How to Employ Your First Employee

The Ten Most Important Steps

Russell HR Consulting

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Preface

It happens to almost every successful business owner. At some point in the growth of your business you realise that you can no longer go it alone. Most business owners are well aware of the problems and costs of employment, and will initially try to use outsourced support. If that works well for you, there's no reason not to use it, though be careful about the over-use of so-called self-employed workers who clearly are not genuinely running their own business.

However there may well come a time when your business has expanded and it can't be done on an outsourced basis. Then it's time to think about employing someone. There are a wide variety of laws, obligations, taxes and statutory records that can trip you up when you don't know what you're dealing with.

Lack of knowledge is not a defence, so ensure you find out what you have to do at an early stage. It will save you time, money and worry. This book has been written with the intention of helping you to avoid these types of sticky situations. The real success of hiring your first employee lies in following the correct procedures, adhering to the requirements of legislation and taking action at an early stage.

About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical approach to HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals have developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or on open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

At Russell HR consulting we will design and deliver a solution that suits your particular needs, identifying and addressing the issues in the way that best fits your workplace.

Please visit our website www.russellhrconsulting.co.uk for information about the services we offer and to download your FREE employment tools.

Contact Russell HR Consulting Ltd
www.russellhrconsulting.co.uk
www.thehrheadmistress.co.uk

Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits, citing BookBoonfirstemployee.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

1 Overview of the Ebook

1.1 Introduction

Deciding to employ your first employee can be a daunting decision to make. But if you don't expand your workforce, you'll always be limited to what you yourself can do. As your business gets busier, you'll find you're pulled in many different directions. Recruiting your first employee may well solve the problem. The key thing is to ensure you've got the right person, and then to ensure that you're managing him lawfully and efficiently.

In addition to the process of recruiting the right person, you also need to ensure that you have fulfilled all the many other obligations placed on employers.

This book gives you an introduction to the key responsibilities for a first time employer and provided that you follow the guidelines, you will be able to jump successfully from a one-person business to two – or more!

1.2 Who counts as an employee?

One of the first points to consider is who actually counts as an employee. Sometimes it's quite clear what the employment status is. Business owners often try to avoid employing someone directly because of the number of employment rights and the costs of National Insurance Contributions (NICs).

If there's a dispute, either between the employee and the worker, or the employer and HMRC (who are very keen on collecting NICs) the courts will apply a number of tests and reach a conclusion based on the commercial reality.

1.3 Recruitment and pre-employment checks

In order to recruit the right person, it's important to define the role and the essential attributes for the job. From that you can design a data collection process which gives you the information you need to make an objective choice. Once you have made the selection, you'd be well advised to take up references. In some cases, you may want to have a pre-employment medical, though this can generally only be explored once an offer has been made.

In all cases you are also required to carry out a check on the prospective employee's eligibility to work in the UK.

1.4 Contracts of employment

The Employment Rights Act 1996 requires employers to provide written terms of employment to an employee within eight weeks of the employee having started his employment.

This constitutes a large part of the employment contract, but terms can be found in other documents, for example, the offer letter and employee handbook (where you have one).

This chapter takes you through the legal requirements as well as some suggested additional terms.

1.5 The first few months

Many employers make the first few months of employment a probationary period. It has no specific legal standing (nor is it illegal as suggested by some organisations), but you can have less favourable terms for employees during this time. For example, it's quite common to limit sick pay to statutory sick pay (SSP) during probation. Throughout the probation period, you will be training and coaching the employee and providing guidance where he fails to meet your standards.

1.6 Employee rights

Employees have more statutory rights than at any time in history. This chapter takes you through the key rights and when the employee becomes entitled to them.

1.7 What if the employee just doesn't work out?

Throughout the early stages of employment, you need to keep a close eye on an employee's performance. If an employee fails to meet standards in the probationary period you should provide guidance and extend the probation period if necessary. If there's no improvement you can dismiss at the end of that time.

1.8 Correcting performance or misconduct

In most cases poor performance is the issue rather than misconduct. We look at the general process that you need to follow where employees fall below the standards required at a later stage.

1.9 Health and safety responsibilities

Employers are responsible for the safety of their employees while at work. This involves providing training and information, conducting a risk assessment, writing a health and safety policy and keeping records up-to-date.

1.10 Additional legal responsibilities

When you become an employer you need to adhere to a number of legal requirements. For example, you will need to ensure that you meet compulsory insurance requirements, keep statutory records, comply with data protection requirements and (from 2016) make arrangements for auto-enrolment into a qualifying pension scheme.

2 Who counts as an employee?

2.1 Introduction

Anyone who works for your business under a contract of service will count as an employee. The status of those who work for the business owner will either be employees, workers or self-employed. Getting the status right is important. If you get their employment status wrong, from the tax point of view, you may have to pay extra tax, NICs, interest and a penalty. Separately, from the point of view of employment rights, a tribunal would first have to determine the worker's employment status and then whether or not he is entitled to the employment rights claimed.

2.2 Employed or self-employed?

There is no one thing that completely determines a worker's employment status. If there is a dispute about the status between a worker and employer, an employment tribunal will consider all the circumstances of a case. Many employers will try to reduce their liability by using outsourced workers.

The sorts of things the tribunal looks at fall into four main categories. Below are some questions to help explain what the categories mean.

The more questions that are answered 'yes', the more likely it is that the worker is self-employed. The more questions are answered 'no', the more likely the worker is to be an employee.

This is for guidance only and a definitive answer can only be given by an employment tribunal or court.

2.2.1 Mutuality of obligation

Mutuality of obligation has been described as the "irreducible minimum" by the courts. This means that both parties owe each other an obligation. Employers are under a duty to provide and pay for work. Employees are under a duty to do the work. If there is no mutuality of obligation there can be no contract of employment.

So the first area considers the extent to which the employer is required to offer the worker work and the extent to which the worker is required to do it.

- Does the company offer work only if and when it is available?
- Can the worker decide when he will work and can he turn down work when offered?

2.2.2 Control

Employees tend to be subject to a much greater degree of control by the employer than those who are genuinely self-employed. So the questions here consider the extent to which the employer decides what tasks the worker does, how and when he does them.

- Does the worker have the final say in how the business is run?
- Can the worker choose whether to do the work himself or send someone else to do it?
- Can the worker choose when and how he will work?

2.2.3 Economic reality

Typically, people who run their own business carry their own costs and take their own financial risks.

- Is the worker responsible for meeting the losses as well as taking the profits?
- Is the worker responsible for correcting unsatisfactory work at his own expense?
- Does the worker have to submit an invoice to the company in order to receive payment?
- Does the worker get a fixed payment for a job (including materials and labour)?
- Does the worker provide the main items of equipment needed to do the job?
- Does the worker work for a range of different employers?

2.2.4 Integration

Another area for consideration is the degree to which a worker is treated as part of the organisation. The sort of things a court might consider are shown below.

- If the worker needs assistance, is he responsible for hiring other people and setting their terms of employment?
- Is the worker excluded from internal company matters, such as corporate training and staff meetings?
- Is the worker exempt from having action taken against him using the company disciplinary procedure?
- Is the worker excluded from company benefits and pension schemes?

2.2.5 Personal delivery of service

Both employees and workers have to deliver work in person. Self-employed workers can arrange for a substitute to do the work. Note that the mere presence of a substitute clause in a contract won't confer self-employed status on the worker if there are stringent conditions attached.

Example

Ms Macfarlane was a qualified gymnastic instructor working at recreational and sports centres operated by GCC. If, for any reason, Ms Macfarlane was unable to take a class, she would arrange for a replacement from a register of coaches maintained by the council. Occasionally, the council itself organised the replacement. The replacements were paid directly by the council, not by Ms Macfarlane.

In 1998 Ms Macfarlane was presented with a new form of contractual agreement which, in her view, significantly changed her terms and conditions of employment and had the effect of making her self-employed. She declined to accept the new form and subsequently claimed that she had been constructively and unfairly dismissed. GCC argued that Ms Macfarlane had always been self-employed.

The case eventually came before the EAT. The court agreed that Ms Macfarlane was an employee of GCC.

It said that a provision allowing for a limited ability to delegate does not always lead to a conclusion that the contract was one **for** services. In the present case, the provision allowing Ms Macfarlane to arrange for an approved replacement if unable to attend work did not have such force that it overwhelmed opposing factors and clearly lead to a conclusion that she was not an employee. Ms Macfarlane could not simply choose not to work in person. Only if she was unable to attend could she arrange for another to take her class. Secondly, she could only provide someone from the Council's own register. To that extent GCC could veto a replacement and could also ensure that such persons as were named on the register were persons in whom the Council could repose trust and confidence. Thirdly, GCC itself sometimes organised the replacement. Fourthly, the council did not pay Ms Macfarlane for the time served by a substitute but instead paid the substitute direct.

