# RIGHTS OF EMPLOYEES




**NOTE: THESE NOTES SHOULD NEVER BE RELIED ON IN ISOLATION IN ADVISING OR DECIDING WHETHER OR NOT TO PURSUE A CLAIM. INDEPENDENT LEGAL ADVICE SHOULD ALWAYS BE SOUGHT IN SUCH CIRCUMSTANCES.**

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# INTRODUCTION

These notes deal with the main employment rights given to a person by legislation and with the enforcement of those rights. They should be viewed as creating a floor of minimum basic rights that can be built upon by negotiation with an employer. The great majority of rights dealt with may be enforced by complaint to an industrial tribunal.

Many of the rates (for instance, Statutory Sick Pay) referred to throughout, although accurate at time of writing, are subject to change. Accordingly, care should be taken when advising about the rates which apply.

## Sources of employment law

Northern Ireland (like England, Wales and Scotland) is a common law jurisdiction which means that, historically, law was developed through caselaw rather than through legislation. Common law is still very important for employment law, particularly in relation to contract law and to employment related torts. A tort is a wrongful act causing harm or loss to a person (for example personal injury). This course will not deal with employment related torts.

However, much of Northern Ireland's employment law is now set out in statutory form (Acts of Parliament, Orders or Regulations). European legislation and case-law is also very important in the employment context.

## The contract of employment/engagement

Many of the rules governing the employment relationship will be set out in the contract between the parties. Section 4 below deals with the contract of employment in more detail. Where there is a dispute about what the terms of the contract are the common law principles of contract law will be relevant in interpreting the contract.

## Domestic legislation

Many of the statutory rights discussed in this course are found in the Employment Rights (Northern Ireland) Order 1996. However, there are many other pieces of legislation governing employment in Northern Ireland (a list of the main applicable legislation is set out in section 23). It should be noted that much of this legislation has been amended over time and care should always be taken when reading legislation to ensure it incorporates the latest amendments.

There are some areas of employment law in Northern Ireland which are governed by legislation from Parliament – for example the Disability Discrimination Act 1995 and the National Minimum Wage Act 1998. However, there are many areas where Northern Ireland has its own specific legislation and care should be taken to check if this is the case. For example, the Transfer of Undertakings (Protection of Employment) Regulations 2006 is legislation passed by Parliament which applies in Northern Ireland in relation to transfer of undertakings. However, the provisions in those Regulations relating to service provision change do not apply to Northern Ireland. Separate

provisions are set out for Northern Ireland only in The Service Provision Change (Protection of Employment) Regulations (NI) 2006.

There is now a significant divergence between Northern Ireland and other parts of the UK in relation to discrimination law as the Equality Act 2010 applies to England, Wales and Scotland but not to Northern Ireland.

Employment legislation can be accessed on www.legislation.gov.uk. The Labour Relations Agency also has a good summary of employment legislation applicable specifically to Northern Ireland at www.lra.org.uk.

## Caselaw

The courts are responsible for the interpretation of legislation and therefore knowledge of caselaw is important for advising on how a particular piece of legislation may apply to a situation.

Decisions of the Northern Ireland Court of Appeal are binding on the Northern Ireland Industrial Tribunal and the Fair Employment Tribunal. A decision of the Supreme Court (formerly the House of Lords) is also binding if it relates to law applicable in Northern Ireland.

Decisions of the Court of Appeal for England and Wales are not strictly binding on the Northern Ireland Industrial Tribunal but are very persuasive. Decisions of the Employment Appeal Tribunals in England, Wales and Scotland are also not binding but are of persuasive value.

Decisions of the Court of Justice of the European Union (CJEU) may also be relevant in relation to rights emanating from European legislation.

## European law

A significant amount of employment legislation in Northern Ireland has been passed as a result of our membership of the European Union. Among others, rights in relation to working time, equal pay, transfer of undertakings, fixed-term workers and agency workers all stem from European legislation. Some EU laws (eg Regulations) are directly applicable but the majority (eg Directives) need to be enacted by domestic legislation. So, for example, the Working Time Regulations (Northern Ireland) 1998 implements the provisions of the Working Time Directive. Where domestic legislation has failed to implement obligations under European law such rights may be relied on before the domestic courts. The rules surrounding when European law may be directly applicable are complex and will not be dealt with in these notes.

The CJEU makes the final decision on the interpretation of EU law. Therefore, CJEU caselaw can be vital when interpreting directly applicable obligations or domestic legislation which implements EU legislation.

Clearly the result of the referendum on membership of the EU may substantially alter this position, although it is unlikely that domestic legislation that has its roots in European Directives would change immediately. Further advice should be sought.

## The Human Rights Act 1998

Following enactment of the Human Rights Act 1998, domestic courts are required to interpret the law in accordance with the European Convention on Human Rights and Fundamental Freedoms. Further, under the Human Rights Act, a complaint about breach of convention rights can be brought by an individual against a public authority. This is an area which will not be dealt with further in these notes.

# 1. WORKERS AND EMPLOYEES

## 1.1 Employee

Many, although not all, employment rights contained in the Employment Rights (NI) Order 1996 (ERO), are available only to a person who is an employee. For instance only an employee has a right to a redundancy payment or to claim unfair dismissal.

Article 3 of the ERO defines an employee as 'an individual who has entered into or works under a contract of employment'. A contract of employment is defined as a contract of service or apprenticeship.

Many people who carry out work for others are not employees. For example, a window cleaner is normally not an employee of the person who owns the house but is self-employed and has what is known in law as a contract for services with each of her/his clients. Someone who is placed in a workplace by an agency and paid through that agency is likely not to be an employee of either the agency or the end-user, depending on all the circumstances.

In assessing whether someone is an employee, there are certain fundamental matters which normally must be in place:

- the person must agree to provide work personally. A substitute cannot normally be nominated except in very limited circumstances;
- there must be mutuality of obligation between the employer and employee. Thus, if there is no obligation on a person to actually turn up to work or if s/he is engaged on a 'casual as required' basis s/he may not be an employee;
- the person must be subject to the overall control of the employer.

If all of the above matters are present it is then necessary to look at other elements of the working relationship, such as who provides the equipment or tools to carry out the work. It should be noted that just because a person is described as 'self-employed' in a contract, or because s/he pays tax and national insurance on a self-employed basis, this does not automatically prevent her/him being an employee. All of the circumstances should be looked at as a whole in deciding employment status.

A wider definition of employee is contained in anti-discrimination legislation and includes a person who contracts personally to carry out work.

Confusingly, some other legislation (eg that relating to Statutory Sick Pay and transfer of undertakings/service provision change) can also contain a different and wider interpretation of 'employee'. It is important to identify the correct statutory test in each case.

## 1.2 Worker

To claim rights under many of the employment laws recently introduced, a person in the workplace need only show that s/he is a 'worker'. This is generally considered to be a much wider term than 'employee'. For instance, a 'worker' in the Working Time Regulations (NI) 1998 is defined as a person who has entered into or works under:

- a contract of employment; or
- any other contract, whether express or implied and (if it is express whether oral or in writing) whereby s/he undertakes to do or perform personally any work or services for another party whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by her/him.

In other words, worker covers almost all contracts to perform work other than those carried out on a genuinely self-employed basis.

Examples of other legislation which include rights for workers are the National Minimum Wage Act 1998, the Public Interest Disclosure (NI) Order 1998 and the provisions in the ERO relating to unlawful deductions from wages.

## 1.3 Agency workers

As noted above, agency workers often find that they are neither the employee of the agency which engages them nor of the end-user to whom they supply services. As a result, many agency workers are denied the benefits associated with employment status (for example protection from unfair dismissal or entitlement to redundancy pay).

The Agency Workers Regulations (NI) 2011 came into effect on 5 December 2011.

Under the regulations, an agency worker will, after twelve weeks' work with a hirer, be entitled to equal treatment on basic working and employment conditions compared to permanent employees of the hirer.

The key basic conditions covered are:

- pay;
- length of working hours;
- night work;

- rest periods;
- rest breaks; and
- annual leave.

In addition, from the first day of their assignment, agency workers will be entitled to:

- information about vacancies at the hirer's workplace;
- the same opportunity as other workers to find permanent employment; and
- equal access to on-site facilities such as childcare.

Agency workers who are pregnant will be covered by the rules relating to paid time off for ante-natal appointments, once the agency worker has completed twelve weeks' service with the hirer. Provision is also made for pregnant agency workers whose assignment is terminated prematurely on grounds of health and safety. Such a worker must be reassigned to other suitable alternative work or, if no such work is available, she must be paid for the period for which the original assignment would have lasted. Again, this protection applies once the agency worker has completed twelve weeks' service with the hirer.

Under the Regulations, agency workers may not be entitled to equal treatment in respect of pay if they are held to be employees of the agency and certain conditions are fulfilled (principally in relation to pay between assignments and an obligation on the agency to try to find alternative work for the agency worker). This is commonly called the 'Swedish Derogation'.

Further advice should be sought if it is considered that this exemption might apply.

# 2. LENGTH OF SERVICE

Some but not all of the rights in employment law are only acquired after a certain length of time working for the same employer. For instance, an employee must have worked continuously for two years with the same employer before s/he can claim a statutory redundancy payment. Likewise, for unfair dismissal, the qualifying period for claiming is normally one year.

This requirement to have been employed continuously for a qualifying period does not apply to a number of specific types of dismissal. These include dismissal because of trade union membership, health and safety reasons, attempting to enforce a statutory employment right and pregnancy (see 16.4.6).

The right not to be subjected to unlawful discrimination also does not require any length of service.

# 3. CONTRACTS OF EMPLOYMENT

Aside from the statutory rights, the legal relationship between employer and employee is based on the contract between them.

A contract is just a legally enforceable agreement. It does not have to be in writing. It is obviously preferable that an employee should have a formal written contract of employment, but very often there is no such document.

The contract of employment is unlike other contracts. This is because it is extremely difficult to tie down everything in great detail. This has the benefit of enabling an element of flexibility. However, the consequences are that often nothing is automatic about the employment relationship as putting it into effect requires dialogue, day-to-day consensus and a certain amount of 'give and take'. Furthermore, because of the uncertainty, conflict and co-operation inherent in the employment relationship, there is enormous scope for divergent interpretations, goals and behaviours.

## 3.1 Illegal contracts

In most cases a person will lose any legal rights s/he had as an employee if the contract under which s/he worked involved illegal activity in which both parties knowingly participated. Examples would be fraud on Her Majesty's Revenue & Customs (HMRC) through non-payment of tax lawfully due, or benefit fraud ie 'doing the double'.

Not all rights may be lost as a result of a contract being illegal. For instance, a claim for sex and race discrimination may be able to proceed in very limited circumstances despite the non-existence of a lawful contract of employment.

## 3.2 Where to find the contract

The terms of a contract will normally include matters such as pay, job duties, holidays, etc. In most cases, such things are taken for granted, but in the event of a dispute it is important to know exactly what the terms of the contract are. Unfortunately it is often unclear what has been contractually agreed.

While some employers give workers a full written contract detailing the terms and conditions of employment which both the employer and the employee sign, many people at work never receive a written contract of employment. Generally, there is no legal obligation on the employer to provide a written contract of employment. An employer is, however, almost always obliged to provide a written statement detailing the main terms of employment (see section 4).

In cases where there is no written contract or where the written contract is not comprehensive or up to date, it may be necessary to look at a number of different sources to determine the terms of the contract.

The terms of a contract of employment are normally a mixture of express and implied terms.

## 3.3 Express terms

The express terms of a contract of employment are those terms that are expressly agreed between the employer and the employee. Express terms may be written or verbal (ie verbally agreed between the employer and the employee).

Apart from any actual written contract, other sources of written express terms could be:

- a letter of appointment which sets out conditions of employment;
- a written statement of terms and conditions (see section 4);
- pay slips giving details of wages actually paid.

Terms and conditions set out in company handbooks or in collective agreements may also be incorporated into a contract of employment as express terms where there is a clear agreement, either verbally or in writing, that the relationship between the employer and employee is to be governed by such provisions. However, it would be wrong to assume that company handbooks and collective agreements are incorporated into the contract of employment in all cases.

In practice, it is very common for there to be a lack of terms which are expressly agreed upon. Often there is merely an offer of employment and an acceptance of that offer with no specific agreement about hours of work, holidays, etc. To establish the terms of the contract in such cases, it is often necessary to look to the implied terms.

## 3.4 Implied terms

Terms may exist as part of a contract of employment due to conduct, or custom and practice (eg an employee received certain holidays in previous years, other staff doing the same job have certain hours, rates of pay etc).

