedent while retaining flexibility over other contractual terms, such as being able to vary hours, bonus terms or place of work.

UK law provides statutory minimums on limited contractual rights. For example, termination notice requirements cannot be less than statute, which is approximately one week for every year of service up to a maximum of 12 weeks' notice after 12 years' service.

PRATICAL QUESTION:

Q: DO WE HAVE TO PROVIDE CONTRACTS TRANSLATED INTO LANGUAGES OTHER THAN ENGLISH FOR NON-ENGLISH SPEAKERS?

A: UK law envisages that employment contracts are in English. There is no freestanding requirement to translate the contracts into an employee's native language. It may be advisable, however, to have key health and safety documents translated for understanding, particularly in manufacturing environments.

Finally, unionised workforces may be subject to collective agreements between the employer and employee which are incorporated into individual contracts of employment. It should be noted, however, that trade union membership and activity is very limited in the UK when compared to other European Union countries and trade union activity in the UK is normally associated with older or more traditional business sectors such as heavy manufacturing.

UK employers often set out rules and procedures in a staff handbook. There is no requirement for such a handbook, but it usually seeks to further protect the employer by, for example, setting out disciplinary rules.

Recruitment

Broadly, an employer can select whoever it chooses to become an employee. It runs the risk of a claim for unlawful discrimination if it directly or indirectly selects or decides not to engage employees or workers on grounds related to protected characteristics (see below on unlawful discrimination). UK law takes a wider definition of discrimination than in some other countries. For example, asking a woman as to whether or not she intends to have children in the next few years in a recruitment context could make the employer liable for sex discrimination on the basis

it shows an intention to discriminate against women of child bearing age who may take maternity leave.

There are also some restrictions on what employers can do on background checks and requiring employees to consent to such background checks.

It is usual for any offer of employment to be made subject to certain conditions being met. The most common one would be receipt of two satisfactory references, one of which is usually from a previous employer.

Data privacy laws may impact on a recruitment process or the retention of information on candidates (see below).

Employment and office holding

It should be noted that an individual's employment relationship is separate from any other office holding. In the event the individual is appointed as a statutory director of the employer or as company secretary, the employment contract should cover off matters relating to such office holding.

It should also be noted that referring to someone as a "director" in their job title (e.g. Human Resources Director) is different from the statutory office holding of a director.

Data Privacy

UK and EU Employees have a greater right to privacy than they do in many other jurisdictions, including the US. Consent usually needs to be given by employees for the employer to process some types of data about the employees. Information should also be given to candidates for employment and employees as to what data will be retained and how that data will be used. UK law does not prevent effective recruitment, but does give employees a right to respect for their private life.

PRATICAL QUESTION:

Q: CAN I SECRETLY MONITOR EMPLOYEES IN THE UK?

A: This is rarely permissible in the UK. An employer needs strong grounds for suspecting criminal activity or similar acts and where telling people about the monitoring would make it difficult to prevent or detect wrongdoing. It can only be used as part of a specific investigation and where you are ultimately looking to involve the police.

Equally, once individuals are employed, information relating to their employment cannot be disclosed unless there are exemptions to UK data laws. Special rules also apply relating to the transfer of employee data outside of the EU and particularly to the US. This would include HR data that global organisations may wish to access from outside the UK. It should be noted that EU law does not automatically regard US data systems as sufficiently secure from governmental surveillance to comply with EU data privacy rights.

Information about an employee's health is classed as "sensitive" personal data and additional rules about the collection, retention and use of such information exist.

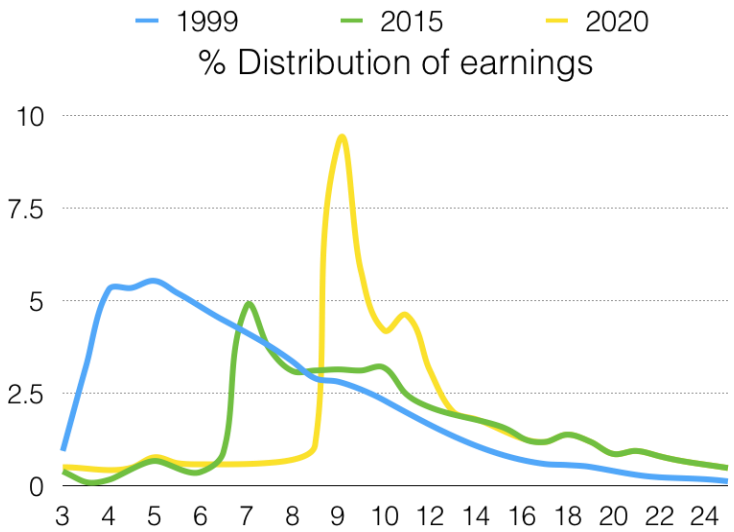
Workers can request access to all information their employer holds about them. This could include emails.