Macfarlane v Glasgow City Council [2001]

2.2.6 Workers

Workers work on a contract for services. As opposed to an employee's contract of service. They may work on a casual, wages-only agreement, where they are paid only for the hours they work and do not assume any other employment rights.

All workers are entitled to certain rights which include:

- paid annual leave;
- rest breaks and limits on working time;
- the national minimum wage;
- no unlawful deductions from wages;
- right not to suffer unlawful discrimination or harassment under the Equality Act 2010;
- health and safety at work.

2.3 Agency staff

Agency workers are classed as workers rather than as employees.

The Agency Workers Regulations 2010 give additional rights to workers who have been with the hirer for 12 continuous weeks in a given job. The agency worker will be entitled to at least the basic working and employment conditions such as pay and working time which are equal to the hirer's own employees.

The Regulations don't cover the genuinely self-employed, individuals working through their own limited liability company, or individuals working on managed service contracts.

From Day 1 of their employment, an agency worker will be entitled to:

- the same access to facilities such as staff canteens, childcare and transport as a comparable employee of the hirer;
- be informed about job vacancies.

After a 12-week qualifying period, an agency worker will be entitled to the same basic conditions of employment as if he had been directly employed by the hirer on day one of the assignment, specifically:

- pay – including any fee, bonus, commission, or holiday pay relating to the assignment. It does not include redundancy pay, contractual sick pay, and maternity, paternity or adoption pay;
- working time rights – for example, including any annual leave above what is required by law.

The 12-week qualifying period does not have to be continuous. Most breaks between or during an assignment to the same job that are less than six weeks in length will simply "pause" the accrual of the 12-week qualifying period. Most breaks between or during an assignment to the same job that are six weeks or more will reset the 12-week qualifying period.

The accrual of 12 weeks qualifying period can be paused by absences for sickness and jury service (for up to 28 weeks) or annual leave, shut downs (e.g. factory closures and school holidays) and industrial action (for the duration of the absence).

Pregnancy and maternity-related absences, maternity leave, paternity leave and adoption leave will not pause the 12-week accrual at all. Instead the12-week accrual period will continue throughout the duration of the absence and include these weeks as those counting towards the 12-week total. Agency Workers (regardless of their employment status) will also be entitled to paid time off to attend ante-natal appointments during their working hours.

2.4 Interns and work experience students

Taking on work experience students and interns from time to time can be helpful for both parties. The student can get some valuable exposure to work and it can be a good way of sourcing potential future recruits.

Work experience generally refers to a limited period of time that a student spends with an employer. The nature, length and arrangements for work experience vary greatly, but it is generally for a fairly short period of time and is unpaid.

Internships are usually longer term placements to work at a company for a fixed, limited period of time. Interns are usually undergraduates or students, and most internships last for any length of time between one week and 12 months. They may be part-time or full-time.

The term 'intern' has no legal status and many employers don't pay them. However, recent case law has suggested that in some cases interns are employees and have the same rights to national minimum wage etc. as other employees.

Example

Keri Hudson worked at My Village website as an unpaid intern in 2010. She worked at the website from 10am–6pm and was personally responsible for a team of writers. She also carried out training and delegating tasks, collecting briefs, scheduling articles and even hiring new interns. The company had told her she was not eligible for any pay because they considered her an intern.

Ms Hudson gave evidence that she had been asked when the site was taken over by TPG Web Publishing Ltd if she would stay on and work for the new company. She was assured her pay would be fixed. After five more weeks she was informed she would not now be receiving a payment for the work she carried out – she resigned and took out a grievance.

The tribunal accepted her evidence and found she was a worker even though she didn't have a written contract and was therefore entitled to be paid at least the National Minimum Wage and holiday pay. Ms Hudson was awarded £913.22 in national minimum wage back pay and £111.76 in holiday pay from TPG Web Publishing.

Hudson v TPG Web Publishing [2011]

3 Recruitment and pre-employment checks

3.1 Introduction

Finding that person who has the right attributes and skills can involve hours of CV sifting and interviews. However the whole process can be made a lot simpler if you follow a robust procedure and design a data collection process which gives you the information you need to shortlist and choose the right candidate.

3.2 Basics of recruitment

Some businesses resort to hiring the first person who walks through the door. Not surprisingly, this is the wrong approach to take.

Having the right people is essential if you are to achieve your business aims effectively. They can bring enthusiasm, commitment, knowledge and experience to your business. Hiring the wrong person is not only disruptive, a waste of time (and can be painful!) but costly.

3.2.1 Job descriptions and personal specs

Start by deciding on the role that you need and create a job title and job description accordingly. Essentially a job description is a "snapshot" of a job which needs to summarise clearly and concisely what responsibilities and tasks the role will entail.

A job description should include:

- the job title;
- a summary of the job's main purpose;
- the main duties.

It is important to ensure that the job description includes a catch-all phrase stating that the job holder is required to carry out any other reasonable request by management. While there is an implied duty upon every employee to carry out reasonable management requests, it makes life much easier if you spell it out.

In addition to the job description, you may also wish to include a person specification within your job advert. Although this is not a legal requirement, it can help you to summarise the key attributes, knowledge, skills and qualifications that a desirable candidate might have. Make sure your job description and person specification avoid requirements which might constitute unlawful discrimination.

It will be automatically unlawful for you to discriminate against candidates for reasons related to a protected characteristic i.e. because of their gender, age, race, religion or disability for example. The only exception to this is if it is a requirement of the job or it qualifies as a genuine occupational requirement (GOR). For example, being of Indian origin may be an essential requirement for some Indian restaurants where an 'authentic' atmosphere is important. You can ask for waiting staff of Indian appearance, but not necessarily Indian cooks.

It would be unlawful to state that candidates are required to have at least five years experience in waitressing for example, as this could discriminate against younger employees.

Note that if your selection process isn't well thought-out and justifiable, you may be the subject of a discrimination claim from somebody whom you have never even met.

Example

Mr Berry, who was in his 50s, sent an email to Recruitment Revolution, a recruitment agency who had advertised a role which advertised a job for a "junior administrator/administrative assistant" indicating that it would be suitable for a school leaver or someone who had recently taken A-levels on behalf of a client, saying that he appeared to be prevented from applying by reason of his age and that unless he heard back he would assume that there was no point in applying. Recruitment Revolution advised Mr Berry that the advertisement had been mistyped and that he should send in his CV, which would be considered with all other CVs received

He did not apply for the advertised job. Instead he submitted an age discrimination complaint against Recruitment Revolution. Mr Berry was, in fact, a serial litigant who had brought in the region of 50 tribunal claims against recruitment agencies and employers complaining that job advertisements were unlawfully discriminatory under the Age Regulations. A number of the claims were settled. In this case, his claim was struck out and Mr Berry appealed to the EAT.

The EAT was equally unimpressed and dismissed his claim. It emphasised that the Regulations were not intended to provide a source of income for those who complain of arguably discriminatory advertisements for job vacancies for which they had no intention of applying, and that those who try to exploit the Regulations in this way would be liable to a costs award

Berry v Recruitment Revolution [2010]

Make sure you draft job descriptions and person specifications carefully to avoid discriminatory claims arising.

3.2.2 Advertising your job

There are a wide variety of options available to you when you are advertising your job and as a general principle you are expected to trawl the market to get to the widest range of possible candidates. Think about who you want to read the advertisment, how long it should run for, how quickly you want a response and how much you would be willing to pay.

Here are some examples of places you can advertise your job.

- social media – Linkedin, Twitter, Facebook;

- online recruitment companies;
- agencies;
- trade journals;
- local newspapers;
- broadsheets;
- word of mouth;
- Job Centre;
- university and college web sites.

An effective job advertisement sells the position and the business and attracts the right candidates. If you're writing the advertisement, the job title should come first and then the key elements of the job description and person specification, followed by a concise description of the business. Tell people how to apply and include contact details and a closing date.

3.2.3 The data collection process

Decide how you wish candidates to supply their details. The CV on paper-format or online application is often the most popular choice, but application forms are generally considered to give a more accurate basis for the comparision of candidates, since you can create a form which sets out the data you want to know about. It means that you (rather than the candidate) determine what information is included. It also makes it quicker and easier to compare applications. Sifting through individual CVs and cherry picking the most useful and appropriate information can be a time consuming process.

Following on from this, the interview tends to be the most common method of recruitment. Unfortunately, the probability of predicting the future success of an applicant from this method alone is very low at around 33 percent.

Use testing to increase your knowledge of the candidates' capabilities. Make sure that any testing is relevant, non-discriminatory and consistently applied.