In addition, over the years, judges have decided that there are also, under common law, implied terms which they consider to be present in every contract. The implied duties on the employer include the duties:

- to take reasonable care of the employee's health and safety;
- not to destroy the relationship of trust and confidence between the parties;
- to pay wages; and
- not to require the employee to undertake unlawful acts.

Implied terms that arise through custom and practice can never override express terms, unless it can be shown that the express term has been varied. However, implied terms may assist in explaining ambiguous express terms or can be used to control how an employer should exercise discretionary powers.

## 3.5 Statutory terms

The law traditionally did not intervene to guarantee rights to employees, preferring to leave the negotiation of terms and conditions to the employer and employee. In practice, this often led to very unfavourable conditions of employment due to the employee's weak negotiating position.

There has been intervention both at European and domestic level to ensure certain minimum protection and rights.

If there is a difference between express terms in a contract and statutory terms, the statutory terms will normally prevail. For example, if a contract states that an employee is entitled to two days' notice to terminate her/his employment but the statute says s/he is entitled to one week, the statutory term will prevail and the employee will be entitled to one week notice pay.

Occasionally, although rarely, it may be possible to negotiate rights different from the statute if certain conditions are fulfilled. For instance, see 7.8, where allowable modification under working time legislation is discussed.

The importance of checking the actual legislation should not be overlooked. In addition, a contract of employment should always be checked when advising a worker as it may provide more rights than the minimum statutory protections discussed in these notes.

## 3.6 Variation of contractual terms

An employer can only lawfully vary an employee's contract of employment if there is a clear and unambiguous provision in the contract permitting such variation by the employer (which is rare) or by agreement with the employee.

If an employer varies an employee's contract of employment without the employee's agreement and where the contract does not permit unilateral variation this will be a breach of contract. Depending on the nature of the change, it may be a fundamental breach of contract. For example, a unilateral variation of an employee's hours of work or rate of pay would be likely to constitute a fundamental breach giving the employee the right to resign and claim constructive dismissal (provided the employee has at least one year's service).

If an employer unilaterally varies an employee's contract of employment but the employee does not object and works on, the employee may be deemed to have accepted the variation. This is most likely where there are changes that immediately affect the worker (such as rate of pay or working hours). However implied agreement is less likely where the change does not immediately impact on the employee (for example a variation to a redundancy policy).

Where an employee does object to a variation s/he should make such objection clear as soon as possible (preferably in writing) and if s/he continues to work under the contract it should be made clear that such work is under protest pending resolution of the breach of contract.

Where the breach of contract gives rise to a loss of wages, an employee can, as an alternative to resigning, remain in employment and bring a claim for unlawful deductions from wages. To do this, it is essential that the employee makes clear that s/he is objecting to the variation and working under protest. This is best done by way of a written grievance. If the matter is not resolved as a result of the grievance, a claim should be submitted to the industrial tribunal. Any delay in objecting to the variation could result in the employee being deemed to have agreed to it.

As an alternative to imposing the change as a variation of contract, an employer may decide to issue employees with new contracts. This requires the employer to terminate the existing contract (with the requisite notice of termination) and issue a new contract (depending on the number of employees involved, this may require the employer to conduct a collective redundancy consultation). For employees with more than one year's service, this could constitute an unfair dismissal. However, an employer who is under severe financial pressure and has imposed a change in contract as an alternative to making redundancies or closing down completely could plead some other substantial reason as a potentially fair reason for the dismissal. An employer in such circumstances who has followed any applicable procedures and in all other respects acted reasonably would most likely be able to defeat a claim for unfair dismissal.

Where the variation of contract relates to a matter on which the employer is obliged to provide a written statement of terms (see below), the employee should receive written details of the variation within one month of the change.

# 4. WRITTEN STATEMENT OF TERMS

## 4.1 When must a statement be given?

As already noted, often there is no formal written contract, making it difficult to ascertain what terms have been agreed between the parties. For this reason, Part III of the ERO provides that an employee who is to be employed for more than one month must be given a written statement of employment particulars no later than two months after the beginning of employment.

## 4.2 Status

This statement is not automatically a contract of employment and is indeed often only what the employer believes has been agreed with the employee. It is, however, good evidence of what might be contained in the contract of employment.

## 4.3 Contents

The following particulars must be given in a single document:

- the names of the employer and employee;
- the date when any period of continuous employment began (taking into account any employment with a previous employer which counts);
- the scale or rate of pay or the method of calculating pay;
- the intervals at which wages are to be paid (for example weekly or monthly);
- hours of work;
- entitlement to holidays, including public holidays, holiday pay and entitlements to accrued holiday pay on the termination of employment;
- the title of the job or a brief description of the work;
- the place of work.

The employer must also provide the following information, although this can be given in instalments:

- the length of notice which the employee has to give or receive to end the contract of employment;
- if the employment is not intended to be permanent, the period for which it is expected to continue, or, if it is for a fixed term, the date when it is to end;
- any collective agreements which directly affect the terms and conditions of employment;
- other details if the employee is required to work outside the UK in respect of pay, currency in which s/he is to be paid and how long s/he has to work outside the UK.

The employer also has to provide details of the following terms and conditions, although these can be referred to in a document which is reasonably accessible to the employee:

- incapacity for work due to sickness or injury, including any provision for sick pay;
- pensions and pension schemes.

It should be noted that the contract does not have to have provisions about any of the matters listed above. However, where there are no provisions this must be stated in the statement of employment particulars.

## 4.4 Disciplinary and grievance procedures

The employer also has to provide a note, in the statement of employment particulars, specifying grievance procedures or referring to a document where these can be

reasonably accessed by the employee. Since 3 April 2005 all employers, regardless of size, have to provide details in relation to disciplinary procedures.

Regardless of the employer's own disciplinary procedures, employers and employees are required to follow set minimum statutory disciplinary and dismissal procedures in certain circumstances. In relation to employee grievances, employers and employees should comply with the Labour Relations Code of Practice on Disciplinary and Grievance Procedures. Further details can be found in section 5.

## 4.5 Changes in particulars

Where there is a change in any of the particulars, the employer must give the employee a written statement containing particulars of the change. This must be done at the earliest opportunity and in any event not later than one month after the change in question.

## 4.6 Enforcement of the right to a written statement

If the written statement is not provided, the employee can complain to the industrial tribunal. The tribunal can declare what the particulars which should have been given are. The tribunal can also award compensation of two weeks' pay if the employer does not provide any or adequate particulars. This can be increased to four weeks' pay if the tribunal considers it just and equitable in all the circumstances to do so.

However, this compensation can only be awarded if the employee is also bringing another claim, in an action brought under one of the jurisdictions identified in section 5, and the tribunal finds in favour of the employee.

# 5. STATUTORY PROCEDURES AND THE LRA CODE OF PRACTICE

## 5.1 Disciplinary and dismissal procedures

An employer should follow disciplinary and dismissal procedures when dismissing or taking relevant disciplinary action.

'Relevant disciplinary action' is action short of dismissal which the employer asserts is based wholly or mainly on the employee's conduct or capability. It does not include suspension on full pay or the issuing of warnings.

Therefore if an employee is dissatisfied with receiving a warning, s/he should raise the matter as a grievance with her/his employer.

### 5.1.1 Which disciplinary procedure?

The standard disciplinary procedure should normally be followed.

The modified procedure will apply where an employee is dismissed for gross misconduct without notice and it was reasonable for the employer to dismiss before enquiring into the circumstances in which the conduct took place.

### 5.1.2 The standard procedure

The standard procedure consists of three steps. It is initiated by the employer writing a letter to the employee setting out the conduct which led the employer to contemplate dismissing or taking disciplinary action. The employer must arrange a meeting before taking any action other than suspension and must provide a right of appeal. The dismissal or disciplinary action can be taken before the appeal hearing.

### 5.1.3 The modified procedure

The modified procedure will take place after dismissal. It consists of two steps. The employer must send a letter setting out what misconduct led to dismissal and give the employee a right of appeal.

## 5.2 The LRA Code of Practice on disciplinary and grievance procedures

The LRA Code of Practice on dealing with disciplinary and grievance issues came into operation from 3 April 2011. It sets out what constitutes good employment practice and reasonable behaviour for both employers and employees in the operation of these procedures. It replaced the statutory grievance procedure. The list of jurisdictions to which the Code applies is as follows:

- discrimination (see section 13):
    - equality clauses (see 6.5);
    - sex discrimination in the employment field;
    - disability discrimination in the employment field;
    - race discrimination in the employment field;
    - discrimination on grounds of religious belief or political opinion;
    - discrimination on grounds of sexual orientation;
    - discrimination on grounds of age;
- certain claims relating to wages:
    - unauthorised deductions and payments (see 6.3);
    - detriment in relation to the national minimum wage (see 6.1);
- certain trade union rights:

- detriment in relation to union recognition rights;
- detriment or inducements in relation to trade union membership and activities;
- inducements relating to collective bargaining;

- breach of contract claims under the Industrial Tribunals Extension of Jurisdiction Order (NI) 1994;
- breach of the Working Time Regulations (see section 7);
- detriment relating to European Works Councils;
- certain detriments in employment relating to:
  - health and safety cases [article 68 of the 1996 Order] (see section 15);
  - working time cases [article 68A of the 1996 Order] (see section 7);
  - trustees of occupational pension schemes;
  - employee representatives for the purposes of collective redundancies or the transfer of an undertaking/service provision change legislation;
  - exercising the right to time off for study or training (see 9.3);
  - leave for family and domestic reasons relating to pregnancy, childbirth, maternity, ordinary, compulsory or additional maternity leave, ordinary or additional adoption leave, parental leave, paternity leave, shared parental leave, time-off for family and dependants provisions (see sections 9 and 10);
  - flexible working (see 9.2.3);
  - the worker making a protected disclosure (see section 14);
  - from 6 April 2007, the procedures are extended to matters relating to limited-liability companies, and consultation of employees (including consultation regarding pension schemes);
- statutory redundancy payments (see section 18);
- unfair dismissal (see 16.4).

If a complaint under any of these jurisdictions is presented to an Industrial or Fair Employment Tribunal by an **employee**, the tribunal can, if it considers it just and equitable, increase or reduce any award of compensation by up to 50 per cent to reflect any unreasonable failure to follow the Code by either the employer or employee. This gives the tribunal considerable latitude to do what it thinks fair in the individual circumstances, or to do nothing. Examples of unreasonable conduct given in the Code include failing to offer a grievance meeting and failing to appeal a decision.

In outline, the Code sets out that grievances should be dealt with as follows:

- if it is not possible to resolve a grievance informally then it should be raised formally in writing;

- a meeting should be arranged, all parties should take reasonable steps to attend, and the employee should be allowed to explain the basis of the grievance;
- the employer's decision and the reason for it should be communicated to the employee in writing, along with any proposed action, and the employee should be informed of the right of appeal;
- the employee should advise the employer in writing of the grounds of any appeal and the employer should notify the employee of the time and place of the appeal meeting;
- the outcome of the appeal should be communicated in writing.

All of the steps to be taken by either party above are to be taken 'without unreasonable delay'.

If the complaint(s) arise(s) wholly from the termination of employment, the grievance procedures under the Code do not apply and the consequential adjustment of award for failure to follow the Code should not apply. However, until caselaw clarifies the application of the law in this area, it would be prudent to raise any such complaint(s) as a grievance (for example during the appeal against a dismissal).

**The Code applies these grievance requirements to 'employees', so workers who are not employees are not subject to these rules.**

The text above does not set out all the requirements of the Code. Readers should refer to the Code of Practice for fuller guidance as to what constitutes a reasonable approach to a grievance or disciplinary procedures. The LRA has also published a detailed practical guidance on the Code, which is not binding but sets out good practice.

**It is extremely important for employees to comply with the full code, as any failure can be the basis for an argument that compensation should be reduced.** For example, failure to raise a grievance informally first might constitute a breach.

## 5.3 When does the statutory dismissal and disciplinary procedure not apply?

The dismissal and disciplinary procedures do not have to be followed:

- if there is dismissal then re-engagement in certain circumstances;
- for some collective redundancies or industrial action dismissals; or
- where employment is covered by a designated dismissal procedures agreement.

If an employer's business suddenly and unexpectedly ceases to function because of an event unforeseen by the employer and it becomes impracticable to employ the employee, for instance if the premises burn down, there is no need to follow the statutory dismissal and disciplinary procedure.

The dismissal and disciplinary procedures also do not apply if the employee cannot continue to work in the position s/he held without contravening a statutory duty or restriction, for instance by losing a driving licence if this was an essential requirement for a position.

Where the modified dismissal and disciplinary procedure would apply but the employee presents an application to an industrial tribunal before the employer sends a step-one letter to the employee, there is no need for the statutory procedures to be complied with.