Breach of data privacy rules may mean the employer is fined by the UK's information commissioner.

Issues during employment

Pay and benefits

The median full time average annual remuneration in the UK in 2014 was £22,044. This is usually paid by way of periodic payments (monthly or weekly). Some employees may be remunerated by reference to hours worked and such payments are usually referred to as wages. Other employees are remunerated by reference to an expected annual remuneration figure which is referred to as salary. The % distribution of hourly wage rates (on bottom axis) in the UK is shown in Figure 2 and what it will be expected to be in 2020.



There is a national minimum wage (recently increased and renamed the National Living Wage). This requires pay of a certain hourly rate. There are four rates; the standard (adult) rate, the development rate, the apprentice rate and the young workers rate. From April 2016 the rate for employees over the age of 25 will be £7.20 per hour. This will be circa £9 per hour by 2020. Calculating the national minimum wage for employees with variable hours or unusual remuneration packages can be complex. Not paying at the correct rate can lead to claims from the individual employee and the state issuing underpayment notices. Deliberately refusing or wilfully neglecting to pay national minimum wage or breaching record keeping requirements can, theoretically give rise to criminal sanctions, but by 2014 there had only been 12 prosecutions since 2007.

In addition to wages or salary, employers can offer bonuses based on performance criteria (either individual or on the performance of the organization). Bonuses are usually deployed to target an employee's focus in his or her role.

Employees can also receive other payments such as shift allowances and attendance allowances, although these are voluntary. Employers may also offer insurances such as private medical insurance, although it should be noted that the healthcare system in the UK is free at point of use to those in the UK and therefore many employers do not provide such benefits for anyone other than senior employees.

Some employers also choose to provide company cars or cash allowances for the employee to purchase a car, particularly for senior or mobile employees.

Employers may also provide pension benefits in excess of the state pension. These can take many forms. As a minimum, however, an employer must automatically enrol qualifying employees into a nominated pension scheme which eventually requires the payment of 3% of remuneration by the employer.

Share options are rare for most employees. Such schemes can have tax benefits for employer and employee if set up correctly.

Sick Leave

Some employers provide for company sick leave to cover any period of absence due to illness. This may be a few days or, as for more senior employees a longer period. Absent any employer given sum, employees may be entitled to statutory sick pay (SSP) which is a government benefit that is administered by the employer and at the employer's cost. In 2015 SSP was £88.45 per week up to a maximum of 26 weeks. SSP does not usually cover short periods of absence.

Tax

Employees have to pay tax on their income. In most cases, however, it is the employer's responsibility for deducting this tax at source and paying it to HMRC. It is usually a requirement to do this in real time on what is called a pay-as-you-earn (called PAYE) basis. Real time means month by month accounting to HMRC for tax. An employer must therefore be registered with HMRC to enable this to occur. Some employers outsource this payroll and accounting function to a third party.

Certain benefits attract different tax treatment such as company cars. Others are tax free, such as payments into HMRC approved pension schemes.

Employees and employers both pay National Insurance contributions in respect of each employee and worker. The Employee's contributions are also usually deducted by the employer in the same way as PAYE. Employer contributions are paid separately.

Non-employment income (e.g. payments of dividends on shares held by the employee) are taxed differently.

There are also tax efficient schemes for an employee to hold shares in his or her employer. Some of these involve the individual's giving up certain employment law protections and creating employee shareholders.

Tax evasion, as opposed to prudent tax planning, can be a criminal offence in the UK.