When deciding which process best meets the needs of your job requirement, it is important to remember that you must make reasonable adjustments for candidates who have a disability. Failure to do so could lead to a discrimination claim.

Example

After a road traffic accident Mr Burns was left with brain damage, causing ataxia. He also suffered from mobility problems and a noticeable speech impediment which defined him as disabled under the Disability Discrimination Act 1995.

Mr Burns applied for the job of trainee mortgage advisor after seeing the advertisement at a job centre. He fully met the requirements specified by the advertisement.

However, the company denied receiving his application, although after an investigation it was discovered that someone from the company had telephoned Mr Burns to discuss his application. Mr Burns was not invited to an interview after the conversation, and the tribunal concluded that a likely reason for this was due to his speech impediment which would have been evident during this conversation.

The company could not justify its reasons for not inviting a candidate who was appropriately qualified to an interview. With regards to Mr Burns's disabilities – one of which would have been evident on the phone – the tribunal concluded that the reason for not inviting Mr Burns for an interview was because of his disability.

The tribunal awarded £1,500 for injury to feelings and recommended that the company should thereafter ensure compliance with discrimination legislation.

Burns v GRF Financial Ltd. [2003]

3.3 References

Reference checking is absolutely essential. One of my clients took on a woman without checking her references because he was so impressed with her. She was a very plausible applicant. In fact it emerged later she had been sacked from every job she had ever held and her CV was a tissue of lies (embellishment by job applicants is not unusual). She even tried – albeit unsuccessfully – to take the company to tribunal. Overall, it cost my client about £4,000 and a great deal of angst and management time to conclude the case.

You can ask for information which should support the applicant's statements. If there's a discrepancy, then check it out.

References should only be taken up once an offer has been made. Ask the candidate for written permission to approach his employer for a reference.

This is the type of information you can ask for.

- Final salary and job title.
- Start and end dates.
- Capacity in which employed.
- Number of days of sickness absence.
- Whether there were any disciplinary warnings live on the file at the time of termination.
- Whether the employee resigned or was dismissed.
- Performance appraisal rating.

3.4 Medicals

Except in a very limited set of circumstances, asking questions about a candidate's health is unlawful during the recruitment process.

You should only ask about a candidate's disability or health if you need to find out whether:

- he will be able to attend an interview or do some form of selection test;
- you will need to make some form of reasonable adjustment to enable him, to attend an interview or to do the test;
- he will be able to do something that is intrinsic for the job in question.

It would also be acceptable to ask about a candidate's health if you want to monitor the diversity of your applications or wish to take positive action to recruit more disabled workers.

Pre-employment medical checks should only be carried out once you have offered the job to a particular person, if the candidate would be required to undergo testing to determine if he is fit to undertake the job or if it is a legal requirement. For example, commercial vehicle drivers may be required to take an eye test. In any case, the level of assessment will depend on the nature of the job and can range from a full health examination to simply checking the levels of absence in a previous job.

3.5 Immigration checks

Under the Immigration, Asylum and Nationality Act 2006, all employers have a duty to check certain documentation to ensure that the candidate has the right to work in the UK. Irrespective of a prospective employee's country of origin, the checks should be carried out in every case. You must ask to see an original document, inspect it and take a copy for the file before the employment starts.

The documents that are acceptable for proving that someone has the right to work in the UK are split into two lists; List A and List B.

3.5.1 List A

Documents provided from List A provide a permanent excuse to work in the UK. Any one of the documents listed below will provide the necessary evidence of the right to work in the UK:

- a passport showing that the holder is a British citizen, or has the right of abode in the United Kingdom;
- a document showing that the holder is a national of a European Economic Area country or Switzerland. This must be a national passport or national identity card;
- a residence permit issued by the United Kingdom to a national from the European Economic Area country or Switzerland;
- a passport or other document issued by the Home Office which has an endorsement stating that the holder has a current right of residence in the United Kingdom as the family member of a national from a European Economic Area country or Switzerland;
- a passport or other travel document endorsed to show that the holder can stay indefinitely in the United Kingdom, or has no time limit on their stay;
- a passport or other travel document endorsed to show that the holder can stay in the United Kingdom; and that this endorsement allows the holder to do the type of work the employer is offering if they do not have a work permit; or
- an Application Registration Card issued by the Home Office to an asylum seeker stating that the holder is permitted to take employment.

3.5.2 List B

Documents from List B indicate that the applicant or employee has restrictions on his entitlement to be in the UK. List B documents provide a temporary excuse to work in the UK. If an employee is supported by a document from List B, you will need to ensure that he takes steps to renew his permission before it expires. Repeat checks should be made at least every 12 months.

Two of the documents in the combinations listed below will provide evidence of the right to work in the UK.

1. A document giving a person's permanent National Insurance number and name. This could be a: P45, P60, National Insurance card, or a letter from a Government agency;

and one of the following documents:

- a full birth certificate issued in the United Kingdom, which includes the names of the holder's parents;
- a birth certificate issued in the Channel Islands, the Isle of Man or Ireland;
- a certificate of registration or naturalisation stating that the holder is a British citizen;
- a letter issued by the Home Office which indicates that the person named in it can stay indefinitely in the United Kingdom or has no time limit on their stay;

- an Immigration Status Document issued by the Home Office with an endorsement indicating that the person named in it can stay indefinitely in the United Kingdom or has no time limit on their stay;
- a letter issued by the Home Office which indicates that the person named in it can stay in the United Kingdom; and this allows them to do the type of work that the employer is offering;
- an Immigration Status Document issued by the Home Office with an endorsement indicating that the person named in it can stay in the United Kingdom; and this allows them to do the type of work that the employer is offering.
- a work permit or other approval to take employment that has been issued by Work Permits UK;

and one of the following documents:

- a passport or other travel document endorsed to show that the holder is able to stay in the United Kingdom and can take the work permit employment in question; or
- a letter issued by the Home Office confirming that the person named in it is able to stay in the United Kingdom and can take the work permit employment in question.

If you are found to be employing a worker who does not have a statutory excuse you could face a civil penalty of up to £10,000 per illegal individual.

Example

In November 2012 the UK Border Agency investigated a Tesco warehouse in Croyden and arrested 20 students for alleged breaches of visa terms that restricted the amount of hours they could work. The UKBA officials discovered the students, who were predominantly of Bangladeshi and Indian origin, had been working up to three-and-a-half times longer than their visas allowed.

The workers all had the right to work in the UK, but there were limits on the right. Investigations found they had been working between 50 and 70 hours a week during the school term, when their visas only allowed for 20 hours

Tesco was subsequently issued with a "notification of potential liability" and faced significant fines.

3.6 CRB checks

Normally, employers aren't allowed to ask job applicants about spent convictions, but for jobs that need a CRB check this rule doesn't apply. An employer must not apply for a check unless the job needs one. Tell the applicant why he's being checked, and where he can get independent advice. The most common roles which require these sorts of checks are jobs which involve working with children and vulnerable adults.

Criminal records checks should not be requested until after a job offer has been made. However, you should make it clear, in writing that the job offer is conditional upon a satisfactory check being made.

There are two types of check, depending on the type of work. For most roles the standard check is sufficient. Jobs that involve caring for, supervising or being in sole charge of children or adults require an enhanced CRB check.

Type of check	What it will check for	How long it normally takes
Standard	Spent and unspent convictions, cautions, reprimands, final warnings	About 2 weeks
Enhanced	As above – plus 'approved' information from local police records, and the Independent Safeguarding Authority (ISA) barred lists	About 4 weeks

Standard checks – To be eligible for a Standard level CRB check the position must be included in the Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975.

Enhanced checks – To be eligible for an Enhanced level CRB check, the position must be included in both the ROA Exceptions Order and in Police Act Regulations.

You will find more detail in my book The Employer's Guide to Recruitment – How to get the Right Man (or Woman) for the Job, published by BookBoon.

4 Contracts of employment

4.1 Introduction

The moment an applicant unconditionally accepts your offer of employment, a contract of employment comes into existence. The Employment Rights Act 1996 requires you to provide a new employee with a written statement of main employment particulars within two months of the employee starting his job.

4.2 Where is the contract contained?

The terms of the contract tend to come from a number of sources. The terms can be oral, written or implied, and typically come from the offer letter, written statement of the main terms of employment, employee handbook or company policies.

Contracts do not have to be in writing to be legally valid but having the terms and conditions written down can help avoid misunderstandings and disagreements later on. An oral contract is as binding as a written one, but its terms can be more difficult to prove.

The courts have established that all employment contracts have the following terms included, whether express or implied:

- to behave reasonably;
- to maintain trust and confidence through co-operation;
- to act in good faith towards each other;
- to take reasonable care to ensure health and safety in the workplace.