The statutory procedure also does not need to be followed if:

- a party (the employer or employee) has reasonable grounds to believe that starting the procedure or complying with any subsequent requirement under the procedure would result in a significant threat to her/him, her/his property or any other person or property; or
- the party has been subjected to harassment and has reasonable grounds to believe that starting the procedure or complying with subsequent requirements would result in her/him being subjected to further harassment; or
- it is not practicable for the party to start the procedure or comply with a subsequent requirement within a reasonable period; or
- it would not be possible to comply with the procedure without disclosing information which would be contrary to national security.

In circumstances when the statutory procedures may not apply, it is recommended to seek legal advice before making any decision not to comply with the procedures, as there are potentially drastic consequences (see 5.5 below).

## 5.4 General requirements

The following general requirements apply to the statutory dismissal and disciplinary procedures:

- each step and action must be taken without unreasonable delay;
- the timing and location of meetings must be reasonable;
- meetings must be conducted in a manner that enables both employer and employee to explain their cases;
- in the case of appeal meetings, the employer should, so far as is reasonably practicable, be represented by a more senior manager than attended the first meeting;
- the employee can choose to be accompanied to the step-two meeting and/or step-three appeal meeting by either a work colleague or trade union representative.

## 5.5 Impact of not following the statutory procedures

A failure to follow the statutory dismissal and disciplinary procedures could have detrimental consequences as follows:

- failure by an employer to follow the statutory dismissal and disciplinary procedures when dismissing could result in a finding of unfair dismissal if an employee has at least one year's continuous service with the employer;
- compensation awarded by a tribunal will be increased or reduced by at least ten per cent (up to a maximum of 50 per cent) depending on who failed to follow the procedures, unless there are exceptional circumstances that would make such an increase or reduction unjust or inequitable.

## 5.6 Industrial tribunal time limits and statutory procedures

Time limits to lodge a claim with an industrial tribunal will not normally be extended, except in certain limited circumstances.

All unfair dismissal claims and other claims about dismissal (see 5.2 above) must now be lodged within three months.

**The statutory procedures are complex and have not been explained in full detail in these notes. It is strongly advised to seek legal advice when any issue relating to the procedures arises.**

# 6. WAGES

Workers and employers are free to agree on how much should be paid for work done as long as the worker (if s/he qualifies) is paid at least the national minimum wage.

## 6.1 Minimum wage

The National Minimum Wage Act (NMW) 1998 came into force on 1 April 1999. It applies to workers (see 1.2). The NMW Act introduced minimum wage rates. The rates normally change every October. The rates at time of writing are as follows:

- **for a worker aged sixteen or seventeen**: £3.87 per hour from 1 October 2015;
- **for a worker aged eighteen to 20:** £5.30 per hour from 1 October 2015;
- **for a worker aged 21 to 24**: £6.70 per hour from 1 October 2015.
- **From April 2016, a new National Living Wage of £7.20 per hour has been introduced for people who are aged 25 and over**. Essentially, this operates as an additional band of the NMW.

Workers paid on a piece-rate basis should be paid the minimum hourly wage or get a fair piece-rate which allows them to earn the minimum wage.

Apprentices aged over nineteen and who have completed the first year of their apprenticeship must receive the national minimum wage at the rate applicable to their age.

Apprentices who are (i) in the first year of their contract of apprenticeship irrespective of age; or (ii) under nineteen must be paid at least £3.30 an hour).

There may be room for debate over whether a worker is genuinely working as an apprentice. To be an apprentice, a worker can be either working under a traditional contract of apprenticeship or working under the government arrangements known as Apprenticeships NI.

### 6.1.1 Persons excluded from the NMW

The following are excluded from claiming the NMW:

- self-employed individuals;
- company directors (with the exception of those who have employment contracts who must be paid the NMW in respect of work done under that contract);
- a person participating in a scheme designed to provide training, work experience or temporary work, or to assist her/him in seeking or obtaining work which is either a scheme provided to her/him under arrangements made by the government or funded in whole or part under the European Social Fund. This exception does not apply if the individual is actually employed under a contract of employment by the employer with whom s/he is placed under the scheme for a period of more than six weeks;
- a worker who is undertaking a higher education course who, before the course ends, is required as part of that course to attend a period of work experience not exceeding one year is not entitled to be paid the NMW in respect of work done for the employer as part of that course;
- a worker who is participating in the European Community Leonardo Da Vinci Programme, European Community Youth in Action Programme, European Community Erasmus Programme or European Community Comenius Programme, in respect of work done for her/his employer as part of the programme;
- a person who is homeless or residing in a hostel for homeless persons and who is participating in a scheme under which s/he is provided with shelter and other benefits in return for performing work;
- a person living in the family home of the employer for whom s/he works, who:
    - is not a member of that family but is treated as such, in particular as regards provision of accommodation and meals and sharing of tasks and leisure

activities and is not liable to make any payment in respect of the provision of the living accommodation or meals; or

- is a family member of the employer who resides in the family home and who shares in the tasks and activities of the family or the running of the family business;

- a person serving as a member of the naval, military or air forces of the Crown or assisting in the activities of the cadet forces;
- a person employed as a master, or as a member of the crew of a fishing vessel who is paid only by a share of profits or gross earnings of the vessel;
- a prisoner in respect of any work done in pursuance of prison rules;
- a volunteer employed by a charity, a voluntary organisation, an associated fundraising body or a statutory body who receives:
  - no monetary payments of any description; or
  - no monetary payments except in respect of expenses actually incurred in the performance of duties or reasonably estimated as likely to have been incurred; and
  - no benefit other than the provision of subsistence or such accommodation as is reasonable;
- a volunteer who is under no contractual obligation to perform work or personally to provide services (such volunteers do not need to be employed by an organization in the voluntary sector as they fall outside the definition of 'worker');
- a residential member of a religious or other community if:
  - the religious community is a charity or established by a charity and is not an independent school or providing a course of further or higher education;
  - a purpose of the community is to practice or advance a belief of a religious or similar nature;
  - all or some of its members live together for that purpose;
- a person undertaking work (or work-like activities) for therapeutic reasons if the participant is genuinely not obliged to perform duties and the employer is genuinely not obliged to provide the activity or pay the individual; and
- workers who do not ordinarily work in the UK.

### 6.1.2 Enforcement of the NMW

The agency responsible for enforcement in all trade sectors, with the exception of the agricultural sector, is HMRC. Enforcement officers have certain powers to obtain information (including removing records for the purpose of copying them) and can issue notices of underpayment to require employers to pay the NMW.

Where a 'notice of underpayment' is issued, it requires an employer to pay a worker any arrears of pay which the officer is of the opinion is owed. Payment should be made within 28 days of the notice. From 1 April 2016 such notice also provides for a penalty of up to 200 per cent of the total underpayment (the minimum penalty being £100 and the maximum being £20,000) payable to the Secretary of State. The penalty for underpayment of the NMW in a reference period prior to 1 April 2016 is 100 per cent. The penalty will be reduced if both the arrears and 50 per cent of the penalty are paid within fourteen days of issue of the notice.

An employer must keep records for a three year period in respect of the NMW, which are sufficient to establish that a worker is being paid at least the NMW.

A worker who has reasonable grounds for believing s/he is not being paid the NMW is entitled to have access to and copy records within fourteen days of a written request. If the worker is refused access, s/he can complain to an industrial tribunal within three months of the refusal. Where a tribunal finds that an employer has unlawfully failed to allow access to records it must award the worker compensation equal to 80 times the applicable minimum wage rate for such a worker.

Workers who are not paid their entitlement to the NMW can make a claim for unlawful deductions from wages in the industrial tribunal (see section 19) or sue for breach of contract in the civil courts. However, a worker should obtain advice on whether to pursue the claim individually or whether to make a complaint to HMRC. If a worker issues proceedings to the industrial tribunal in relation to failure to pay the NMW, this may end any HMRC investigation into the same issue.

A worker subjected to a detriment or an employee dismissed due to having taken action to try and secure the benefit of any rights under the NMW can complain to an industrial tribunal. A dismissal in such circumstances will be treated as automatically unfair. No qualifying period of service will be required to bring a claim for unfair dismissal.

Breach of the NMW Act may also be a criminal offence.

The UK Pay and Work Rights helpline (telephone number 0300 123 1100) deals with enquiries and complaints in respect of payment of the NMW.

## 6.2 Payslips

Under Article 40 of the 1996 ERO, all employees are entitled to be given an itemised pay statement every time they are paid.

This statement must show gross and net wages, the amounts of any deductions and how the wage has been calculated. If an employer fails to provide such a pay statement, an employee may take the employer to an industrial tribunal and receive compensation equivalent to the amount deducted from her/his wages over the previous thirteen weeks.

The pay statement need not contain separate details of a fixed deduction if it contains an aggregate amount of fixed deductions and the employer has previously given a

standing statement of fixed deductions. This standing statement will only be valid for twelve month periods.

## 6.3 Deductions from wages

The ERO makes provision for the protection of wages. The relevant provisions apply to workers (see 1.2).

Normally, an employer can only make deductions from a worker's wages where such a deduction:

- is authorised by statute (eg income tax);
- is authorised under the contract of employment (and notified to the worker in writing); or
- is agreed in writing by the employee before the reason for the reduction arises.

This does not apply, however, where an earlier overpayment of wages is being recovered.

Particular protection is given to retail workers in relation to deductions for shortages so that, for example, no more than ten per cent of any payment of wages, other than a final payment, may be deducted for shortages.

The provisions in relation to 'unauthorised deductions from wages' in the ERO may be used to recover wages withheld but not wages in lieu of notice. Wages in lieu of notice may be recoverable in the industrial tribunal or civil courts in a claim for breach of contract.

A claim for unauthorized deductions from wages must be made to an Industrial Tribunal within three months of the date of the deduction. If there has been a series of deductions, the claim can seek to recover the previous deductions as well, so long as it is made within three months of the last deduction in the series.

Recent caselaw has suggested that it may only be possible to recover a series of deductions where the gap between each deduction in the series is less than three months, and legislation to limit recovery to a maximum period of two years has also been proposed. This is therefore an area currently subject to a degree of uncertainty.

**Note:** Workers who sue for breach of contract should be aware that employers can counter sue. The damages an employer may recover could be substantially more than what the worker is claiming.

## 6.4 Guarantee payments

Employees who have been employed for one month or more may be entitled to guarantee payments from their employer if they are laid off or put on short time working. However, this right will be lost if the employee refuses an offer of suitable alternative work or if s/he does not comply with the reasonable requirement of the employer to be available for work.

The right to a guarantee payment is currently limited to a maximum of £25.90 per day and can only be paid for up to five days in any three month period. The limit on a guarantee payment changes every year, usually during February. An employee who does not receive payment can apply to an industrial tribunal within three months of the day for which s/he was not paid.

It should be noted that, in the absence of a contractual term agreed between the employer and employee, the employer may be acting in breach of contract in laying an employee off or putting the employee on short time working. This may enable the employee to resign in response to the breach of contract and, if s/he has one year's continuous service, to claim unfair dismissal on the basis that s/he has been constructively dismissed (see 16.4). Alternatively the employee could resist the variation of contract (see 3.6), make it clear s/he is available for work and seek to recover unpaid wages as an unlawful deduction (see 6.3).

## 6.5 Equal pay

The Equal Pay Act (NI) 1970, as amended, guarantees equal pay and conditions to women who are engaged in the same or broadly similar work as men, or work which, although different, is of 'equal value'.

It also works vice versa to ensure men are paid the same as women doing similar work. Advice on equal pay claims should be sought from the Equality Commission for Northern Ireland (telephone 028 9050 0600).

## 6.6 Right to sick pay

### 6.6.1 Rate of Statutory Sick Pay

Statutory Sick Pay (SSP) is payable by an employer to an employee for up to 28 weeks at a rate of £88.45 per week from 6 April 2016.

The definition of employee is not limited to that of other employment legislation (see section 1). It can include temporary and casual workers. Previously, agency workers engaged by an agency for less than three months did not qualify but from October 2008 the rules have changed and all agency workers qualify for SSP.

The rate of SSP usually changes every April.

### 6.6.2 Qualifying for SSP

Employees must earn an amount equal to at least the lower earnings limit for national insurance contributions liability - £112 from 6 April 2016 - and be ill for a period of four days or more in a row.

SSP is only payable if the employee is sick (or unable to attend work due to the operation of public health legislation to prevent the spread of infectious disease).

Thus, an employee cannot be paid SSP for instance if a child is sick or if s/he is absent to attend a funeral.

### 6.6.3 Qualifying days

If the employee is sick for less than four days, no SSP is payable. If an employee is sick for four days of more this a Period of Incapacity for Work(PIW). SSP is not payable for the first three qualifying days of any PIW. If an employee remains ill after three qualifying days, then SSP is payable for each qualifying day s/he is ill.

