

Introduction

Using this book

- i) This book uses the '*expanded index*' format so that each subject is treated holistically. This leads to a certain amount of duplication to avoid constant cross-referencing. The titles of ancillary subjects to which reference may be needed are set in BLOCK CAPITALS.
- ii) Because of the considerable number of cases (around 80,000 each year) this is a very fluid sector of the law. In addition, there is a constant flow of new legislation. This book tries not only to deal with what has gone before but also to outline new proposals – and their likely effect. When referring to a section it may be advisable to check the entire text in case there are proposals – often set out at the end as a 'Postscript'.
- iii) Decisions in cases have been used to demonstrate:
 - the law in action – i.e. how the Courts interpreted the law
 - flaws (or good practice) in the approaches of employers
 - that although Courts cannot change the law, if they change the interpretation of the law, to us as practitioners that virtually amounts to the same thing
 - human interest!
- iii) Rulings of ETs are persuasive but not binding on other ETs. Rulings of the EAT are binding on all ETs. Rulings of each more senior Court (Court of Appeal, House of Lords/Supreme Court, and European Court of Justice) are binding on each level of more junior Courts.

- iv) Decisions given here (even of long standing) may be subject to re-interpretation by more senior Courts.
- v) Draft wordings are provided to act as a base for a reader's internal use – these do need to be customised.

Compensation and Employment rights

(Many are reviewed annually, dates of review being shown.)

A. Tribunal awards:

- **Unfair dismissal** – maximum awards: basic £12,000, compensatory £68,400 (Feb 2011)
- **Additional award** – £10,400 – £20,800 (26-52 weeks pay) (Feb 2011)
Used for failure to comply with an order for reinstatement, etc.
- **Breach of contract** – £25,000
- **Maximum weeks pay** – £400 (Feb 2011) Used for redundancy calculation, compensation for: failing to deal properly with flexible working request, not allowing representation at a disciplinary/grievance meeting, not providing a contract of employment, etc.

B. Employment payments:

- **Guarantee pay** (5 days each quarter) – £22.20 per day (Feb 2011)
- **Lower earnings Level (LEL)** – £102 per week (April 2011)
- **Statutory sick pay** – £81.60 per week (April 2011)
- **Statutory paternity pay, statutory adoption pay** – £128.73 (April 2011) or 90% of wage whichever is lower.
- **Statutory maternity pay** for women who have earned above the LEL for 8 weeks and with 40 weeks service before EWC: 90% of pay for 6 weeks and lower of 90% of pay or £128.73 (April 2011) for 33 weeks

- ‘**Small employer**’ limit for reclamation of SSP, SMP, SPP, SAP (if total of NI contributions in previous years is less than £45,000 – April 2004).
- **Jury service allowances**
Up to 4 hours (days 1-10): £30.64 per session
(days 11-200): £61.28 per session
(days 201+): £107.59 per session

Over 4 hours (days 1-10): £61.28 per day
(days 11-200): £122.57 per day
(days 201+): £215.17 per day
- **National Minimum Wage**
Full rate £6.08 per hour (Oct 2011)
Reduced rate £4.98 per hour (Oct 2011)
Youth rate £3.68 per hour (Oct 2011)
- **Apprentice pay**
£2.60 per hour (Oct 2011)
- **Graduate loan repayment threshold**
£15,000 per annum (April 2005)

Criminal Records Bureau certificates

- Basic (all employers): £23 (April 2009)
- Standard (working with children and/or vulnerable adults): £26 (April 2009)
- Enhanced (as standard but where Police records are involved): £44 (April 2010)

Service rights – qualification periods

(i.e. minimum period (from employment start date) to qualify)

- Redundancy: payment and time off to train for other work: **2 years**
- Unfair dismissal and parental leave: **1 year**

- Statutory maternity and paternity pay, transfer of unused additional maternity leave to partner: **26 weeks** (as at the 15th week pre EWC)
- Making request for flexible working (eligible employees only), adoption leave and pay, and (unpaid) training leave: **26 weeks** (N.B. Training leave is only available in employers with 250 or more employees.)
- Paternity leave: **26 weeks** (by the end of the 15th week before the EWC)
- Provision of contract of employment: 8 weeks
- Statutory sick pay, maternity leave, antenatal appointments, paid training leave (16 & 17 year olds – completing education); time off for employee representatives (and candidates for election), trade union duties activities, public duties, dependants emergency leave, access to personal data, breach of statutory right (including unauthorised deduction from wages), access to personal data: **None**

Abbreviations, Acts and definitions

Legislation, legislative and other bodies to which reference is made repeatedly are referred to as follows:

Legislation

CA06 Companies Act 2006

Bodies

ACAS Advisory, Conciliation and Arbitration Service

CIPD Chartered Institute of Personnel & Development

DBIS Department of Business Innovation and Skills

EAT Employment Appeal Tribunal

ET Employment Tribunal

ECJ European Court of Justice

HMRC Her Majesty's Revenue & Customs

HSE Health and Safety Executive

LTD Limited company (private)

PLC Limited company (public)

SSP Statutory Sick Pay

General notes

1. The decisions in recent cases quoted here may be subject to reversal on appeal. The contents reflect the author's understanding of the situation as at 1st August 2011. Where it is known that an appeal process is outstanding this has been indicated in the text. This book is regularly updated and if you wish to be advised of new editions please contact Thorogood Customer Services on 020 7749 4748 or complete and return the contact form at the end of the book.
2. Examples, policies, checklists and letters, etc., are provided as a base for individual use but need to be customised.