4.3 Legal requirements

The general rule is that employers must provide employees with a written statement of their main terms and conditions of employment within two months of starting their job. The written statement is not the whole contract, because contract terms may be found in other places, for example, the offer letter, but it does form a significant part of it.

The main terms must contain:

- the names of the employer and the employee;
- the full address of the employer;
- the place of work;
- the job title or a short job description;
- the commencement date of the employment;
- the duration of the contract; either fixed or permanent;
- the rate of remuneration and pay intervals;
- annual leave and other paid leave entitlements;
- hours of work (including overtime);
- sick leave;
- pension arrangements (where applicable);
- notice requirements; and
- reference to any collective agreements in force.

You should also have a dispute resolution process (discipline and grievance procedures). Include details of these in your main terms or refer to where they may be found.

Both parties should sign and date the written statement. You should also keep a copy of this for at least one year after the employee leaves the organisation.

4.4 Extra terms

Whilst it is not necessary, it is recommended that you also include the following:

- a probationary period;
- provision for lay off and short time working;
- a flexibility clause;
- a confidentiality clause;
- a clause which details the changes to conditions of employment;
- clauses relating to current issues e.g. rules about social media usage and personal mobile phones.

These 'added extras' will help to ensure that you are covered should any disagreements occur at a later stage. The lay off and short time provision for example, gives you added flexibility if you suddenly have to reduce your employee's working hours. It is also advisable to state within the probationary clause that you have the right to extend the probationary period if necessary.

4.5 Updates and amendments

Should you wish to update or amend the contract of employment, there are certain procedural requirements that have to be undertaken to ensure that you are not in breach of any legalities.

Any change, other than the most minor, is likely to require the consent of the employee, preferably in writing. This is still the case even if the contract is oral or based on implied terms. Without this agreement, there is the risk that the employee may sue you for breach of contract or claim constructive unfair dismissal if he has sufficient service qualification. This is a year if the employee was employed on or before 5th April 2012 and two years if the employee was employed on or after 6th April 2012.

Any changes to the statutory written statement of particulars must be communicated to the employee no later than one month after you have made the change. Such a change will also require the employee's agreement.

Make sure you consult affected staff about proposed changes. Any change which involves employees suffering financial loss is likely to be at risk of being a breach of the implied term of trust and confidence.

Example

The supermarket chain Asda decided to amend the contracts of employees and put them on a "new regime" of pay. Asda sought to ensure that no employees suffered a loss of pay and underwent an extensive consultation period.

Despite this, more than 700 claims were brought by Asda store staff claiming unauthorised deductions from wages, breach of contract and unfair dismissal. Asda sought to rely on a provision in its staff handbook (the variation clause) which stated, "The company reserves the right to review, revise, amend or replace the contents of this handbook, and introduce policies from time to time".

The tribunal found that the introduction of the new regime was a significant change, that pay was fundamental to the employment relationship and on ordinary principles Asda was required to obtain consent to the changes. However, the tribunal accepted that employers may reserve the contractual right to vary terms or change important aspects of the job, irrespective of whether the employee consents. If the change or variation falls within the contractual power to vary, it will be effective.

The Employment Appeal Tribunal (EAT) upheld the tribunal's decision and held that the staff handbook permitted Asda to make the changes to the pay and work regimes without the consent of the employees. The wording of the handbook was wide enough to permit Asda to change matters set out in it.

Bateman v Asda Stores [2010].

Although this decision appears to give a very wide discretion to employers to make unilateral changes to contracts where there is contractual variation clause, in practice it should be treated with caution. Had Asda not consulted with its employees about the proposed changes, then the outcome could have been significantly different.

The importance of having a variation clause within your employee's contract of employment is therefore quite important if you wish to give yourself maximum flexibility to make changes in the future.

5 The first few months

5.1 Introduction

The first few months will be an eye-opener for both you and your new employee. When someone starts a new job it can often take some time to ascertain how well he's getting on. Many businesses choose to have probationary periods as it allows them to see how well the new employee takes on the job requirements. This gives you the scope to set targets and monitor improvement if the person continues to fall short of expectation.

5.2 Purpose of probation

The probationary period only really has one purpose: it allows you to evaluate the performance of your employee to decide whether or not he meets your standards. If you have followed a rigorous selection procedure, then hopefully there will be no problems. However this can never be guaranteed; many applicants look great on paper, but when it comes down to the nitty-gritty, they underperform and disappoint. The probationary period allows you to spot and prevent under-performing employees from progressing in your company.

To effectively evaluate your employee during the probationary period, set up weekly or monthly review meetings with the aim of providing constructive feedback. This should focus on both the positive and negative points of their performance and include examples of success as well as examples of areas for improvement. If the employee is struggling, give him something more attainable. On the other hand, if someone is completing the tasks with ease, provide something more challenging.

5.3 Less favourable terms during probation

Many employers enhance statutory rights such as sickness and holiday entitlement. These come at a cost, so during the probationary period, you may wish to limit some or all of any enhanced contractual rights where given. For example, it's quite common to limit sick pay to statutory sick pay (SSP) during this time. In a sales department it is also quite usual for a person on probation to receive a lower commission from sales compared to an employee with longer service.

During the probationary period, an employee has short service and is unlikely to succeed with a claim for unfair dismissal, although he is not excluded from making claims for unlawful termination.

Example

Miss Whyte began her three month probationary period with Capital & Regional Property Management Ltd. on 26th April 2004.

On 16th July, she was dismissed because of various concerns about her performance which related to concerns about her sickness absence and failure to keep on top of her work.

What had been earlier described as a "poor" sickness record of three days had since increased to another three days, but the company was aware that those three days' absence related specifically to Miss Whyte's pregnancy. As a result of this absence, she found it difficult to keep on top of her work and reduce her backlog.

The tribunal found that although there were reasonable areas of concern about Miss Whyte's performance that began before the employer became aware of her pregnancy, it was too quick to reach a decision to dismiss without giving her the opportunity to improve through an extension of her probationary period.

The tribunal found that the dismissal at that time would not have taken place were it not for the knowledge of Miss Whyte's pregnancy and the fact that she took time off work for pregnancy related ill-health. The tribunal found the dismissal to be sex discrimination and unfair dismissal.

Whyte v Capital & Regional Property Management Ltd [2004].

NB While there is a service qualification for unfair dismissal, employees have the right not to suffer unlawful discrimination at any stage of employment and there is no service qualification for such claims.

5.4 Extending the probation

It is normal for probationary periods to last between one month and six months but if the employee doesn't meet your standards, then it may be appropriate to extend the probationary period. This will allow you more time to assess the employee's performance.

It is important to give your employee regular feedback and ways to improve throughout this period. If no set targets are given then it can be hard to give an objective reason why the employee's performance does not meet the requirements.

If, after this time, the employee demonstrates improvement, then the probation will end and he will become a permanent employee. However, if no improvement is seen then you have the right to terminate the employment when the extended period is over.

5.5 Dismissal at the end of probation

If you dismiss at the end of the probationary period, make sure you follow the correct procedure. At the minimum, this will entail writing to the employee to set up a formal meeting to discuss the employee's performance and the approaching end of the probation period. The employee should be advised of his right to be accompanied by a work companion or a trade union representative. The meeting will formally explore the issues and, if after an adjournment you are of the same mind, you should confirm your decision to dismiss. The employee will be advised of his right of appeal and the whole thing should be confirmed in writing.

5.6 Dismissal after expiry of the probation period

Make sure you properly manage the performance of employees during the probationary period. Prompt action should be taken to address any concerns and feedback on targets to be achieved should be given. If a probationary period is to be extended ensure that this should be done prior to the period end.

Example

Miss Przybylska was employed on a three month probationary basis from 3 October 2005. During the probationary period her contract could be terminated at a week's notice and Modus reserved the right to extend the probationary period (including the week's notice provision) if it needed to make a further assessment of her performance.

The probationary period expired on 2 January 2006 but Miss Przybylska was absent on holiday at this time and Modus did not extend the probationary period before her holiday began. At the end of January 2006 Miss Przybylska was dismissed because she had not, in the view of Modus, successfully completed the probationary period. As Miss Przybylska was only paid one week's pay in lieu of notice she made a claim in the Employment Tribunal for breach of contract contending that she should have been paid three months' notice after completion of the probationary period.

The Employment Tribunal rejected the claim by implying a term in the contract of employment that it was reasonable for the probationary period to continue until Miss Przybylska had received an indication as to whether she had successfully completed it or not. No notification of success or failure had been received by the time the probationary period was originally set to end and so it continued and any delay in assessing Miss Przybylska's performance was reasonable.