Each week must have at least one qualifying day.

If the employer and employee have not agreed a qualifying day in advance of a period of sickness, qualifying days are days that an employee is required to be available for work for the employer under the contract of employment.

If the employer and employee agree that there would be no such contractual days, the Wednesday will by default be the qualifying day.

If there is no agreement as to which days the employee would have been required to work, all days of the week, other than those agreed as being rest days, will be qualifying days. Essentially, this means for instance in the case of shift work that there may be different qualifying days, so that different amounts of SSP may be payable each week.

### 6.6.4 Notification of illness

To claim SSP, the employee must notify the employer of her/his illness.

An employer can set a time limit for notification but cannot insist on notification being given personally or more than once in every seven days. Unless otherwise agreed, that notification should be given in writing.

If the employer has not set any time limit for notification, the default time limit is that the employee should inform the employer by the seventh calendar day following the first qualifying day.

For the first seven days of absence, self certification is sufficient. After the first seven calendar days of sickness, the employer may require the employee to supply medical evidence in the form of a doctor's statement.

A 'fit note' was introduced in April 2010. Under the fit note a GP can advise whether an employee should refrain from work, but s/he can also advise whether it would be appropriate for them to do some work. Where this advice is given, the GP will provide additional information which will help employers consider whether basic adjustments could be made to help someone return to work.

The employer will not be bound to implement the GP's suggested changes. Where no changes are made, the medical statement should be considered as evidence of the individual being unfit for work for sick pay purposes.

### 6.6.5 Late claims

If notification is not given on time, the employer can still pay SSP if s/he accepts there was good cause for late notification. However, a delay in notification which is more than 91 days late will not be acceptable under any circumstances regardless of whether there was good cause.

### 6.6.6 Challenging the employer's decision

If the employer withholds SSP, the employee can ask the employer for a written statement which explains why SSP is not being paid for the days in question. The employee can then ask HMRC for a decision on whether SSP is payable. The application must be made to HMRC within six months of the earliest day for which SSP is in dispute.

If there is no dispute over entitlement to SSP, ie where the employer admits entitlement to SSP but withholds all or part of it, then an employee may present a claim for unlawful deductions from wages instead (see 6.3).

### 6.6.7 Persons excluded from SSP

SSP will not be payable if the employee:

- is no longer sick;
- has reached the maximum entitlement to SSP, ie had 28 weeks of SSP from the employer during the period of incapacity or from a former employer where the last day in which SSP was paid by the former employer was within eight weeks of the current period of incapacity;
- has reached the end of the contract of employment (special provisions apply where the employer brings the contract to an end solely to avoid paying SSP);
- works abroad and the employer is not liable to pay national insurance contributions;
- is disqualified on maternity grounds. The maternity disqualification period for 39 weeks if receiving either Statutory Maternity Pay (SMP) or Maternity Allowance (MA). Payment of these starts no sooner than eleven weeks before the baby is due (ie from week 29 of the pregnancy) or on the date the baby is born. Where a woman is not entitled to SMP or MA the maternity disqualification period is eighteen weeks. Any woman off sick or planning to go off sick whilst pregnant should seek legal advice, as this may affect whether she will have satisfied earnings conditions to qualify for SMP. If a woman goes off sick in the four weeks before her expected week of childbirth, maternity leave may be triggered but only if she is absent due to a pregnancy related reason;

  (**Note:** An expectant or new mother up until the baby is six months old or a breastfeeding mother (regardless of how old the child is) suspended from work due to risks to health and safety identified by a risk assessment may be entitled to full

pay where the employer is unable to alter the employee's working conditions or hours of work).

- has not actually started work with an employer under a contract of employment;
- is affected by a strike at work and has a direct interest in the outcome. Thus, if s/he falls ill during a strike, SSP is generally not payable;
- earns less than £112 per week;
- is in legal custody, whether convicted of an offence or not;
- started or returned to work after getting Employment and Support Allowance, Incapacity Benefit or Severe Disablement Allowance;
- is within eight weeks of a maternity disqualification period before or during which a period of incapacity had started.

It should be noted that the Fixed-term (Prevention of Less Favourable Treatment) Regulations (Amendment Regulations) (NI) 2008 have removed the bar on employees being entitled to SSP where the contract was for a fixed period of three months or less.

## 6.7 Pensions

Under the Pensions (No.2) Act (Northern Ireland) 2008 employers have been required from 2012 to provide work based pensions to all workers who fulfill the following minimum requirements:

- earn more than the minimum earnings threshold which is currently £10,000;
- are aged between 22 and their state pension age; and
- work in the UK.

Unlike a stakeholder pension, under a work based pension an employer will be required to contribute to the scheme, with the minimum contribution set to rise to three per cent of qualifying earnings by April 2019. The worker will also pay a contribution, with the total combined contribution eventually rising to a minimum of eight per cent by 2019.

From October 2012 employers have been required to automatically enrol eligible employees into workplace pension schemes depending on the size of the employer. The government has established the National Employment Savings Trust (NEST) which aims to provide a low cost scheme to small firms and employers of low to medium earners.

The regulator of work based pension schemes, known as the Pensions Regulator, has comprehensive information on work based pensions on its website (see section 24).

# 7. HOURS, HOLIDAYS AND REST BREAKS

## 7.1 Governing legislation

The Working Time Regulations (NI) 1998) were introduced to:

- implement the EC Working Time Directive which lays down minimum conditions relating to weekly working time, rest entitlements and annual leave; and
- make special provisions for working hours and health assessments in relation to night workers.

Amendments to the original Regulations have now been consolidated in the Working Time Regulations (NI) 2016 (the WT Regulations). The WT Regulations also implement certain aspects of the EC Young Workers Directive relating to adolescent workers (ie above the minimum school leaving age but under eighteen).
The information in this section relates only to adult workers. See section 7.9 on the working time provisions in relation to young workers.

## 7.2 Entitlements and limits

### 7.2.1 Main entitlements and limits

The main entitlements and limits referred to in the WT Regulations provide for adult workers:

- a limit on the average weekly working time of 48 hours for each seven days (the average being calculated over a reference period);
- a limit on the average length of night work to eight hours in every 24 hour period;
- a limit on actual length of night work to eight hours in every 24 hour period where work involves special hazards or heavy physical or mental strain (note the difference with the limits referred to above which deal with average hours as opposed to actual hours in a specific period);
- a limit on assigning a worker to night work unless an opportunity of a free health assessment has been granted;
- a free health assessment at regular intervals for a night worker;
- a transfer to day work if possible by an employer on the advice of a GP;
- adequate rest breaks where the organisation of work is such as to put the health and safety of a worker at risk, in particular because the work is monotonous or the work rate is predetermined;
- a daily rest period of eleven consecutive hours in each 24 hour period; *

- an uninterrupted weekly rest period of not less than 24 hours in each seven day period; *
- an entitlement to an (unpaid) rest break of 20 minutes where the working day is more than six hours; *
- a right to paid annual leave. *

### 7.2.2 Holiday entitlement

The right to annual leave under the WT Regulations is currently 5.6 weeks per year – that is 5.6 times the regular working week, eg 28 days for those on a five day week. The entitlement increased from 4.8 weeks to 5.6 weeks on 1 April 2009. The maximum entitlement under the WT Regulations is 28 days. The entitlement is inclusive of public or bank holidays that the worker receives as holidays.

Please note that the WT Regulations set a minimum holiday entitlement - a contract can give a worker an entitlement to more holidays than the WT Regulations minimum.

The worker should receive holiday pay that reflects her/his normal weekly earnings. Recent caselaw in this area has established that overtime worked should be included in the calculation of appropriate holiday pay in some circumstances. If this issue arises, further advice should be sought, as the legal position is complicated and subject to change.

### 7.2.3 Holiday notice

The core four weeks' entitlement must be taken within the leave year and cannot normally be 'carried over' (but see 7.2.4 below). The additional 1.6 and any additional contractual entitlement can be carried over by agreement.

Subject to any agreement to the contrary, the normal position is that a worker must give her/his employer notice of intention to take holiday and the notice must be at least twice as long as the amount of holiday to be taken. An employer can object to the worker taking the holiday at the requested time. Such objection must be communicated to the worker in advance of the proposed holiday start date. The length of notice of objection must be at least as long as the proposed length of holiday. So if a worker wishes to take five days' holiday but the employer objects, the employer must notify the worker of such objection at least five days before the proposed start of the holiday. An employer can require a worker to take the holiday to which the worker is entitled and can require her/him to take it on particular days provided s/he gives appropriate notice to the worker. The notice must be at least twice as long as the amount of holiday to be taken.

### 7.2.4 Sick leave and accrued annual leave

The Court of Justice of the European Union (CJEU) has confirmed that a person on long-term sick leave (and a person on maternity leave) does accrue annual leave under the Working Time Directive. Accordingly, a worker should be allowed either to carry

over holidays or to designate a period of sick leave as a period of annual leave. Please note that this rule may only apply to the core four week holiday entitlement guaranteed by the Directive: the extra 1.6 week entitlement under the WT Regulations can be carried over to the next leave year by agreement (see above) but it is not certain that there is an absolute right to do so.

Although the WT Regulations expressly forbid the carry-over of holidays or payment in lieu (save, in the latter case, where employment has ended), a Court of Appeal decision seems to confirm that a worker can carry over annual leave to the next year if s/he was out on sick leave up to the end of the leave year. This is achieved by adding wording to the WT Regulations to make them read in accordance with EU Law. However the law in this area is still in flux and may be subject to further change. For instance, it had previously been held that the employee needed to notify the employer within the leave year that a carry-over of leave to the next year is desired, and it may still be prudent to do so, even though the Court of Appeal has now held that this is not essential.

European law in this area is also still developing, and limitations to how long leave can be carried over are emerging from caselaw. It may not breach the Directive to limit carry-over beyond eighteen months from the end of the leave year. Persons on long-term sick-leave may, therefore, wish to consider using the option of taking their holidays during their sick-leave in some circumstances to avoid losing the entitlement. Consideration should also be given to taking the additional 1.6 weeks above the core four=week entitlement during the leave year. Further advice should be sought.

#### 7.2.5 Unpaid holiday pay and unlawful deduction of wages

Following CJEU decisions, the Supreme Court has now decided that a claim for unpaid holiday pay can be made as a claim for unlawful deductions of wages (see 6.3). This can allow a worker to recover unpaid holiday pay from previous holiday years if there has been a series of deductions.

Again, the law on this area is developing. A limitation on claims for unpaid holiday pay has already been introduced in England and Wales, limiting such claims to two years. A consultation has taken place on whether a similar provision may be introduced in Northern Ireland in due course. Further advice should be sought on this difficult area.

## 7.3 Enforcement of limits and rights

Enforcement of the entitlements and limits in 7.2 above (except the last four rights which are marked*) is the responsibility of the Health and Safety Executive or local district council.

The Health and Safety Executive (Enforcing Authority) Regulations (NI) 1999 list the activities which determine whether local councils or the Health and Safety Executive will be the enforcing authorities.

Broadly speaking, local councils are responsible for offices, catering services, hotels, sports, and retail premises. The Health and Safety Executive is the enforcing agency

for building and construction sites, colleges, schools, hospitals, quarries, fairgrounds and broadcasting studios.

A failure to comply with any requirements which the Health and Safety Executive or a local council is responsible for is a criminal offence, punishable by a fine.

A worker may present a complaint to an industrial tribunal where the employer has refused to permit the worker to exercise the rights which are marked * in 7.2. This must be done within three months of the breach.

## 7.4 Detriment and dismissal for asserting Working Time rights

A worker also has the right not to be subjected to a detriment and dismissal of an employee will be unfair if it is for a reason connected with rights and entitlements under the WT Regulations.

Such a dismissal will be automatically unfair and an employee does not require any length of service to present a claim.

## 7.5 Exclusions and modifications

Certain classes of worker are excluded from the rights under Working Time Regulations, either:

- completely (merchant seafarers, fishermen and workers on inland water-craft); or
- partially (notably aircrew, the emergency services during a serious emergency, those, such as business executives, whose working time is unmeasured and mobile road transport workers).

Many of these workers do however benefit from similar rights conferred by other sector specific legislation.

When advising workers in the classes referred to above, professional advice should be sought. See also 7.8 below.

## 7.6 Opt out agreements

It is currently possible for workers to sign a written agreement to opt out of the 48 hour weekly maximum.

The agreement to opt out can be ended by the worker giving notice in writing.

The length of the notice required to opt out cannot be for a period of less than seven days or more than three months.