Discrimination in employment

UK employment law is concerned with preventing the discrimination and harassment of "protected characteristics". These are: age; disability; gender; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; and sexual orientation. Discrimination can be direct such as treating an employee less favourably because of their race. It can also be indirect such as policies which do not directly effect a single person but have the effect of treating a group of people with the same protected characteristic less favourably. An example of indirect discrimination would be requiring employees to work full time which could discriminate against women with childcare responsibilities. Employers can, however, justify indirect discriminatory practices to avoid liability.

There are additional issues around disability where an employer is required to make reasonable adjustments to accommodate an employee's disability.

Separate rules (called "Equal Pay") seek to make discriminatory differences in pay between men and women carrying out the same role in the same manner unlawful. Such rules are complicated.

An employer will usually be vicariously liable for any discrimination an employee suffers, although there may be defences available. As a consequence, many employers train employees about what conduct the employer considers unacceptable. This is usually called "equal opportunities" training.

It should be noted that while an employer's liability for discrimination claims is unlimited, in 2014, for example, the mean average sex discrimination claim carried a liability of £8,200. Such claims are also loss based; there is no punitive element of damages awarded for discrimination as in, for example, the US. Damages for discrimination may, however, include damages for "injury to feelings" of up to circa £30,000.

It should also be noted if there are facts from which it could be decided, without any other explanation, that an employer could have discriminated, the burden of proof shifts to the employer to show it did not discriminate. In effect, this means employers must be prepared to prove they did not discriminate against employees.

Family friendly rights

Employees have rights during employment relating to time off for maternity leave (for the mother), paternity leave (for the father), adoption leave (for adopters) or parental leave (for parents and carers generally). This can mean employees can have periods of a year absent from work if certain statutory tests are met.

Pay for such leave varies depending on the type of leave and other requirements. Most employers only pay the statutory amounts for such leave, which is recouped from the government by setting off against the amount of employers National Insurance contributions it makes (see tax above).

Employees with or responsible for children also have the right to request time a flexible working pattern to accommodate childcare. The right is, however, only a right to request and have that request considered.

Much of the right to time off is unpaid – i.e. it is a right to be absent from work without being disciplined. UK law imposes certain payments (e.g. maternity pay).

Business transfers

UK law, as derived from European Union law, protects employees where the business in which they work is transferred to another owner. This law, the Transfer of Undertakings (Protection of Employment) Regulations is referred to as "TUPE", pronounced "Tyoo-Pee".

Where TUPE applies, it broadly requires that:

- employees will automatically transfer with the business to which they are attached together with all rights, liabilities and obligations related to them;

- employees who are dismissed in connection with such a transfer have a legal claim for dismissal (see below);

- an employer will need to provide information about such a transfer and consult with representatives of those employees affected about any measures proposed in connection with the transfer. Failure to do so can give rise to liabilities of up to thirteen weeks full pay per employee.

TUPE applies in a variety of situations; where the assets of a business are sold the employees will follow, by operation of law. It can also apply, however, where a function is outsourced, where one contractor takes over from another contractor and where an organization decides to take a business function back "in-house". The issue of whether or not TUPE applies to any commercial contract and what is necessary to mitigate any such issues is often a significant concern when supplying services in the UK.

As with most UK employment laws, penalties for breaching any requirement of TUPE is a civil claim by the employees, or their representatives, for damages. There is no criminal sanction.

Issues on termination

Generally, employers in the UK are freely able to dismiss employees. Assuming the reason for the dismissal is not discriminatory (see above) then the liabilities an employer faces are only (1) the ones set out in the employee's contract; and (2) any termination indemnities that an Employment Tribunal (a specialist labour law court) requires the employer to pay if it has not complied with UK law.

Individual Termination Rights

The primary termination indemnity that may need to be made to employees if they claim is for a statutory remedy called "unfair dismissal". Unfair dismissal only applies to employees with two or more years' service. To avoid having to pay a termination indemnity for unfair dismissal an employer must follow a fair process in effecting the dismissal (broadly consulting with the employee over the proposal and giving them the opportunity to improve their performance or argue against their dismissal) and to have a "fair reason" under UK law.

Fair reasons include where the employer is reasonable in concluding:

1. the employee has committed an act of misconduct. Note it is not that the employee must have committed the act, only that the employer is reasonable in concluding this fact;

2. where the employee is not capable of carrying out the job through either illness or aptitude, although such a process in effecting the dismissal on this grounds can take several months;

3. where the employee does not have the qualifications to do the job;

4. where another UK law prevents the employee carrying out his job (this is unusual); and

5. where the employee is "redundant" (see below).