On appeal the Employment Appeal Tribunal found that the term implied by the Employment Tribunal was inconsistent with the express terms of the contract of employment. The assessment was to take place during the probationary period and the fact that Miss Przybylska would be on holiday at its end should have been foreseen. Modus could have extended the probationary period, as allowed for under the contract, if it had not been able to complete the assessment before the holiday. They did not do this and it was not necessary to imply a term which automatically extended the probationary period.

Przybylska v Modus Telecom Limited [2007]

6 Employee rights

6.1 Introduction

Employees have a wide range of statutory rights. Some, like the right to redundancy pay, are acquired after a period of time. Others apply immediately, for example, the right not to suffer unlawful discrimination. You can always enhance statutory rights, but you cannot reduce them, even with the agreement of the employee.

6.2 Pay

All employees are entitled to be paid for the work that they have done, and unless the employment contract states otherwise, they are also entitled to be paid if they are ready and willing to work but you have not provided them with any work to do.

With a few exceptions, all workers are entitled to the national minimum wage. Any pay above this is dependant on the employee's individual contract of employment.

Example

Pendragon plc is a large car dealership. It employs around 10,000 people in 250 UK and four US locations. The company runs a scheme allowing staff to lease a car from its car dealership in return for a deduction from the net pay of participants. The payment for the benefit is recouped from employees by way of a deduction from their wages, with the company retaining the sums and not remitting them to an external party such as a finance company. HMRC carried out an investigation into the pay arrangements for 40 staff.

HMRC argued that Pendragon made deductions from workers' pay for the use of lease cars and salary-sacrifice schemes. This resulted in pay falling below the national minimum wage.

The company accepted that the money taken from the workers' pay brought their pay below the national minimum wage in the amount of £30,254.68. However, the company argued that the amounts taken were not deductions, but were payments made by the workers to the employer for their own benefit and use. They further said that the sums had been taken directly from the workers' net pay "purely for administrative simplicity"; and to disallow its arrangement would be contrary to the Government's aims in enforcing the national minimum wage.

The tribunal rejected the company's submissions and ordered it to pay a total of £30,354.68 to the 40 workers to meet the underpayments. Pendragon has also been ordered to pay a £5,000 penalty for non-payment of the national minimum wage.

Pendragon v HMRC [2012]

You are only allowed to make deductions from an employee's wages if:

- the deduction is required by law. For example, tax and national insurance;
- allowed for by the employee's contract. There must be a specific clause in the contract which allows for that particular deduction to be made; or
- the deduction has been agreed to in writing by the employee before it is deducted.

6.3 Pension

6.3.1 Legal framework

New regulations which came into force in 2012, make it a requirement that all employers will have to provide a pension scheme in which eligible employees will automatically be enrolled.

The exact date on which a business will be affected is dependent on the number of employees employed in April 2012. Smaller businesses will not be affected until 2016, however, it is worth investigating the exact date and the likely costs to your organisation.

Eligible employees are defined by the Pensions Regulator as workers who:

- earn more than the minimum earnings threshold;
- are aged between 22 and the state pension age; and
- work in the UK.

The main things that you must do as an employer are:

- provide a qualifying scheme for your workers;
- automatically enrol all eligible jobholders into the scheme;
- pay employer contributions for eligible jobholders to the scheme;
- tell all eligible jobholders that:
  - they have been automatically enrolled; and
  - they have the right to opt out if they want;
- register with the Pensions Regulator.

You must contribute at least 3% of your worker's earnings, although you can choose to contribute more if you wish.

Employers who don't have a suitable pension scheme can make use of NEST, a simple low cost government sponsored scheme run by a not-for-profit trust.

For all employers, compliance with the pension reforms is compulsory. It is therefore crucial that you understand how your workforce is categorised under the legislation, and make plans to adhere to the requirements.

6.3.2 Employer's checklist for pension auto-enrolment

1. Identify the date when you must start auto-enrolment.

2. Identify a suitable pension scheme to meet the minimum requirements for auto-enrolment. This includes minimum contribution levels (for defined contribution schemes) or benefit levels (for defined benefit schemes).
3. Establish which of your job holders are not already enrolled in a compliant scheme. Jobholders include employees, temporary workers, directors employed under a service contract and may include agency workers.
4. You will need to meet the requirements in respect of minimum contribution levels for your employees. For auto-enrolment purposes, contributions are based on a definition of earnings which includes salary, wages, commission, bonuses and overtime. Contributions are only paid in respect of earnings in a defined band. Contributions to an existing scheme may be based on a different definition of earnings, so company payroll systems may need to be updated.
5. There will be an optional waiting period of up to three months before an employee needs to be automatically enrolled into a workplace pension. Workers can, however, opt in during the waiting period.
6. You should also put processes in place to identify auto-enrolment triggers for existing employees and new joiners (for example, when they reach the age of 22 or the minimum level of earnings).
7. Individuals can opt out of scheme membership, within one month of becoming a scheme member or receiving enrolment information. If they do so, all contributions must be refunded. Someone who has opted out can apply to re-enrol, but only once in a 12-month period. Automatic re-enrolment will apply every three years, although employers will have some flexibility about when re-enrolment should take place.
8. Communicate with staff about auto-enrolment and explain that they have the right to opt out if they wish. You cannot encourage jobholders to opt out of auto-enrolment or encourage candidates to do so during the recruitment process – penalties will apply.

6.4 Sick pay

It is not a legal requirement to provide company sick pay (CSP), and it's up to you to decide whether you will or not. If you decide to do so, then you must state this in your contract of employment and adhere to the guidelines and requirements that you specify.

If you decide not to offer CSP, and your employee is ill, then he will be entitled to Statutory Sick Pay (SSP) if he:

- is sick for at least four days in a row (including weekends, bank holidays and days that he is not usually contracted to work); and
- has average minimum weekly earnings;
- complies with the notification requirements.

The first seven days (including weekends or days the employee is not rostered for work) will be self-certified by the employee. After that the employee must submit some form of medical evidence from the eighth day of sickness onwards. This will normally be a medical note supplied by the employee's GP or a hospital.

To work out the daily rate of SSP, you must divide the weekly rate of pay by the number of days the employee usually works in that week. A week runs from Sunday to Saturday.

6.5 Hours of work and breaks

An employee aged 18 or over cannot be required to work more than 48 hours a week on average, unless he has signed an opt out agreement. The employee is able to freely choose whether to opt in or out and you must not put pressure on him or otherwise treat him less favourably if he refuses to do so. If he does opt out, note that he can opt in again at any time, though he will be expected to give notice.

You must keep a record of your workers' hours, including those opted out.

Workers' hours are usually calculated as an average over 17 weeks and should include work-related training, travel as part of a worker's duties and working lunches. Travel to and from work is not included as working time.

Workers aged 18 or above are also entitled to a minimum 20 minute break for every shift lasting more than six hours. This can be paid or unpaid. It is up to you to decide when your worker takes his break but it shouldn't be at the start or end of a shift.

Where a worker is provided with accommodation so that he can be on call, all time spent on call amounts to working time, even if the worker is able to rest while on call.

Example

Mrs Hughes was employed as a part-time care assistant at Graylyns Residential Home, Dyfed, Wales. Mrs Hughes was paid at a rate of £5.05 per hour for eight hours a week; although she was required to be on-call between 9am and 8pm seven days a week to assist with any incidents at the residential home. She was called out to give assistance at the residential home about twice a month, and received half-an-hour's pay for each call out.

In return for her on call duties Mrs Hughes was permitted to rent a flat near the residential home at a discounted price. She alleged that her employers were in breach of the Working Time Regulations for failing to allow her adequate rest breaks, and were also in breach of the National Minimum Wage Regulations, as she was paid less than the legal minimum amount.

On appeal, the Employment Appeal Tribunal found that Mrs Hughes was entitled to be regarded as working when she was on-call, regardless of whether or not she was called out during this time. In this regard, they found that Mrs Hughes' home was not separable from the workplace and therefore she had not received the relevant rest breaks. Additionally, she had not received the national minimum wage which was payable for all her working hours, including those where she was not required to give additional assistance at her workplace.

Hughes v Graham and another t/a Graylyns Residential Home [2008].

Young workers aged 16 and 17 should have a 30 minute break if they work more than four and a half hours, and at least two consecutive days of rest a week.

Workers aged 18 or above are entitled to have a minimum of 11 hours' rest between each working day, and shouldn't be forced to work more than six days in seven or 12 days in every 14. The only exceptions are busy periods, emergencies and for people working away from home, in which case, rest periods can be compensated for and taken later.