## 7.7 Domestic servants

Workers employed as domestic servants in a private household are excluded from the provisions relating to:

- the 48 hour week;
- length of night work;
- health assessments;
- transfer to day work; and
- breaks for monotonous work.

## 7.8 Modification or exclusion by agreement and other special cases

A collective agreement or a workforce agreement may modify or exclude the provisions on daily and weekly rest periods, breaks and hours of work for night workers. These provisions are also excluded if certain special circumstances apply (see below).

The provisions on daily and weekly rest periods may be excluded for shift workers in certain circumstances. In all such cases, if a worker is required to work during what would otherwise be a rest period, the employer is under a duty wherever possible to allow the worker to take an equivalent period of compensatory rest. In exceptional cases where this is not possible, the employer is under a duty only to afford the worker such protection as may be appropriate in order to safeguard the worker's health and safety.

The special circumstances referred to above are:

- where a worker's activities are such that the place of work and place of residence are distant from one another or different places of work are distant from one another;
- where a worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers of security firms;
- where a worker's activities involve the need for continuity of service or production, as may be the case in relation to:
    - services relating to the reception, treatment or care provided by hospitals or similar establishments, residential institutions and prisons;
    - work at docks or airports;
    - press, radio, television cinematography, postal and telecommunications and civil protection services;
    - gas, water and electricity production, transmission and distribution, household refuse collection and incineration;
    - industries in which work cannot be interrupted on technical grounds;
    - research and development activities;

- agriculture;

- where there is a foreseeable surge of activity as may be the case in relation to agriculture, tourism and postal services;
- where the worker's activities are affected by:
  - an occurrence due to unusual and unforeseeable circumstances beyond the control of the worker's employer;
  - exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer;
  - an accident or the imminent risk of an accident.

## 7.9 Young workers

Workers who are over the minimum school leaving age but under eighteen are covered by the Working Time (Amendment) Regulations (Northern Ireland) 2002. Under the regulations such young workers must:

- work no more than a maximum of eight hours a day and 40 hours a week (not averaged);
- have a 30 minute break after working 4.5 hours;
- have a rest period of twelve hours between each working day;
- have two days off a week; and
- not ordinarily work at night (between 10pm and 6am).

The employment of children aged fifteen or under is governed by The Children (Northern Ireland) Order 1995. The rules strictly limit the hours a child can work on a school day, limit work on a Saturday and Sunday, prescribe the overall hours a child can work in a week and prescribe a minimum rest break of one hour after four hours' work. Further information is available in the guide '*Employing Children and Young People'* at www.nibusinessinfo.co.uk and the Citizen's Advice Bureau's advice guide *'Young People and Employment'* (www.adviceguide.org.uk).

It is not lawful to employ a child aged thirteen or under save for limited exceptions (for example, acting).

# 8. SUNDAY WORKING

The Shop (Sunday Trading & c.) (NI) Order 1997 provides for the rights of shop workers in relation to Sunday working. Shop work has a specific definition and only includes premises where retail trade or business is carried on. The legislation applies to protected shop workers and opted out shop workers.

A protected shop worker is a person who was employed as a shop worker before 4 December 1997 and who was not required under contract to work on a Sunday. A protected shop worker cannot now be required to work on a Sunday unless s/he has given the employer a signed written opting in notice expressly stating that there is no objection from the worker to Sunday working.

An opted out shop worker is an individual who has at any stage provided her/his employer with an opted out notice. An opted out notice is a written notice signed and dated by the shop worker which states that s/he objects to Sunday working.

It takes effect three months after the notice is given to the employer (or one month if the employer has not previously given the employee an explanatory statement setting out her/his statutory rights regarding Sunday working).

A shop worker who is subjected to a detriment or dismissed for asserting rights in relation to Sunday working can complain to an industrial tribunal within three months of the detriment or dismissal.

The Betting and Gaming (NI) Order 2004 provides similar rights to on course betting workers.

# 9. TIME OFF PROVISIONS

## 9.1 Trade union and employee representatives' rights

An employee has the right to be active in a trade union.

The following rights are guaranteed by law:

- the right not to be refused employment because of trade union membership or lack of such membership;
- the right to a reasonable amount of paid time off for certain trade union duties and to attend trade union training if the employee is a trade union official;
- the right to a reasonable amount of paid time off for trade union representatives to perform their duties and attend relevant training;
- the right to a reasonable amount of unpaid time off for trade union activities (applies to an ordinary trade union member who is not an official);
- the right not to be victimised because of trade union membership or activities;
- the right not to be dismissed because of trade union membership or activities;
- the right not to have unauthorised union subscriptions deducted from wages.

## 9.2 Unpaid time off

### 9.2.1 Trade union activities

As stated in 9.1 above, an employee who is a trade union member or representative is entitled to a reasonable amount of unpaid time off work to take part in activities of that trade union.

### 9.2.2 Time off for dependants

Article 85A of the 1996 Order provides for entitlement of an employee to take a reasonable amount of unpaid time off during working hours which is necessary:

a. to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted;

b. to make arrangements for the provision of care for a dependant who is ill or injured;

c. in consequence of the death of a dependant;

d. because of the unexpected disruption or termination of arrangements for the care of a dependant;

e. to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for that child.

An employee must tell the employer the reason for absence as soon as is reasonably practicable (and if able to, to tell the employer before the absence how long the absence is expected to last).

Dependant means a child, a parent or a person who lives in the same household as the employee, otherwise than by reason of being an employee, tenant, lodger or boarder.

For the purposes of a. and b. above, dependant also includes anyone who reasonably relies on the employee either for assistance on an occasion when the person falls ill, is injured, assaulted, or to make arrangements for the provision of care in the event of illness or injury.

For the purposes of d., dependant includes any person who reasonably relies on the employee to make arrangements for the provision of care.

With regard to b., the right is to take time off to make arrangements for care, not to provide that care oneself over an extended period.

### 9.2.3 Flexible working

From 6 April 2015, the right to request flexible working has been extended to all employees who meet the qualifying criteria.

To qualify, an employee must:

- have worked with the employer continuously for 26 weeks at the date the application is made; and
- have not made a request for flexible working in the preceding twelve months. An employer can only refuse a request on specific grounds which are as set out in Article 112 G of the 1996 Order. The only grounds for refusal are if the employer considers that one of the following applies:
    - burden of additional costs;
    - detrimental effect on ability to meet customer demands;
    - inability to reorganise work among existing staff;
    - inability to recruit additional staff;
    - detrimental impact on quality;
    - detrimental impact on performance;
    - insufficiency of work during the periods the employee proposes to work;
    - planned structural changes.

The initial onus will be on the employee to make an application in writing to the employer. Only one application can be made per year.

Within 28 days, the employer should arrange to meet with the employee to explore the desired work pattern in depth and to consider alternatives. The employer will then be expected to write within fourteen days of the date of the meeting, either:

- agreeing to a new work pattern and a start date; or
- providing clear business grounds as to why the application cannot be accepted.

An employee who is dissatisfied with the decision will then have a right to appeal in writing within fourteen days of notification that the request has been refused. A further meeting should be held within fourteen days to consider the appeal. The appeal decision should then be given to the employee in writing within fourteen days of this meeting.

The employee is entitled to be accompanied by a work colleague to the initial meeting and/or the appeal.

It should be noted that there is no automatic right to be allowed to work flexibly.

An employee can only go to an industrial tribunal in specific circumstances such as the failure to follow the procedural requirements or where the employer's decision to refuse the request was made on the basis of incorrect facts. Alternatively, a resolution can be sought through the LRA arbitration scheme (see 21.12).

In certain circumstances, a failure to allow flexible working may constitute unlawful sex discrimination (see 13.3).

Detailed guidance on flexible working can be accessed at www.lra.gov.uk.

### 9.2.4 Parental leave

Part III of the Maternity and Parental Leave etc Regulations (NI) 1999 gives an employee who has been continuously employed by an employer for at least a year and who has or expects to have responsibility for a child the right to be absent from work on parental leave.

Altogether, an employee is entitled to thirteen weeks leave in respect of any individual child (or eighteen weeks if the child is entitled to Disability Living Allowance (DLA)).

Default provisions used in the legislation will apply if an employee does not have provision in her/his contract:

- which gives entitlement to be absent from work for the purposes of caring for a child; and
- which operates by reference to or incorporates a collective or workforce agreement.

Under the default provisions:

- no more than four weeks leave can be taken in respect of one child in any year;
- from 5 April 2015 parental leave may be taken up until the child's eighteenth birthday;
- leave may only be taken in blocks of a week (as opposed to single days here and there) unless the leave is taken in respect of a child who is entitled to DLA;
- the employee must give at least 21 days' notice to the employer before leave is to start, specifying the dates leave is to begin and end.

In addition, under the default provisions, the employer may postpone leave (other than leave to be taken when the child is born when the correct notice has been given). The postponement can only be made if the employer considers that the operation of the business would be unduly disrupted if the employee took leave during the period requested.

To validly postpone leave, the employer must give the employee notice not more than seven days after receiving the employee's notice. The employer's notice must specify a date which is within six months and has been determined by the employer after consultation with the employee specifying the dates agreed when the employee can take leave.

## 9.3 Paid time off

An employee has rights to paid time off during working hours:

- to carry out certain duties, activities and training if an official or learning representative of an independent trade union (guidance is provided in the Code of Practice published by the Labour Relations Agency);

- to undertake study or training leading to a relevant qualification (defined in the Employment Rights (Time Off for Study or Training) (NI) Order 1998) if aged sixteen or seventeen (or eighteen if study or training began before the age of eighteen) and s/he has not attained a specified standard of educational achievement;
- to perform duties as a Justice of the Peace or as a member of a district council, a statutory tribunal, relevant prison visiting authority, specified health body (eg a health and social services trust), relevant education body (eg an education and library board) or a district policing partnership;
- to attend an antenatal appointment when pregnant (medical evidence can only be requested by an employer if the employee fails to produce an appointment card or evidence from a medical practitioner after the first appointment);
- to perform duties or undergo relevant training as a trustee of an occupational pension scheme;
- to perform functions or undergo training in relation to being an employee representative for the purposes of collective redundancies or in respect of the transfer of undertakings/service provision change legislation;
- to look for work or arrange training, if employed for two years or more and under notice of redundancy. In such circumstances, payment ought to be made at the normal hourly rate but the total will not exceed 40 per cent of a week's pay;
- to attend meetings in advance of a child's placement for adoption.

# 10. MATERNITY, PATERNITY, ADOPTION AND SHARED PARENTAL LEAVE

## 10.1 Maternity leave

Maternity leave, which guarantees the right to return to work, is only available to employees. Other workers have no automatic right to return to a job (although a complaint of sex discrimination might be made in certain circumstances).

### 10.1.1 Ordinary maternity leave

The length of ordinary maternity leave is 26 weeks, regardless of how long a woman has worked for her employer.

### 10.1.2 Additional maternity leave

Additional maternity leave is now available to all employees, regardless of length of service. Additional maternity leave starts immediately after ordinary maternity leave and continues for a further 26 weeks.

### 10.1.3 Employee's notification

A pregnant employee is required to notify her employer of her intention to take maternity leave by the fifteenth week before her expected week of childbirth (EWC), unless this is not reasonably practicable. She needs to tell her employer that she is pregnant, the week her baby is expected to be born and when she wants her maternity leave to start.

### 10.1.4 Varying the date of leave

A woman can change her mind about when she wants to start her leave providing she tells her employer at least 28 days in advance (unless this is not reasonably practicable).

### 10.1.5 Employer's notification

On receipt of a woman's notification, an employer must respond to her within 28 days. The employer must write to the employee setting out the date on which the employer expects her to return to work if she takes her full entitlement to maternity leave, ie the end of her additional maternity leave.

### 10.1.6 Starting maternity leave

The earliest date at which maternity leave can start is the beginning of the eleventh week before the baby is due (or the date of an earlier birth).

### 10.1.7 Pregnancy related illness

If a woman is absent from work for a pregnancy related illness during the four weeks before the start of her EWC, her maternity leave will start automatically.

### 10.1.8 Compulsory maternity leave

An employee entitled to maternity leave must not work or be permitted to work by her employer during the period of two weeks beginning with the date of her confinement.

### 10.1.9 Maternity pay

Not everyone is entitled to be paid during maternity leave but many workers, as well as employees, can be entitled if they meet the qualifying conditions below.

A woman who is entitled to Statutory Maternity Pay (SMP) or Maternity Allowance (MA) is entitled to payment for 39 weeks. Therefore, in practice, the period of payment will cover the first thirteen weeks of the additional maternity leave period.

The woman does not need to intend to return to work.

#### 10.1.9.1 Statutory Maternity Pay

A woman continuously employed for 26 weeks by the same employer by the fifteenth week before the EWC and who has average weekly earnings (accredited to the eight weeks before this fifteenth week) of at least the lower earnings limit (£112 from April 2016) may be eligible for SMP.