Whether an employee is "redundant" is similar to a dismissal for economic reasons; where there is a reduced need for employees doing that type or work or a reduced need for employees at that location. Employees who have more than two years' service and are redundant are also entitled to a further statutory termination indemnity which is calculated by a formula that uses age and length of service. The maximum statutory redundancy payment in 2015 was £14,240, but most are significantly lower.

It is important to note that the fair reasons apply where the employer is reasonable to conclude the employee committed an act of misconduct, not whether or not the employee actually did commit the act. This is so that employers do not have to always second-guess how a judge might view the situation. It can, therefore, be possible for an employer to lawfully dismiss an employee for misconduct where it is reasonable to conclude the employee committed the act of misconduct, even if the employee can later prove they did not do the act of misconduct.

There is also another fair reason which is described as "some other substantial reason", usually abbreviated to SOSR. SOSR is a catch all category and can include, for example, business re-organizations, substantial personality clashes with a line manager and where there is a conflict of interest.

UK law does, however, describe some reasons for dismissal as being automatically unfair. These include where the dismissal is on the grounds of maternity, if employees are dismissed on the grounds of being a trade union member and, as mentioned above, on the grounds of TUPE.

Collective dismissals

Where 20 or more employees at any location are dismissed in any 90 day period for reasons not relating to their own conduct (e.g. redundancy, business re-organization, etc.) then collective dismissal rules apply. This requires a form HR1 to be sent to the UK authorities, and failure to do so can result in a criminal fine. Collective consultation with the representatives of the employees must also occur for 30 days otherwise the employer may be liable for a claim for 90 days' full pay per employee. Where there are 100 or more employees to be dismissed, then the consultation needs to occur for at least 45 days.

Collective consultation may need to occur in addition to the individual dismissal process.

Negotiated settlements

Where things are not working out, it may be possible for an employer to negotiate an agreed departure, most commonly where the employee is more senior. Usually this involves the employer paying a termination indemnity negotiated between the parties. The settlement is recorded in a settlement agreement. For the agreement to be a complete waiver of all statutory employment claims (e.g. discrimination or unfair dismissal) the employee must be advised by a legally qualified adviser on the effect of the settlement agreement.

Care needs to be taken when commencing settlement negotiations. Employers can inadvertently dismiss employees when commencing such discussions.

Tax issues on termination

On dismissal, depending on the circumstances, it is possible certain payments can be made to an employee free of tax and national insurance contributions, up to a limit of £30,000. This would cover, for example, settling certain types of legal proceedings that an employee may have brought or be able to bring against his employer. Equally, a statutory redundancy payment is not subject to tax.

After an employee has been dismissed, the employer should issue a tax form P45 to end the taxable relationship with the employee.

Employment Claims

The majority of claims an employee can bring are dealt with in the Employment Tribunal, a specialist and relatively informal labour court. Matters are often dealt with within months of the claim being issued. The Employment Tribunal system is impartial and free from bias or favour. Not responding to any claim brought by an employee or responding after any deadline set by the Tribunal may mean the employee's claim automatically succeeds. Parties to litigation in the Tribunal system have to meet their own legal costs and except in rare circumstances, costs cannot be recovered from the other side. Many Tribunal claims are determined by a Tribunal judge alone, although often a full hearing may use "wing members", being one from an employee background (such as a trade unionist) and one from an employer background.

Certain claims (for example for breach of contract where it is worth more than £25,000) can only be brought in the full UK Court system, upon payment of a fee. This is far more formal than the

Tribunal system. Judges and specialist advocates in such cases, called Barristers, still wear formal gowns and wigs modelled on dress codes of the 1700s. Cases are argued by advocates before a judge alone. There is no jury for non-criminal cases. Again, cases are determined without bias or favour. Each party bears their own legal costs, but a winning party will usually apply to have its legal costs paid by the loser to the litigation. Courts will usually order around 70% of the winning party's costs to be paid by the loser. As a consequence, many cases are settled by agreement between the parties. Fees payable to the Court, separate from legal costs, can often amount to £10,000.