Example

Alpha Catering Services Limited was a company in the airline catering business. The employees were delivery staff employed to load and deliver meals and drinks on to the aircraft and to remove the used items at Gatwick Airport. During the course of the employees' working day there were periods which were very busy and other periods where they had no immediate duties to perform. These periods were described as "down time" where employees were required to remain in radio contact with the employer, either in or close by their delivery vehicles. They were treated as being at the employer's disposal.

The delivery staff complained that Alpha had unlawfully denied them rest breaks to which they were entitled under the Working Time Regulations 1998. Alpha argued unsuccessfully that the work required continuity of service so the exception to the rest breaks provision applied. They further argued that in any event, the down time constituted a rest break.

Dismissing Alpha's appeal, the Court of Appeal found that the exception meant that the test of continuity of employment focused on the activity of the worker rather than the employer. It accepted that whilst Alpha had required continuity of service in that the employees were at its disposal, the employees' activities did not reflect continuity of service. The regulation only excluded the workers' right to rest breaks where the worker is involved in activities requiring continuity, rather than the employer.

Gallagher v Alpha Catering Service [2004]

6.6 Holiday

Under the Working Time Regulations 1998, workers (including part-timers and most agency and freelance workers) have the right to 5.6 weeks' paid leave each year.

There is no separate right for paid time off for public holidays. Whether there is an entitlement to paid time off will be dependent on the terms of the worker's contract. Paid public holidays can be counted as part of the statutory 5.6 weeks holiday entitlement.

It is important that you specify in the employee's statement of written particulars the rules and requirements surrounding holidays. For example, how much notice do you want employees to give before requesting time off? Is holiday allocated on a first come, first served basis? Do you have a limit on the number of employees taking holiday at the same time? Do you have a ban on holiday being taken at a particularly busy time of year? Do you have a Christmas closedown, which means that employees should keep some holiday in hand?

Employees have to take holiday by agreement with you. They cannot just take time, even for reasons connected to religious festivals. If holiday is taken without permission it will be an unauthorised absence.

There is no right for statutory holiday to be paid unless it is taken as holiday. The exception is where an employee has accrued holiday at the date of termination. In those circumstances he will be paid for any holiday accrued but not taken on a pro-rata basis in proportion to each complete month of service in the holiday year prior to such termination.

Note that holiday continues to accrue during periods of absence, such as maternity leave or sickness absence.

6.7 Discrimination

In the modern workplace, you will find people from various different social, racial and cultural backgrounds. Employers are under a legal obligation to protect their workers from unlawful discrimination in the workplace.

It is unlawful to discriminate on the basis of a protected characteristic. These are: gender (including pregnancy, maternity and marital status), sexual orientation, religious and philosophical belief, disability, race, nationality, colour and age.

There are four different types of discrimination:

- direct discrimination – treating somebody less favourably for a reason directly related to a protected characteristic;
- indirect discrimination – applying a rule which applies to all individuals but which in practice disadvantages somebody for a reason connected with a protected characteristic and which cannot be justified;

- harassment – where someone is subjected to unwanted language or behaviour which has the purpose or effect either of violating his dignity or creating a workplace which is offensive, upsetting, intimidating or humiliating;
- victimisation – treating a person less favourably as a consequence of an earlier complaint of unlawful discrimination.

Discrimination is a broad topic and employers have to manage in such a way as to reduce risk in the workplace. There is no upper limit on compensation for unlawful discrimination and you can end up being vicariously liable for the wrong doing of others.

Start by making sure you have a good dignity at work policy which helps to set the standards and train your employees to understand how seriously it must be taken.

6.8 Family friendly rights

There are many rights in place which protect working parents and carers. They cover:

- maternity leave and pay;
- paternity leave and pay;
- adoption leave and pay;
- parental leave;
- leave for dependants; and
- flexible working.

The statutory rates are updated annually.

You will find more detail in my book, The Employer's Guide to Family Friendly Flexibility published by BookBoon.

6.9 Time off

In addition to time off for holidays, and family friendly rights, employees have a statutory right to time off for a range of other reasons. These include for example:

- public duties e.g. being a school governor or magistrate;
- jury service;
- trade union duties.

6.10 Dispute resolution

The Employment Rights Act 1996 requires employers to have dispute resolution processes and to make them available to employees.

6.10.1 Grievances

Employees have the right to raise a grievance, either formally or informally. A grievance may arise where an employee has a concern about some aspect of the workplace. You will be under a duty to properly consider it and make reasonable efforts to resolve the matter, though employees do not have the right to demand specific outcomes.

Where the matter is raised formally there are certain procedural elements, for example, the right to be accompanied and the right to appeal against a first stage finding.

6.10.2 Discipline

A case of discipline might arise where the employee either cannot (capability) or will not (misconduct) meet your reasonable standards.

If that's the case and earlier guidance hasn't worked, you should start to explore it formally though your discipline procedure.

The ACAS Code provides the basic statutory minimum. The Code should be read together with the Guidance. You can download both from the ACAS website.

We return to what happens when it doesn't work out in Chapters 7 and 8 and you will find more detail in my book, How to Sack Employees Without Being Taken to Tribunal, published by BookBoon.

6.11 Redundancy

A redundancy situation arises where the job is no longer there in whole or in part or in whole or in part at that place.

You should always consider what steps should be taken to avoid the need for redundancy. If there is no other alternative, make sure you plan it properly and follow a fair procedure.

Alternatives to redundancy could involve other ways of cutting costs; for example reducing overheads, or more commonly, finding alternative vacancies within the organisation that the affected employees could have. If your employees suggest alternatives to redundancy, you are required to consider them.

You must consult with the affected employees about the upcoming redundancy. Consultation must be meaningful and timely, so be prepared to discuss:

- the reasons for the redundancies;
- the numbers and categories of employees involved;
- how you plan to select employees for redundancy;
- how you will carry out redundancies; and
- how you will work out redundancy payments.

The consultation must be carried out with a view to reaching an agreement, including ways of avoiding redundancy or reducing its effect. This means that there should be several private meetings with each employee.

Any employee who has two years or more of continuous service is also entitled to statutory redundancy pay. This payment is based on the length of service, age and weekly pay. Where an employee is being made redundant he is entitled to a written statement explaining how much redundancy pay he will receive and how this has been worked out.

Part of the final payment is notice. You can require the employee to work his notice or (if the terms of employment allow it) make a payment in lieu of notice.

Unless the terms of employment state otherwise, the statutory notice period is as follows:

Years of employment	Length of notice
0–2	1 week
2–3	2 weeks
3–4	3 weeks

The notice increases by a week for each completed year of service to a maximum of 12 weeks at 12 years.

During the notice period, you are required to provide your employees, who are due to be made redundant, with "reasonable" time off at full pay to look for other work or to retrain.

You will find more detail in my book, Getting Redundancy Right published by BookBoon.

6.12 Young people

A young worker is defined as somebody who is aged between 16–18 and has left school or college. A young worker cannnot usually be made to work more than eight hours a day or 40 hours per week. Exceptions can only be made if:

- it is necessary to keep the continuity of service or production; or
- there is a surge in demand for a service or product.

Young workers who need to work for more than four and a half hours will be entitled to a rest break of half an hour, which should not be taken at the beginning or end of a shift. Each young worker should also get 12 hours' rest in each 24 hour period in which they work, and should have at least two consecutive days off a week.

For people aged below school leaving age (under 16) there is no national minimum wage. However when a young worker reaches 16, he will be entitled to the statutory rate of pay. The rate for the national minimum wage is reviewed annually and changes introduced in October.

All full time employees are entitled to the same minimum annual leave entitlement, regardless of age.

7 What if the employee just doesn't work out?

7.1 Introduction

There is no way of telling how well your employee will fit into your organisation without seeing him work, and the probationary period is a useful tool for evaluating that. If an employee is failing to meet your standards, then it is important not be too hasty in sanctioning him. There are still certain procedural requirements which should be followed when you are considering the dismissal of your employee both at the end of the probationary period and after this period has passed.

7.2 Dismissal during or at the end of probation

The purpose of probation is to give you the opportunity to evaluate your employee's performance and so the period allowed for such an assessment should be fair in the circumstances.

If, during the course of the probationary period, review meetings suggest that the employee isn't performing to the standard that you would like, then it is important to let the employee know that this is the case, and therefore give him feedback, agree specific targets for improvement and provide help where appropriate. If it comes to the end of the period, and the employee is not aware that he has been underperforming, then the termination of employment will be a bit unfair. More information on setting standards and preventing problems is given in chapter eight.

If you have given the employee a fair chance and offered reasonable support then you are within your rights to dismiss the person. Write to set up a formal meeting, give the right to be accompanied and if you do decide to dismiss, give a right of appeal against your decision.