A woman who qualifies for SMP is entitled to receive SMP from her employer at 90 per cent of average weekly earnings for the first six weeks of the pay period.

Thereafter, she is entitled to a standard rate of SMP from her employer of £139.58 per week (for babies due or born on or after 6 April 2016) or 90 per cent of her average weekly earnings if this is a lesser amount.

Rates of SMP usually change every year during April.

#### 10.1.9.2 Maternity Allowance

A woman who does not qualify for SMP but who has earned on average £30 per week in at least thirteen of the 66 weeks up to the EWC and has been employed for 26 of those weeks may qualify for MA.

If a woman qualifies for MA, she will receive £139.58 per week or 90 per cent of her average weekly earnings if this is less than £139.58 (from April 2016). This will be paid by Incapacity Benefits Branch, Castle Court, Belfast.

The rate of pay usually changes every year during April.

### 10.1.10 Terms and conditions during ordinary maternity leave

During the 26 weeks of ordinary maternity leave, the employee continues to be employed and to benefit from the normal terms and conditions of employment other than the terms or conditions relating to remuneration.

### 10.1.11 Terms and conditions during additional maternity leave

During additional maternity leave, an employee will now continue to enjoy her normal terms and conditions of employment (bar the terms or conditions relating to remuneration).

The position in relation to pension contribution during maternity leave is complicated and legal advice should be sought.

### 10.1.12 Work during maternity leave

An employee may carry out up to ten days work for her employer during her statutory maternity leave period without triggering the end of the maternity leave.

These ‘keeping in touch’ days are optional and should only be arranged by agreement. Any days worked do not extend the maternity leave period.

Employees are prohibited from working for two weeks after childbirth (see 10.1.8).

### 10.1.13 Returning to work during or at the end of maternity leave

A woman who intends to return to work at the end of her full maternity leave entitlement, including additional maternity leave, does not have to give any further notification to her employer.

To return to work before the end of her maternity leave, an employee has to give eight weeks notice of intention to return.

An employee who is entitled to additional maternity leave but wants to return on the expiry of ordinary maternity leave (or when her entitlement to SMP runs out) should give the appropriate notice that she wants to return.

### 10.1.14 Terms and conditions after maternity leave

A woman returning from ordinary maternity leave is entitled to return to the same job, under the same terms and conditions as if she had not been absent.

An employee returning from additional maternity leave has a right to return to the same job as she was employed in before her absence or, where not reasonably practicable, to a job with at least the same terms and conditions as her old position, and of an equivalent or better status.

### 10.1.15 Detriment and dismissal

Dismissal of a woman who is pregnant or on ordinary or extended maternity leave on grounds of redundancy is automatically unfair if the employer has failed to offer her a suitable alternative vacancy.

It is unlawful to subject a woman to a detriment and dismissal is automatically unfair if it is for:

- a reason connected to her pregnancy; or
- the fact that she has given birth or sought to avail of maternity leave; or
- a reason relating to the use of 'keeping in touch days'.

## 10.2 Paternity leave

The Employment (NI) Order 2002 enables a person who has or expects to have responsibility for a child's upbringing and who is the biological father of the child or the mother's husband, civil partner or partner (whether of the same sex or otherwise) to take paternity leave. To qualify, such a person must have been continuously employed by her/his employer for 26 weeks leading into the fifteenth week before the baby is due.

The paternity leave must be taken within 56 days of the actual date of birth of the child. Only one period of paternity leave is available regardless of whether more than one child is born as a result of the same pregnancy. The leave is limited to two weeks.

Note that the former entitlement to additional paternity leave was abolished with effect from April 2015 and has been replaced by shared parental leave.

### 10.2.1 Statutory Paternity Pay

An employee who has average weekly earnings above the lower earnings limit for national insurance purposes (£112 from 6 April 2016) may qualify for Statutory Paternity Pay (SPP) of £139.58, or 90 per cent of average weekly earnings if this is less than £139.58. This is the same rate as the standard rate of SMP.

The rate of SPP usually changes every April.

### 10.2.2 Notification requirements

To avail of paternity leave, an employee is required to inform her/his employer of her/his intention to take paternity leave by the fifteenth week before the baby is expected, unless this is not reasonably practicable. In addition, the employee will need to tell the employer the week the baby is due, whether s/he wishes to take one or two weeks leave and when s/he wants the leave to start.

An employee will be able to change her/his mind about the date on which s/he wants the leave to start, provided that s/he tells her/his employer at least 28 days in advance unless this is not reasonably practicable.

The employee will also have to tell the employer at least 28 days in advance of the date s/he expects payments of SPP to start unless this is not reasonably practicable.

## 10.3 Adoption leave

### 10.3.1 Who is entitled to adoption leave?

Adoption leave is available to an employee where an approved adoption agency notifies the employee of a match with a child. To qualify, an employee no longer needs to have continuously worked for the employer for 26 weeks. This brings entitlement to adoption leave into line with entitlement to maternity leave. Adoption leave and pay are not available in circumstances where a child is not newly matched for adoption, for example when a step parent is adopting a partner's child.

Adoption leave and pay are only available to one member of a couple where a couple adopt jointly. The couple may choose which partner takes adoption leave. Adopting couples are entitled to avail of the new right to shared parental leave.

### 10.3.2 Length of adoption leave

An employee will be entitled to up to 26 weeks ordinary adoption leave followed by up to 26 weeks additional adoption leave. Only one period of adoption leave will be available regardless of whether more than one child is placed for adoption as part of the same arrangement.

### 10.3.3 Earliest date leave can be taken

A person can choose to start leave from the date of the child's placement or from a fixed date which can be up to fourteen days before the expected date of placement.

### 10.3.4 Relationship with paternity leave and pay

The partner of the person who elects to take adoption leave may be entitled to paternity leave and pay.

### 10.3.5 Statutory Adoption Pay

Not all employees are entitled to Statutory Adoption Pay (SAP). However, if they do qualify, Statutory Adoption Pay is payable for up to 39 weeks at the same rate as the standard rate for SMP (£139.58 from April 2016) per week or 90 per cent of average weekly earnings if this is less.

It is only paid to an employee who has average weekly earnings above the lower earnings limit for national insurance contributions (£112 from April 2016) for the eight weeks ending with the week of being notified of a match for adoption. The rate of SAP usually changes every year in April.

### 10.3.6 Notification requirements - employee

An employee will be required to inform the employer of the intention to take adoption leave within seven days of being notified by an adoption agency that s/he has been matched with a child for adoption, unless this is not reasonably practicable. The employee will also have to tell the employer when the child is expected to be placed with her/him and when s/he wants adoption leave to start.

An employee will be able to change her/his mind about the date on which s/he wants leave to start, provided the employer is told at least 28 days in advance, unless this is not reasonably practicable.

The employee will also have to tell the employer the date s/he expects any payments of SAP to start at least 28 days in advance, unless this is not reasonably practicable.

### 10.3.7 Notification requirements - employer

An employer will have to respond to an employee's notification of leave within 28 days. The employer will need to write to the employee setting out the date on which s/he is expected to return to work if the full entitlement to adoption leave is taken.

### 10.3.8 Returning during or at the end of adoption leave

An employee who intends to return to work at the end of full adoption leave (which includes additional adoption leave) will not have to give any further notification to her/his employer.

An employee who wants to return to work before the end of full adoption leave must give eight weeks' notice.

### 10.3.9 Terms and conditions during adoption leave

During ordinary adoption leave, an employee will be entitled to the benefit of normal terms and conditions of employment except for terms relating to remuneration.

During additional adoption leave, the employment contract continues and some contractual benefits and obligations will remain in force, similar to provisions on maternity leave (see section 10.1.11).

### 10.3.10 Work during adoption leave

An employee may carry out up to ten days work during adoption leave. These 'keeping in touch' provisions are similar to provisions on maternity leave (see section 10.1.12).

## 10.4 Shared parental leave and pay

### 10.4.1 What is shared parental leave?

Shared parental leave is a new entitlement for eligible parents of babies due or children to be placed for adoption on or after 5 April 2015. Under the arrangements, the partner of a mother/adopter who is entitled to maternity/adoption leave is entitled to take the balance of the leave where the mother/adopter returns to work before the end of her/his maternity/adoption leave. An entitlement to shared parental pay can also be created in this situation.

Unlike maternity, paternity and adoption leave, shared parental leave can sometimes be taken in a number of separate periods instead of one block of leave.

The entitlement also applies to parents entering into surrogacy arrangements where they are applying for a parental order and are eligible for adoption leave and pay.

The rules around shared parental leave are quite complex and are not covered in depth in these notes. It is strongly recommended that readers refer to the technical guidance published by the Department for the Economy and available on its website (*Shared parental leave and pay – Employer's Technical Guide to Shared Parental Leave and Pay- January 2015*). The Labour Relations Agency has also published a useful guide which is available on its website (*Shared Parental Leave: a good practice guide for employers and employees*).

### 10.4.2 Who is entitled to shared parental leave?

For a parent to be eligible for shared parental leave, each parent must fulfil the conditions set out below.

A.The mother/adopter must:

- share care of child with a partner, joint adopter or the child's other parent;

- be entitled to statutory maternity/adoption pay or allowance*;
- have confirmed the intention to terminate her/his maternity/adoption leave or pay period early;

*This means the mother/adopter must have worked for at least 26 weeks in the 66 weeks leading up to baby's due date/child's matching date and earned at least £30 a week in any thirteen weeks.

B. The partner must:

- be an employee;
- have at least 26 weeks service at the end of the fifteenth week before the baby's EWC / matching date and be working for the employer at the start of each leave period;
- share primary responsibility for the child with the mother/other parent;
- have complied with notification and evidence requirements to her/his employer.

Crucially, the mother/adopter need not be an employee but can be self-employed or a worker. Provided the mother/adopter fulfils the earnings requirement set out above s/he can pass entitlement for shared parental leave to a partner.

If both parents meet the eligibility requirements, shared parental leave can be shared between the parents who can alternate periods of work and leave or be at home together. Where both parents wish to avail of shared parental leave, both must fulfil the employment qualifying criteria and notification criteria set out at B above (in addition to the requirement at A).

### 10.4.3 Who is entitled to shared parental pay?

For a parent to qualify for shared parental pay, the employee must

- meet the qualifying conditions for shared parental leave;
- have a partner who meets the employment and earnings test (see above); and
- have earned no less that the lower earnings limit (currently £112 per week) in the eight weeks leading up to the qualifying period.

### 10.4.4 Notification of entitlement to shared parental leave

An employee who wishes to take shared parental leave must provide notice of entitlement at least eight weeks prior to the start date of shared parental leave.

The notice must include the following details:

- names of the mother/adopter and partner;
- start and end date of the mother/adopter's statutory maternity/adoption leave
- or pay period (notice to end entitlement is binding);

- baby's EWC or the child's date of placement;
- amount of shared parental leave each parent intends to take;
- proposed dates for taking shared parental leave (such dates are not binding).

The partner of the employee must also provide the following:

- name, address and NI number;
- and confirmation that s/he:
  - is the father or mother of the child or the partner of the mother/adopter of the child;
  - meets the employment and earnings test;
  - is entitled to statutory maternity/adoption leave or statutory maternity /adoption allowance and that notice has been given to end that entitlement at the date of birth or placement the mother/adopter shares responsibility for care of the child with the employee consents to the amount of leave and pay (where applicable) the employee is proposing to take.

### 10.4.5 Notification of shared parental leave dates

Shared parental leave can be taken in up to separate three blocks although an employer can agree to allow further periods of leave. However, all shared parental leave must be taken within a baby's first year or in the first year after adoption placement.

Notice for leave must be given at least eight weeks before any period of leave begins.

### 10.4.6 Amount of shared parental leave that can be taken

A maximum of 50 weeks of shared parental leave can be taken. To calculate the amount of shared parental leave available, start with 52 weeks and deduct from that the number of weeks maternity leave or adoption leave taken by the mother/adopter (bearing in mind that a minimum of two weeks must be taken by the mother/adopter and four weeks maternity leave must be taken by a mother working in a factory setting). The leave must be taken in blocks of at least one week.

### 10.4.7 Amount of shared parental pay that can be taken

The total amount of shared parental pay is calculated as 39 weeks less the number of weeks or maternity/adoption pay or allowance taken by the mother/adopter at the date either returns to work or gives notice of intention to curtail her entitlement to maternity/adoption leave/allowance.

### 10.4 .8 Returning to work during or at the end of shared parental leave

An employee who intends to return to work at the end of shared parental leave will not have to give any further notification to her/his employer.