Glossary

Audit trail: the name given to the process by which the employer is able to prove receipt and comprehension so that an employee cannot subsequently claim '*I didn't know*' or '*I wasn't told*'. Thus, each time something is given to an employee they should either sign a receipt or the act should be witnessed by a third party and a note made of the event.

Collective agreement: where a trade union is recognised for negotiating purposes this is usually evidenced by an agreement between employer and union. Such an agreement sets out the basis for negotiations and manner by which they will be conducted etc.

Constructive dismissal: the action by which an employee brings the employment relationship to an end because the employer has carried out an act (or failed to carry out a promised act) which the employee maintains

is fundamental to the continuance of the contract OR carries out a series of acts or inactions, the cumulative effect of which makes it untenable for the employee to remain. Although the employee resigns it is regarded as a '*dismissal*' forced by the employer's act (or inactions).

Continuous development: change is endemic in modern commercial life and few employees will be able to work without some degree of retraining. Increasingly, particularly within professional bodies, members are encouraged to ensure that each year they commit a number of days off the job to retraining or being coached in new developments affecting their jobs and/or skills.

Counselling service: some employees may be able to withstand work-based pressures and could become subject to medical stress which could lead to a claim against their employer. To counter this employers are increasingly offering – usually bought in and provided by experts in the field – free and confidential counselling services which employees should be encouraged to use. Such provision may mean the employer is not liable for any subsequent stress claim.

Curriculum vitae (c.v.): the detailed description of a job applicant's personal details, education, qualifications, skills, experience and previous employment data which accompanies (or may substitute for) an application form. If recruitment is based solely on a c.v. (i.e. there is no application form) it should be signed (thus confirming the contents as being accurate).

Employee handbook: every employer being different, their rules and procedures also vary widely yet employees are required to abide by those rules. Since this could make the contract of employment a very bulky document many employers restrict the contract to the bare essentials and provide more detail in a handbook. Such a book should be referred to in the contract in order to make it part of the contractual terms. With the rapid change in employee rights and requirements the provision of such a document in looseleaf or electronic (provided **everyone** has access) form so that it can be readily updated is becoming essential.

Exit interview: a meeting held after an employee (who ideally the employer wanted to retain) has decided to leave, to try to determine the true reasons for the resignation on the basis that in such a position the employee (with nothing to lose) might be truthful. Some employers ask leaving employees

to list three items which they feel might make the employer's organisation a better place in which to work.

Familiarisation: the structured process (often referred to as Induction which is only part of the process) by which a new recruit becomes an established and experienced employee. It may be best achieved by providing mentors and manager with a checklist with, in some cases, a requirement to recheck items and training already provided to ensure sound knowledge.

Family friendly: the phrase given to the movement which seeks to make work a more accessible environment for those who have family commitments. Essentially, it requires employers (mainly via what are now legal obligations) to pay, largely on behalf of the State, certain benefits and to try to be flexible about employees' hours, starting and leaving times etc. for those who are responsible for young children etc.

Fixed term employee: anyone who works under a contract which is not open ended (that is the termination date is fixed rather than dependent on notice under the contract being given by one party to another at an indeterminate future date). Under current legislation, those who perform comparable jobs on a fixed term basis to those working on a normal contract basis must have the benefit of similar terms (that is they must not be treated '*less favourably than*') a permanent employee doing a similar job unless such differences can be objectively justified.

Gross misconduct: an act which so fundamentally destroys the trust of the employer in the employee that they can regard the employee as having broken the contract and can thus bring it to an immediate end by summarily dismissing the employee (that is dismissing without notice required by the contract or under statutory requirements whichever is longer).

Guarantee payments: the State stipulates that where an employee is '*laid off*' (forced idleness as there is no work) and unable to earn their normal wage (possibly as an alternative to being made redundant) the employer must pay them for up to five days each quarter at a daily rate which is reviewed each year.

Hazard reporting: as part of a risk assessment process, employees can be encouraged to report hazards (i.e. incidents, near misses and potential risks in the workplace, etc.) which they identify providing the employers with an opportunity to address the hazard.

Headhunters: with senior and/or specific one-off roles it may be preferable, rather than attempting recruitment by advertising a job and sifting the applicants, for organisations specialising in headhunting to be retained. They attempt to identify people (who were not necessarily looking for a job) who might fit the requirements and approach them to see if they might be interested.