7.3 Dismissal after the end of the probation

Once the employee's job has been confirmed at the end of the probationary period, you are under an obligation to follow a proper procedure when considering dismissal. Although the general rule is that an employee cannot make a claim for unfair dismissal with less than two years' continuous service with the company, it is important to demonstrate fairness and integrity. There are many exceptions to the two year service requirement, so make sure you follow a fair procedure!

7.4 Dismissal – the minimum procedure

There are five fair reasons for dismissal.

- Conduct.
- Capability.

- Redundancy.
- Statute.
- Some other substantial reason.

It is important to set out your dismissal and disciplinary rules in writing, and to follow the guidelines you set. The ACAS Code of practice sets out a 'good-practice' advice section on discipline and grievance which you are advised to follow. If you unreasonably fail to follow the code and the issue ends up at an employment tribunal, then the tribunal could increase any compensation it awards an employee by up to 25 percent.

At the very least you should use the following minimum procedure.

1. Write to set up the meeting. Give your concerns and the reasons for them and say that you wish to discuss them formally. Offer the right to be accompanied by a work colleague or an accredited trade union representative. Allow reasonable time for the employee to prepare.
2. Discuss the matters at the meeting. Give the employee the chance to make his representations and consider them carefully. Adjourn to reflect on the arguments put to you.
3. Make a decision. If you still decide to dismiss, advise the employee of his right to appeal. This should all be confirmed in writing.

8 Correcting poor performance or misconduct

8.1 Introduction

At some point you will have to deal with an employee's poor performance or an issue of misconduct.

Start by deciding which one is the issue. Poor performance is by far the most common. Many business owners aren't even aware there's an issue they should be dealing with!

The key question is this: are all of your people meeting all of your reasonable standards nearly all the time? If your standards are reasonable and achievable and the answer is "No" you have some work to do.

Keep in mind that the goal of any discipline is to correct the misconduct and modify the behaviour, rather than to punish.

8.2 Poor performance

Capability refers to an employee's skills, ability, aptitude and knowledge in relation to his job. It can also mean making genuine mistakes. It is one of the potentially fair reasons for dismissal, provided that the procedure has been correctly followed.

8.3 Misconduct

In cases of misconduct where an employee elects not to meet your reasonable standards, he can be taken through the formal discipline process. If he does not meet your standards, ultimately he will be dismissed.

As the employer, you are responsible for determining whether disciplinary action should be taken. You should ask yourself whether any disciplinary action can be justified under the circumstances.

Make sure you collect evidence, follow your procedure and the ACAS Code; ensure that any punishment is proportionate and reasonable. Never dismiss for a first offence, unless it is gross misconduct.

8.4 The correction process

8.4.1 Set standards

Standards are the minimum levels of performance or conduct required by the organisation. Ensure that employees know your workplace standards. For example, we have a rule that advice to clients must be confirmed in writing.

Be precise. For example, it is too vague to say "be here on time." Give the detail i.e. "Be in front of your workstation ready to start work at 8am". If you can't explain exactly what you expect your employees to deliver, you'll have a problem explaining to an employment tribunal why you have reasonable belief that a dismissed employee was performing below your standards.

8.4.2 Provide regular feedback

Be friendly, but keep a degree of separation from your employees. Provide regular objective feedback. In addition to the exchanges that take place during the working day, meet with employees regularly (every two or three months) to discuss how things are going and to give and receive feedback informally.

Such meetings are useful for reiterating conduct or performance standards, clarifying understanding, providing relevant information, and establishing agreements and expectations on both sides.

8.4.3 Provide early guidance and correction

Act as soon as you notice that the employee is not delivering work to the required standard. Delaying, or doing nothing, may well cause the problem to get worse. It's much easier to blow out a match than put out a forest fire!

If early informal intervention doesn't work, escalate to the formal stage sooner rather than later.

8.4.4 Focus on the facts

Investigating will help you collate an accurate picture of the employee's performance or misconduct. The first steps will be informal. Discuss the matter with the employee, giving specific examples to help him understand your concerns. Create an informal action plan together and ensure that he is fully supported.

Unless it is a matter of gross incompetence (this is very rare) or gross misconduct, the first steps will be informal.

8.4.5 Give time to improve

Give the employee reasonable time to improve to the specified standard (two or three months is appropriate in most cases). If there's insufficient improvement, move to the formal process and ensure that all procedural elements, for example, the right to be accompanied, are observed. The action plan will continue alongside the formal process.

Whether it is a conduct or a capability matter, meet with the individual to ensure progress is being reviewed and you are providing feedback. If you see no improvement, then you may need to let that person go. If you have provided the appropriate support and training, had regular review meetings and exhausted all other efforts, then this may be the only other alternative. The correct dismissal procedure should still be followed in these circumstances.

Failure to meet reasonable standards costs organisations a lot of money. The Deepwater Horizon explosion and subsequent oil spill is an extreme case, but shows the damage that can be done and the consequences can go on for years.

Example

In 2010 the Obama administration made it clear that it considered BP's performance in resolving the enormous oil spill in the Gulf of Mexico after the explosion on the Deepwater Horizon rig to be very poor.

In the first six months after the incident, the US administration sent BP and other parties a bill of $122.2m (£80.6m). It didn't stop there. The company had to budget $38.1bn (£23.76bn) to try and remedy the damage caused and pay compensation. In November 2012, it was fined $4.5bn (£2.8bn) in criminal fines and could still face further prosecution and fines of $21bn (£13.09bn). Unsurprisingly there has been a downwards slide in BP's share value.

9 Health and safety responsibilities

9.1 Introduction

Employers have a duty to protect the health, safety and welfare of their employees, visitors to site, for example contractors, and even trespassers. You must do whatever is reasonably practical to achieve this. To manage health and safety within your workplace, you will have to conduct a basic series of tasks that include carrying out a risk assessment, providing training and information, writing a health and safety policy and keeping records up-to-date.

9.2 Policy statement

A health and safety policy describes how you intend to manage health and safety in your workplace. It is not a legal requirement to provide one unless you have five or more employees, but it is useful to know who is responsible for doing what, when and how and; demonstrates how seriously you take your health and safety responsibilities.

A policy statement is usually in three sections.

- A short statement detailing how safety will be managed.
- A section dealing with the organisation of safety, detailing how responsibilities are allocated and how employees fit into the overall safety management system.
- An arrangements section that specifies how specific activities and functions are managed.

The policy should be monitored regularly and updated where necessary. Effective monitoring can be achieved through audits and by reviewing management reports and accident investigations.

9.3 Risk assessment

All employers are required to assess the risks associated with their workplace. If you don't know or appreciate where the risks are, then you are putting yourself, your employees, your customers and your organisation in danger.

A risk assessment looks at the place of work and work activities systematically, considering what could go wrong and deciding on appropriate action to avoid accidents, damage or injury in the workplace.

What should be covered in a risk assessment depends on the nature of your business and the work done. Assessments must consider everyone who could be affected by the activity.

Example

Ms Mannell was employed by Clinton Cards as manager of one its stores in Surrey until her resignation in June 2004. In February 2004, Ms Mannell informed her manager orally that she was pregnant and confirmed this in writing to the Human Resources Officer in March 2004. The tribunal found that the respondent had no understanding of the obligation to carry out a specific pregnancy risk assessment, as well as a general risk assessment. Ms Mannell's manager instructed her instead to "carry out her own risk assessment". Ms Mannell completed a form, but this was lost and never acted on by the respondent.

Mrs Mannell was working very long hours in the belief that she needed to do so to turn around an underperforming store.

If the company had carried out a specific pregnancy related risk assessment, it would have revealed that Ms Mannell was under-going a high risk pregnancy and was suffering from work-related stress. A risk assessment would have uncovered these facts, and steps could have been taken to alleviate the risks posed to Ms Mannell's pregnancy before her resignation.

The tribunal found that she was constructively dismissed and awarded compensation of over £14,000, including £3,000 for injury to feelings.

Mannell v Clinton Cards plc [2005]

The Health and Safety Executive sets out an approach where you carry out the risk assessment process in five steps.

1. Identify the hazards associated with work activities.
2. Identify who could be harmed by those hazards.
3. Identify how you manage the risks at present and what further steps might be required to reduce the risks. These are your control measures.
4. Record the findings of your assessment and inform those at risk of the controls.
5. Review the risk assessment on a regular basis, at least annually.

You should look at each activity as critically as possible, observing how it is carried out and checking existing guidelines and information.

9.4 Employers' responsibilities

It is impossible to remove all of the risks and hazards from a working environment, as new ones appear all the time. However, the law requires that employers are under a specific duty, so far as is reasonably practical, to:

- provide all necessary information, instruction, training and supervision to enable individuals to be safe;
- provide and maintain a safe place of work with safe entry and exit;
- provide and maintain a working environment that is safe and without risk to health;
- provide and maintain systems of work that are safe; and
- arrange for the safe use, handling, storage and transport of articles and substances.