An employee who wants to return to work before the end of shared parental leave must give eight weeks' notice. Special rules apply where an early return to work is as a result of the death of a parent or of the baby.

The rules around the right to return to work mirror the rights under maternity leave.

### 10.4.9 Terms and conditions during shared parental leave

During shared parental leave, an employee will be entitled to the benefit of normal terms and conditions of employment except for terms relating to remuneration (and the requirement to attend work).

### 10.4.11 Employment protection for employees in relation to shared parental leave

An employee is protected from detriment and unfair dismissal connected to the taking of shared parental leave.

Employees on shared parental leave also enjoy similar protections in respect of redundancy as afforded to women on maternity leave (see 18.3.4).

### 10.4.10 Work during shared parental leave

An employee may carry out up to 20 days agreed work during shared parental leave without bringing an end to the shared parental leave or shared parental pay period.

# 11. PART TIME WORKERS

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000 makes less favourable treatment of a part time worker in comparison with a comparable full time worker unlawful if the reason for the less favourable treatment is on the ground that the worker is a part time worker, unless there is an objective reason to justify such treatment.

## 11.1 Written statement procedure

A worker who considers that the employer has treated her/him less favourably can request a written statement giving particulars of the reasons for the treatment from the employer.

The worker is entitled to receive the employer's statement within 21 days of the request.

An adverse inference can be drawn by an industrial tribunal for a failure to provide a written statement or if the statement is evasive or equivocal.

## 11.2 Complaints to an industrial tribunal

A complaint in respect of unfavourable treatment or failure to provide a written statement can be made to an industrial tribunal within three months of the treatment or failure respectively.

# 12. FIXED TERM EMPLOYEES

## 12.1 Less favourable treatment

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (NI) 2002 makes less favourable treatment of fixed term employees than comparable permanent employees on the grounds of their fixed term status unlawful, unless there is an objective reason to justify such treatment.

## 12.2 Less favourable terms and conditions

A fixed term employee has the right not to be treated less favourably as regards the terms of the contract or by being subjected to any other detriment by any act or deliberate failure to act of the employer.

This includes the right not to be treated less favourably in relation to any period of service qualifications or in respect of the opportunity to receive training.

## 12.3 Right to be informed of available vacancies

A fixed term employee also has the right not to be treated less favourably in relation to the opportunity to secure permanent employment in the establishment.

In this respect, a fixed term employee has the right to be informed of available vacancies in the establishment by her/his employer. For the employer to have informed of such vacancies, it is enough if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of employment.

## 12.4 Written statement procedure

A fixed term employee who feels less favourably treated than a comparable permanent employee may submit a request in writing to the employer for a written statement of the reasons for the treatment.

The employer must provide such a statement within 21 days of the request. Failure to provide a statement or an evasive or equivocal reply can lead the tribunal to draw an adverse inference if proceedings are subsequently issued.

## 12.5 Series of fixed term contracts

The Regulations also provide that a fixed term employee who has been continuously employed on a series of fixed term contracts for four years or more will be regarded as employed on a permanent contract unless the last renewal on a fixed term basis was objectively justified.

## 12.6 Complaints to an industrial tribunal

A complaint of less favourable treatment can be made to an industrial tribunal within three months of the treatment.

# 13. DISCRIMINATION

Unfair treatment in the workplace will only be illegal discrimination if that treatment is linked to a specific aspect of a person's identity protected by law.

Legislation is in place which protects actual or potential employees in Northern Ireland against discrimination:

- if they have a disability; or
- on racial grounds; or
- because of religious belief or political opinion;
- on grounds of sex (including equal pay);
- because of pregnancy or maternity;
- because of gender reassignment;
- because of married or civil partnership status;
- on grounds of sexual orientation; or
- because of age.

In Great Britain, the various pieces of legislation giving protection against discrimination have now been amalgamated and harmonized in the Equality Act 2010, but in this jurisdiction we are still left with a patchwork of numerous different legislative instruments. It is hoped that a Single Equality Bill can be brought before the Assembly as soon as possible, as protection from discrimination in Northern Ireland is now weaker in a number of respects than that in GB. The Equality Commission has published a briefing note outlining the differences in protection, which is available on its website (see section 20).

## 13.1 Equality Commission for Northern Ireland

The Equality Commission for Northern Ireland (ECNI) was established by the Northern Ireland Act 1998. This body is responsible for promoting equality of opportunity in Northern Ireland. It exercises the functions of the former Equal Opportunities Commission, Fair Employment Commission, Commission for Racial Equality and Disability Council.

The Commission can give advice and assistance to people who believe they have been discriminated against. In addition, it has important responsibilities regarding the 'Section 75' statutory duty on all public bodies to have due regard to the need to promote equality of opportunity across the areas of:

- religion;
- political opinion;
- gender;
- race;
- age;
- marital status;
- sexual orientation;
- disability; and
- those with and without dependants.

The Commission provides useful information on discrimination on its website (see section 20).

## 13.2 Sex discrimination and related areas

The Sex Discrimination (NI) Order 1976 (as amended) makes it unlawful for an employer to discriminate, either directly or indirectly, on the grounds of sex, marital or civil partnership status, gender re-assignment, pregnancy or maternity leave in matters of employment, including recruitment, selection and promotion. The protection in relation to marital status does not apply to unmarried persons.

The Equal Pay Act (NI) 1970 (as amended) makes discrimination on grounds of sex unlawful in the area of pay. It is not covered in detail in these notes. See 6.5 above.

Complaints of sex discrimination and equal pay are dealt with by industrial tribunals.

The Sex Equality Directorate of the Equality Commission will provide advice and information, and sometimes fund legal representation for individuals in relation to alleged sex discrimination.

## 13.3 Race discrimination

The Race Relations (NI) Order 1997 makes it unlawful for an employer to discriminate, directly or indirectly:

- on racial grounds (ie colour, race, nationality or ethnic or national origin); or
- on the grounds of a racial group (ie a group of persons defined by reference to colour, race, nationality or ethnic or national origin).

References to a person's racial group refer to any racial group into which s/he falls. The Irish travelling community is specified to be such a group.

Protection covers all employment matters, including recruitment, selection, terms and conditions, training, promotion and dismissal.

As with other issues of discrimination, an employee who feels s/he has been discriminated against can lodge proceedings with the industrial tribunal.

The Race Discrimination Directorate of the Equality Commission may provide advice and assistance and fund legal representation for a person who alleges s/he has been unlawfully discriminated against on the grounds of her/his race.

## 13.4 Disability discrimination

The Disability Discrimination Act 1995 (DDA 1995) makes it unlawful for an employer to discriminate against an employee or job applicant on the grounds of disability.

A person has a disability for the purposes of the DDA 1995 if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on her/his ability to carry out normal day-to-day activities. Note that the requirement that a mental impairment be clinically well recognised was removed from 31 October 2007.

Special provisions exist to cover progressively deteriorating conditions, recurring or fluctuating conditions and severe disfigurements. Since 31 October 2007, a person with HIV, cancer or multiple sclerosis is considered to be disabled from the point of diagnosis.

The effect of an impairment is long-term if it:

- has lasted at least twelve months; or
- is likely to last at least twelve months; or
- is likely to last for the rest of the individual's life; or
- is likely to recur.

An impairment will be taken to affect the ability of the individual to carry out normal day-to-day activities **only** if it affects **one** of the following:

- mobility;
- manual dexterity;

- physical co-ordination;
- continence;
- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn of understand; or
- perception of the risk of physical danger.

A code of practice for the elimination of discrimination in employment which further explains the provisions of the DDA 1995 is available.

The employment provisions did not previously apply to employers with fewer than fifteen employees. As a result of changes made by the Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004 repealing the small business exemptions, the provisions now apply to all employers regardless of size.

If an employee believes that s/he has been discriminated against as a result of her/his disability, s/he can make a complaint to the industrial tribunal. This must be made within three months of the alleged infringement of the Act.

The Disability Directorate of the Equality Commission can provide advice and information. It can sometimes fund legal representation for individuals in relation to issues of disability discrimination.

## 13.5 Sexual orientation discrimination

Since 2 December 2003, when the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 came into force, it has been unlawful for an employer to discriminate, either directly or indirectly, on the grounds of sexual orientation in matters of employment, including recruitment, selection and promotion.

Sexual orientation includes orientation towards persons of the same sex, orientation towards persons of the opposite sex and orientation towards persons of the same sex and of the opposite sex.

It may not be unlawful to discriminate in relation to certain jobs where there is a 'genuine occupational requirement', notably in relation to employment for the purposes of an organised religion.

The Equality Commission may provide advice and information and may fund legal representation for a person alleging discrimination on the grounds of sexual orientation.

## 13.6 Age discrimination

The Employment Equality (Age) Regulations (Northern Ireland) 2006 came into operation on 1 October 2006, making it unlawful to discriminate directly or indirectly on grounds of age in the employment field.

Unlike other discrimination legislation, it is possible to justify both direct and indirect discrimination on grounds of age. Certain age related differential treatment (eg the National Minimum Wage age bands) is expressly permitted.

The Equality Commission may provide advice, assistance and possibly legal representation to a person alleging discrimination on grounds of age.

## 13.7 Religious or political discrimination

The Fair Employment and Treatment (NI) Order 1998 makes it illegal for an employer to discriminate, either directly or indirectly, on the grounds of religious belief or political opinion in matters of employment, including recruitment, selection and promotion.

Protected religious belief can include a wide range of religious faiths and philosophies, such as Judaism, Buddhism or philosophical theism, and includes perceived belief and absence of belief.

Protected political opinion does not have to relate to the constitutional status of Northern Ireland. It can include political opinions relating to the conduct or government of the state, or matters of policy, eg, conservative or socialist political opinions. A political opinion which includes approval or acceptance of the use of violence for political purposes in Northern Ireland is not protected.

Complaints of religious or political discrimination are dealt with by Fair Employment Tribunals.

The Fair Employment and Treatment Directorate of the ECNI will provide advice, information and sometimes fund legal representation for individuals in relation to alleged political or religious discrimination.

## 13.8 Who is protected by discrimination legislation?

The various statutes referred to above can have application beyond the employment field, but this is beyond the scope of these notes.

In the employment field, discrimination by employers is outlawed, and, in addition to employers, other categories of organisation are covered. The exact scope of protection can vary slightly, and the governing legislation should be consulted in each case. For example, the following are covered under the Fair Employment and Treatment (NI) Order 1998:

- those with statutory power to select employees for others;
- employment agencies;
- trade unions and employer organisations;
- vocational training providers;
- those who have power to confer qualifications;

- those for whom work is done by contract workers;
- those who have power to select office holders;
- office holders;
- barristers; and
- partnerships.

'Employment' for the purposes of discrimination law means 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour'. This is a wider definition than that found in other areas of employment law.

## 13.9 Aspects of employment in which discrimination may occur

It is unlawful for an employer, body or organisation to discriminate:

- in **recruitment and selection**, including arrangements for deciding who should be offered employment; in the terms on which employment is offered or by refusing or deliberately omitting to offer a person employment;
- in the **terms and conditions of employment**;
- in relation to **access to benefits**, including opportunities for promotion, transfer, training or any other benefits, or the refusal of those opportunities;
- by **dismissing** an employee or causing him or her any other detriment; or
- by subjecting an employee to harassment (see 13.10.4).

In addition, if an employee is disabled, discrimination can take place where there is a failure to make reasonable adjustments (see 13.10.6).

Discrimination against former employees (for example in relation to references) may also be illegal.

## 13.10 The different forms that discrimination can take

Discrimination can be by way of:

- direct discrimination;
- indirect discrimination;
- victimisation;
- harassment.

Additionally, disabled employees may be discriminated against through:

- disability related discrimination;
- failure to make reasonable adjustments.

The various different pieces of legislation also outlaw a range of other unlawful discriminatory acts, such as putting pressure on someone to discriminate, or aiding discrimination.

### 13.10.1 Direct discrimination

Direct discrimination occurs when one person is treated less favourably than another and the difference in treatment is based on one of the protected aspects of that person's identity.

Proving direct discrimination therefore involves comparing the way that you are treated with the way in which someone with a different identity is treated. The comparator should ideally be someone who is in exactly the same position 'but for' her/his race or sex or other aspect of identity. If the person's position is different - for example if s/he does a different job – then it can be argued that any difference in treatment is due to that factor rather than being based on discriminatory considerations.

If it is not possible to identify an exact comparator, which is often the case, then a tribunal has to consider how a hypothetical comparator would have been treated – an imaginary person who would be in the same position as the employee 'but for' her/his race/sex/etc. How other people who are not exact comparators are treated can be used as evidence, as 'building blocks', to help construct how a hypothetical comparator would have been treated.