Specialist areas

Trade Unions

Although trade unions have a long history in the UK, they are only present in a minority of UK workplaces. Union membership and industrial action are at low levels, particularly compared with any other major EU nation. Outside the public sector, union involvement tends to be restricted to traditional manufacturing industries.

Unions can apply to be officially "recognized" by an employer over, for example, pay negotiations. If a union can demonstrate sufficient union membership within the relevant part of the employer, then they can invoke a statutory process. That statutory recognition process can result in the ordering of a ballot of relevant employees.

Union recognition, whether statutory or voluntary, is normally recorded in a written recognition agreement. Recognition agreements can be decades old and may not reflect the reality of employee relations at an employer.

Employers who fear a request for recognition can put in place alternative, non-union staff bodies and take other steps to prepare to defeat any request they subsequently receive. Many employers, however, neglect to take these precautionary steps.

Employers can follow a process to de-recognize a trade union where, for example, union membership drops below a certain level.

Industrial Action

UK law imposes obligations on trade unions in respect of the steps they have to take before calling for industrial action. Industrial action in this context can be the withholding of services (strike) or some other action (e.g. overtime boycotts). The union movement regards the obligations imposed on them to as often frustrating the ability to call for industrial action. If a union fails to meet its obligations in calling for industrial action, it may be liable for the damages arising from the industrial action to both the employer and even third parties.

A key difference between the law in the UK and other countries is that strikes can only be related to a dispute with the employer on certain grounds. Strikes for purely political protest purposes are therefore unheard of in the UK, unless the employer is in the public sector. UK laws also limit the effect or scale of industrial action, although employers cannot use temporary workers to, for example, cover a strike.

Agency Workers

Many employers in the UK choose to use individuals who are supplied by a third party agency and not their employee. This might be, for example, to temporarily cover staff shortage or as a longer term alternative to employing direct. Such commercial contracts govern the rights and liabilities, but Agency Worker legislation makes the end-user / hirer of a temp responsible for certain matters relating to equal access to facilities, job application opportunities. Agency workers have the right after 12 weeks to be paid the same as a comparable employee. The commercial terms between the supplier of the temp and the end user / hirer will usually seek to make this the responsibility of the end user / hirer, although this is a matter for negotiation between the commercial parties.

Protecting against your employees

UK law will not automatically protect employers against subsequent actions of its employees. It is expected that employers will build their own protections about confidential information, use of the employers intellectual property and what employees can go on to do into their own contracts of employment.

Where an employer has implemented appropriate protections in the contract of employment, it may be possible to prevent, for example:

- a key ex-employee leaving to go and work for a competitor for a period of time;
- an employee working in sales from poaching or dealing with the customers s/he dealt with; or
- a team of employees moving as a group to a third party.

Such protections can be enforced through the UK Courts by a court order (called an "injunction") requiring that, for example, an ex-employee does not go to work for a named competitor, does not poach customers etc. UK Courts will only uphold such restraints to the extent they give no more protection than is reasonable in all the circumstances. For example, a 12 month restraint may be reasonable for a managing director, but not for a junior member of staff.

There is no requirement, unlike in many other countries, that the employee is paid during the period they cannot, for example, work for a competitor.

UK law also has certain protections relating to preventing employees copying databases or accessing computer systems for inappropriate purposes.

About this Guide and Shulmans LLP

This guide is intended to be general guidance and is no substitute for legal advice. Notwithstanding that disclaimer, we hope it proves useful.

It was compiled by the team of specialist lawyers here at Shulmans who work in the sphere of human capital. Our specialists work across areas of expertise such as employment law, immigration and employment taxes. The breadth of our knowledge means we can deal with whatever issue you need to tackle. Our personable approach means we turn potentially unpleasant situations into pleasant interactions with the intent of equipping you to face, and face down, whatever challenges your organization finds when it comes to the UK.

We use our knowledge of human capital matters to create value for our clients. We would love to do the same for you.

Shulmans LLP

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We offer the full range of corporate law services to businesses and organisations, including the following core services: Commercial, Corporate Finance, Insolvency & Business Restructuring, Debt Recovery, Employment, Real Estate, Property Litigation, Construction, Planning & Environment and Dispute Resolution.

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If you have any questions or simply want to clarify anything relating to employing people in the UK, please get in touch. Jim Wright, a partner in our employment team with significant experience of international matters would love to hear from you.

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