9.5 Employees' responsibilities

Employees must:

- take care of their own health and safety and that of people who may be affected by what they do (or do not do); and
- co-operate with others on health and safety, and not interfere with, or misuse, anything provided for their health, safety or welfare.

9.6 Sanctions

Employers are expected to take all reasonable steps to comply with the law and to do what they can to reduce risk to an acceptable level in the workplace. The sanctions for failure can be very severe, especially if someone is seriously injured or dies as a result of the employer's failure. Penalties include fines and/ or imprisonment.

Example

Geologist Alexander Wright worked for Cotswold Geotechnical. He died in September 2008 when a 12.6ft (3.8 metres) deep unsupported trial pit that he was working in alone caved in at a development site in Brimscombe Lane, near Stroud, Gloucestershire.

Cotswold Geotechnical was found guilty at Winchester Crown Court of corporate manslaughter relating to Mr Wright's death. The judge said that Peter Eaton was in substance the company and his approach to trial pitting was "extremely irresponsible and dangerous". The company was fined £385,000.

While the penalties for employers can be high, employees who are responsible for failures in safety can also be prosecuted, although this is far less common.

Make sure that your employees follow your safety rules and explore matters formally through the disciplinary process if they do not.

10 Additional legal responsibilities

10.1 Introduction

Becoming an employer means that there are several legal obligations that you are required to undertake.

10.2 Employers' liability insurance

Employers' liability (EL) insurance is a legal requirement for all employers. EL insurance allows businesses to meet the costs of damages and legal fees for employees who are injured or made ill at work through the fault of their employer. By law, all businesses must be insured for at least £5 million, although most insurers automatically provide cover of at least £10 million. You can be fined up to £2,500 for each day that you do not have appropriate insurance. If you fail to display the certificate or refuse to make it available for the HSE inspectors when they ask, you can also be fined.

You will need EL insurance for someone who works for you where you:

- deduct national insurance and income tax from the money you pay them;
- have the right to control where and when they work and how they do it;
- supply their work materials and equipment;

- have a right to any profit that your workers make, although you may wish to share this with them through commission, bonuses etc;
- require that person only to deliver the service and they cannot employ a substitute if they are unable to do the work; and
- treat them in exactly the same way as the other employees, for example, they do the same work under the same conditions as someone else you employ.

Note that you are required to keep EL certificates for 40 years.

10.3 NICs

National Insurance Contributions (NICs) are paid on the earnings you provide to PAYE employees. Earnings include not only cash amounts but benefits, such as providing your employees with company cars or mobile phones.

The PAYE (Pay as You Earn) system which you use to operate your regular pay-roll, deducts the tax and NICs due on your employee's earnings automatically. However, the NICs that apply to many employer-provided benefits are calculated separately after the end of the tax year.

Your main responsibilities are to:

- deduct and pay the employer and employee Class 1 NICs due to your employees' earnings through your payroll;
- pay employer Class 1A NICs after the end of the tax year on benefits you have provided to your employees;
- pay employer Class 1B NICs after the end of the tax year if you have agreed a PAYE Settlement Agreement with HM Revenue and Customs.

Self-employed workers pay their own NICs (Class 2 and Class 4).

Because employers' NICs are so expensive, many employers try to reduce their liability by treating workers as self-employed. Where a worker is genuinely self-employed, that is, there is no mutuality of obligation; you exercise little control over the way he does his work and it's clear that he is running a separate business in his own right), then that will be fine.

But if there is no clear evidence that the employee is genuinely self-employed, you may face an investigation by HMRC. If the inspector considers that the allegedly self-employed person is in fact an employee, you will have to pay up to six years' worth of NIC contributions, irrespective of tax already paid by the worker. HMRC are targeting NIC avoidance, so get advice.

10.4 Statutory records

You are required to keep certain records by law. Others you should keep as a matter of good practice.

You are required to keep the following records:

- pay roll details – to ensure that you are issuing workers with pay statements and to ensure that you are paying your workers at least the minimum wage;
- sickness records of more than four days and how much SSP you have paid;
- evidence of eligibility to work in the UK;
- written permission to keep and process employees' personal data. This can be achieved by having a permission box on the application form;
- accidents, injuries and dangerous occurrences to meet health and safety requirements.

Under the Working Time Regulations, you must also keep records to ensure that weekly working time and night work limits are not being exceeded. There is no specified record that you should keep to show this. Existing records maintained for other purposes, such as pay can be used to achieve this.

You will need to keep an up-to-date record of workers who have agreed to work more than 48 hours per week, but you don't have to record how many hours they have actually worked.

The following checklist represents a guide to the documents (or copies of documents) which should be held in an employee's personal file. Not everything will apply in every case, but if for instance, an employee drives a vehicle owned by the company you should ensure you check the licence at least once a year and take a copy.

- Application form or CV.
- Medical questionnaire or results of medical examination.
- Copies of certificates / educational qualifications.
- Interview notes.
- Results of tests where used.
- Copy of offer letter.
- Copy of P45 (if not held by payroll).
- Copy of agency terms (if recruited using an agency).
- References.
- Signed statement of terms and conditions.
- Copies of documents varying terms of employment (for example, salary increase or promotion).
- Bank or building society details.

- Contact and address details, details of dependents if appropriate (for example, if you offer medical insurance or an occupational pension) contact details of person to be notified in an emergency. NB these should be updated annually.
- Staff benefits information for which the employee is eligible and which he has taken up.
- Company car, company mobile details where appropriate.
- Copy of driving licence where appropriate.
- Confirmation / extension of probationary period.
- Documents relating to grievances raised.
- Notes from informal counselling sessions.
- Notes from formal disciplinary hearings;
- Disciplinary warnings – these may expire with the passage of time and need no further activity; we can remove them from the individual's file but retain them centrally. Alternatively we can mark them "time expired – no further action" and leave them in the file. Remove details of minor offences after a few years (though keep a note that the warning has been given). Don't throw away time expired warnings related to gross misconduct or safety breaches.
- Induction and training records (though these may be kept by the line manager).
- Signed authorisation for lawful deductions, e.g. deductions for union membership, loans or training agreements which may be repaid by the employee.
- Copies of appraisals where held.
- Copies of documents relating to termination.
- Details of disability or arrangements / requirements relating to disability.
- Attendance records. NB Details of medical records and sickness details should be held separate from the attendance records.

10.5 Data protection

Under the Data Protection Act, you have a legal duty to ensure that all your employee's personal details are kept securely and confidentially. You should only collect the data you need. This may mean that you collect some data at different times. Data must be accurate and up-to-date. It's a good idea to check and update this annually with each of your employees.

Employees have a legal right to see copies of most of the information you hold about them. With few exceptions, you must give access to this information when a worker requests it. The worker must specify what data he wants to see. You must provide a copy within 40 days. You can make a £10 charge to cover administration costs.

Some data requests can be refused in certain circumstances, either because they are one of the exceptions or they clearly identify another person. If that other person does not give permission for the information to be disclosed and the data cannot be supplied in a suitably redacted form (i.e. anonymous), the request can be refused.

10.5.1 Recruitment and selection

The Data Protection Act will apply if you collect or use information about people as part of a recruitment and selection exercise. When you place a job advert, you must ensure that you identify your organisation properly. You must also ensure that you do not collect more information from candidates than you actually need, and that this information is only used for recruitment and selection purposes.

The personal information that you collect should be kept secure and not disclosed to another organisation without the data subject's consent.

10.5.2 Employment records

Ensure that your employees are aware of how you will use records about them, and whether you will disclose the information that they contain. It is important that you delete any information for which you have no genuine business need. You should ensure that only staff who have proper authorisation and the necessary training have access to your employee's records.

10.5.3 Monitoring

If you monitor your workers by collecting or using information about them, the Data Protection Act requires openness. Workers should be aware of the nature, extent and reasons for any monitoring unless in exceptional circumstances, when covert monitoring is justified.

10.5.4 Information about workers' health

As an employer, your interest will mainly be about knowing whether a worker is or will be fit for work, and therefore, as far as possible, it should be left to medically qualified staff to have access to detailed medical information and interpret it for you. In all cases consider whether the collection and use of health information is justified by the benefits that it will result.

11 Where Next?

Taking on your first employee is an exciting and scary time. This book will alert you to your responsibilities and talks you through some of the most common situations.

As ever, the Devil's in the detail, so do make sure you get help. It doesn't have to be expensive. We have a special pack for first time employers at a discounted rate. If you'd like to make sure you get it right from the word go, get in touch, citing Bookboon First Time Employers to take advantage of discounted support.

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