Job description: a written statement of all the facets of a job accompanied (in some cases) by required levels of achievement to be attained by the person performing the job. Ideally, both employer and employee should sign such a statement to evidence their agreement to the requirements.

Material terms: the material terms of a contract of employment are usually regarded as being those relating to the hours to be worked and the remuneration linked to those hours. If there are other important terms (e.g. confidentiality) then provided this is made clear these terms also could be regarded as being material. The importance is that if there is a breach of a material term by the employer, the employee may be able to resign and claim constructive dismissal; or, if a breach by the employee, the employer should be able to dismiss fairly.

Mentor: an established employee, not in direct control of a new recruit but who is available to that recruit for informal, friendly and usually confidential advice, concerning them settling in the environment and/or performing their duties.

Outsourcing: the process by which an employing organisation slims its operations to the essentials by placing responsibilities it perceives to be peripheral to its core operations (e.g. cleaning the premises, security, payroll, etc.) with third parties who charge for the provision of the service. Often the employees engaged on such activities are transferred to the third party's employ.

Part-timer: anyone who works fewer hours than the number of hours normally regarded by an individual employer as '*full-time*' for that role or job is regarded as being part-time. Under current legislation, those who perform comparable jobs on a part-time basis to those working full-time, must have the benefit of similar terms of the full-timer doing a similar job, that is they may not be treated '*less favourably than*', unless such differences can be objectively justified.

Performance review/appraisal: the process by which an employee's performance in the job is assessed by their superior ideally in conjunction with the employee themselves. To avoid the process being reduced to a 'criticism' session, it is preferable to focus attention mainly on the future – for example identifying training needs etc. and considering how these can be met.

Person description: a written statement analysing the skills, educational attainments and/or experience believed to be required by the ideal candidate for the vacancy being filled. Candidates' attainments can be compared with the required items to try to obtain a perfect match, or, if not, to identify areas where training may be required.

Pool: when an employer has too many employees for their requirements and needs to make some redundant, they need to identify the area from which the jobs must be lost. Such a pool could be the whole establishment or a part only affected by the downturn which has not affected other parts.

Probationary period: attempting to match an applicant to job requirements can be difficult and few will know how a recruit is likely to perform. Recruits also rarely know how well they have understood the ethos of the organisation they have joined and requirements of the job they have undertaken to perform. It may be best for both parties that the first, say, three months employment will be subject to a probationary period during which time each party can assess the other and by the end of which they should know whether they are likely to be able to continue the relationship.

Pension:

- a) occupational – a pension arrangement provided by and possibly part-funded by the employer which an employee can join and contribute towards in order to build a pension for payment in later life.
- b) stakeholder – if an employer does not provide an occupational pension arrangement, provision must be made for a stakeholder pension so that an employee has the opportunity to provide for their retirement.
- c) 'nest' – in stages between October 2012 and 2015, it has been proposed that employers (depending on employee headcount) may

be required to make a Personal Accounts scheme (PA) available to their employees if they do not provide at least a comparable qualifying retirement benefits scheme (QS). Employees aged 22 or over will be automatically enrolled either into a PA or a QS (although they will be able to opt out). The minimum pension age is 55. The current proposal is that employers contribute at least 3% of earnings between £5,035 and £33,540. Total contributions must be at least 8% of qualifying earnings. The scheme is being promoted as the National Employment Savings Trust (or NEST) and will be operated by the NEST Corporation. The website address of the Pensions Accounts Delivery Authority (which is overseeing the introduction of NEST) is:

<http://www.padeliveryauthority.org.uk/index.asp>

Note: The timing of the introduction of the obligation is based on the number in an employer's PAYE scheme. Accessing www.tpr.gov.uk/staging and entering an employer's PAYE number and number of employees will generate the start date (which will be confirmed in hard copy 6/12 months prior to that date).

Risk assessment: legally required this is a written analysis of the risks that occur within the workplace. Risks that can be eliminated or reduced should be addressed to this end, but inevitably some risks cannot be reduced. The principle is that by identifying them and bringing them to the attention of the workforce they are put on alert when coming into contact with such risks.

Self-employed: a person who works for (*employs*) themselves rather than working for an organisation under a contract of employment. The categorisation of a person as being self-employed is not easy. Basically, courts usually state that if there is no '*mutuality of interest*' between the parties (employing organisation and worker) then the later may be self-employed.

Short-list: is not only the name given to a process by which the original applicants for a job are reduced to those deemed to be most likely to be successful or who seem best suited for the job, but also to the actual list of such names. Ideally, from the short-list after another interview etc., the successful candidate will be selected.

Works council (Information and Consultation forum, Joint Consultative Committee): under current EU requirements, UK employers, depending on how many employees they have, must, if requested by those employees, set up a consultation forum (by whatever name called) in the near future. There is a specified range of subjects such Councils must consider and membership is by election from the workforce.