In cases of discrimination against a woman because she is pregnant or on maternity leave it is not necessary to have a comparator.

The defence of justification (see 13.10.2 below) is not available in cases of direct discrimination except in claims of age discrimination.

### 13.10.2 Indirect discrimination

Broadly speaking, indirect discrimination occurs where the same rule is applied to everyone, but it has a greater negative effect on people with a particular protected aspect of identity.

A slightly different test applies in some areas (for example discrimination on grounds of colour or nationality) but indirect discrimination is generally defined as being where a person:

- applies to another person a provision, criterion or practice which s/he applies or would apply equally to persons not of the same identity as that other, but:
    - which puts or would put persons of the same identity as that other at a particular disadvantage when compared with other persons;
    - which puts that other at that disadvantage; and
    - which s/he cannot show to be a proportionate means of achieving a legitimate aim.

An example of potential indirect discrimination could be a minimum height requirement of 5 feet 10 inches to work in a particular employment – ostensibly a neutral rule applied to everyone, but in practice likely to mean that women will be much less likely to be able to qualify.

The defence of justification is available to the employer. Therefore, even if a rule puts a particular group at a disadvantage, if the employer can show that it is there to achieve a legitimate aim and that it is proportionate, there will be no discrimination. Whether a measure is proportionate will depend on whether it is necessary and appropriate given the negative effects that it will have for a particular protected group. It therefore involves a balancing exercise.

Indirect discrimination does not apply in the area of disability discrimination, but see disability related discrimination at 13.10.5 below.

### 13.10.3 Victimisation

Discriminatory victimisation occurs when an employer retaliates against the employee because s/he has made an allegation of discrimination or assisted someone else who has done so.

It is broadly legally defined as follows.

A person ('A') discriminates against another person ('B') if s/he treats B less favourably than s/he treats or would treat other persons in those circumstances; and s/he does so because B has:

- brought proceedings against A or any other person for discrimination; or
- given evidence or information in connection with such proceedings brought by any person; or
- otherwise done anything under discrimination legislation in relation to A or any other person; or
- alleged that A or any other person has contravened discrimination legislation (whether or not the allegation states so); or
- A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

A person is not protected by the victimisation provisions in relation to any allegation made by her/him if the allegation was false and not made in good faith.

### 13.10.4 Harassment

Discriminatory harassment is defined as occurring:

- where, on grounds of a protected aspect of identity, a person, A, engages in unwanted conduct which has the purpose or effect of:
    - violating another person, B's, dignity, or

- creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct shall be regarded as having the effect specified only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

Behaviour that is intended to harass is clearly therefore covered.

If the behaviour is not intended to harass ('purpose'), but is nonetheless offensive ('effect'), the victim's subjective feelings are not conclusive. There is an objective as well as a subjective test. A tribunal will consider the personal reaction of the person, but if it concludes that it was not reasonable to be offended in the circumstances then illegal harassment will not be established.

In addition to harassment on grounds of sex, the sex discrimination legislation contains a specific additional definition of sexual harassment. This occurs where:

- a person engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of:
  - violating a woman's dignity, or
  - creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

There is also a protection for female and transgendered employees in relation to their reaction to being harassed. It will be further harassment if:

- on the ground of her rejection of or submission to unwanted harassing conduct a person treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

#### 13.10.4.1 Vicarious liability and the employer's defence

Employers are liable for any harassment (and other discriminatory acts) committed by their employees in the course of their employment, even if they did not know about the harassment or would not have approved of it, had they known. Employers can successfully defend a harassment case only if they can show that they took such steps as were reasonably practicable to prevent the harassment happening. This will generally involve having relevant policies to prevent such behaviour and being able to show that these are actively pursued and enforced.

### 13.10.5 Disability related discrimination

Discrimination for the purposes of the DDA 1995 is less favourable treatment which relates to a person's disability and which an employer is unable to show is justified.

It was previously thought that a comparator was not required for this variant of discrimination, but the House of Lords decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] reversed that position. As a result it is now much harder to bring a case of disability related discrimination. For instance, a person

dismissed due to sick leave related to her/his disability will have to compare her/himself with a person without a disability out sick for the same period. The employer will probably be able to successfully argue that that person would also be dismissed.

The Equality Act 2010 has addressed and rectified this problem in Great Britain but, until the Assembly legislates to similar effect, disability discrimination claims are better brought as claims of failure to make reasonable adjustments (see below).

### 13.10.6 Reasonable adjustments

Employers may have to take particular steps to prevent their arrangements or premises from discriminating against people with disabilities. These steps are referred to as 'reasonable adjustments'. Reasonable adjustments are designed to ensure fair access for disabled people or to compensate for the disadvantage they experience as a result of their disability.

The DDA 1995 states that in determining whether it is reasonable for an employer to have to take a step to comply with the duty to make reasonable adjustments, regard should be had to:

- the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- the extent to which it is practicable for the employer to take the step;
- the financial and other costs which the employer would incur in taking the step and the extent to which taking it would disrupt any of her/his activities;
- the extent of her/his financial and other resources;
- the availability to the employer of financial or other assistance with respect to taking the step;
- the nature of her/his activities and the size of her/his undertaking.

The DDA 1995 also gives examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments. These are examples and not an exhaustive list. The examples are:

- making adjustments to premises;
- allocating some of the disabled person's duties to another person;
- transferring the employee to fill an existing vacancy;
- altering the employee's hours of work or training;
- assigning the employee to a different place of work or training;
- allowing the employee to be absent during working or training hours for rehabilitation, assessment or treatment;

- giving or arranging for mentoring (whether for the disabled person or any other person);
- acquiring or modifying equipment;
- modifying instructions or reference manuals;
- modifying procedures for testing or assessment;
- providing a reader or interpretation;
- providing supervision or other support.

Reasonable adjustments are potentially very wide in ambit and might, for instance, include changing the operation of sickness, absence or dismissal policies to take account of a disability. A code of practice for the elimination of discrimination in employment which further explains the provisions of the DDA 1995 is available.

# 14. WHISTLEBLOWING

The Public Interest Disclosure (NI) Order 1998 inserts provisions into the 1996 Order which seek to protect workers from disclosing information relating to certain wrongdoing. Amendments contained in the Employment Act (Northern Ireland) 2016 are to be introduced by way of Regulations. When implemented, this will remove the requirement that the disclosure be in 'good faith' (but allowing any compensation to be reduced if it is not), and will introduce a requirement that the disclosure be in the public interest.

## 14.1 Qualifying disclosure

A qualifying disclosure is information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

- that a criminal offence has been committed or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which s/he is subject;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health or safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged;
- that information tending to show any matter falling within any one of the above is being or is likely to be deliberately concealed.

## 14.2 Protected disclosure

To be a protected disclosure, the qualifying disclosure must be made:

- to the worker's employer (or, where the information relates to the conduct of another person for which a person other than the employer has legal responsibility, to that other person); or
- in the course of obtaining legal advice; or
- in good faith to a Minister of the Crown or a Northern Ireland Department where the worker's employer is an individual or a body appointed under any statutory provision by a Minister of the Crown or a Northern Ireland Department; or
- to a person prescribed by an Order made by the Department for Employment and Learning (a prescribed person) for the purposes of receiving qualifying disclosure information of relevant categories (see the Public Interest Disclosure (Prescribed Persons) (Amendment) Order (NI) 2014); or
- where the worker makes the disclosure in good faith and not for purposes of personal gain, to a person other than as described above. It must be reasonable for the worker to make the disclosure. In assessing whether it is reasonable to make the disclosure, regard will be had to:
    - the identity of the person to whom the disclosure is made;
    - the seriousness of the relevant failure;
    - whether the relevant failure is continuing or likely to occur in the future;
    - whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person.

  Regard may also be had to any action which the employer (or a person to whom a previous disclosure was made) has taken or might reasonably have been expected to have taken as a result of a previous disclosure and whether the worker complied with any procedure authorised by the employer. In such circumstances, to be protected the disclosure must satisfy the following conditions:
    - that the worker reasonably believes, at the time of making the disclosure, that s/he will be subjected to a detriment by the employer if disclosure is made to the employer or a prescribed person;
    - in cases where there is no prescribed person, the worker reasonably believes that evidence relating to the wrong doing will be concealed or destroyed if a disclosure is made to the employer;
    - the worker has previously made a disclosure of substantially the same information to the employer or a prescribed person; or
- in good faith and not for personal gain, if the worker believes the information to be substantially true and the failure is of an exceptionally serious nature and in all the circumstances it was reasonable to make the disclosure. In assessing

reasonableness, regard will be had to the identity of the person to whom the disclosure is made.

## 14.3 Unfair dismissal and detriment

Workers have a right not to suffer detriment in employment and employees have a right not to be unfairly dismissed for making protected disclosures. Such a dismissal will be automatically unfair and not be subject to a qualifying period of continuous employment.

# 15. EMPLOYMENT PROTECTION IN HEALTH AND SAFETY CASES

An employee has the right not to be subjected to a detriment and a dismissal will be automatically unfair if the reason for dismissal is because s/he:

- carried out activities after being designated by the employer to prevent or reduce risks to health and safety at work;
- performed functions as a representative of workers on health and safety matters or being a member of a safety committee or having taken part in consultation with the employer or in an election pursuant to the Health and Safety (Consultation with Employees) Regulations 1996;
- brought to the employer's attention, by reasonable means, circumstances connected with work which s/he reasonably believed were potentially harmful to health and safety, where it was not reasonably practicable to raise matters with the health and safety representative or safety committee;
- left or proposed to leave or refused to return to a dangerous part of the workplace while the danger persisted, in circumstances of danger which s/he reasonably believed to be serious and imminent and which could not reasonably be averted by her/him;
- took or proposed to take appropriate steps to protect her/himself or other persons from danger in circumstances of danger which s/he reasonably believed to be serious and imminent.

# 16. TERMINATION OF EMPLOYMENT

## 16.1 Notice to terminate employment

To bring a contract to an end, a contract of employment can specify how much notice is to be provided to terminate it. It is lawful for an employee to accept pay in lieu of notice.

While a contract can provide for longer periods of notice, it cannot provide for a shorter period of notice than the minimum period specified in article 118 of the 1996 Order. According to article 118, the minimum period to be given by an employer to an employee (except in cases of dismissal for gross misconduct where no notice is required to be given) is as follows.

| **Length of service** | **Minimum notice** |
|---|---|
| Less than one month | no minimum |
| More than one month and less than two years | one week |
| Two years | two weeks |

Then one additional week for each additional year's continuous service up to a maximum of twelve weeks in total.

An employee employed for one month or more is obliged under article 118 to provide at least one week's notice to the employer.

The contract of employment may provide for greater notice periods. If it does, an employee or employer may be acting in breach of contract in failing to adhere to its provisions.

## 16.2 Wrongful dismissal

If an employer dismisses an employee and fails to provide notice in accordance with the contract or statutory notice provisions, the employee may be able to claim damages for wrongful dismissal. This should not be confused with unfair dismissal which is a statutory creation (see 16.4).

A wrongful dismissal claim normally arises due to a breach of an express or implied term to provide notice to lawfully end the contract of employment. Damages will normally be limited to wages and other benefits payable during the notice period.

Breach of contract claims can be brought in an industrial tribunal provided the contract is connected with employment and the employment has ended.

A claim for breach of contract in an industrial tribunal must normally be brought within three months of termination of the contract. An employer may counterclaim against the employee within six weeks of receiving a copy of the employee's claim. The value of the employer's counterclaim may be worth substantially more than the employee's claim.

The maximum award a tribunal can make in a breach of contract claim is £25,000.

Claims can also be brought in the ordinary civil courts, such as the county court or the high court, for breach of contract. The time limit in the ordinary civil courts for bringing a claim is six years from the date of the breach of contract.

Caution should be exercised in deciding where to issue proceedings. 'Cause of action estoppel' may prevent an employee pursuing a claim in the county court or the high court if a case about termination of employment has been determined by an industrial tribunal.

## 16.3 Statement of reasons for dismissal

Article 124 of the 1996 Order enables an employee to be provided with a written statement giving particulars of the reasons for dismissal.

The employee is normally only entitled to a written statement if s/he has been employed for one year at the date of dismissal and has requested the statement. Where the statement is requested, the employer must provide it within fourteen days.

An employee who is dismissed while pregnant or during ordinary or additional maternity or adoption leave is automatically entitled to a written statement without having to request it and irrespective of how long she has actually been employed.

If the employer fails to provide a written statement or if the reasons are inadequate or untrue, a tribunal can award up to two weeks' pay and make a declaration as to what it finds the employer's reasons were for dismissing the employee. The tribunal can only consider such a complaint if it is presented at the same time as a complaint of unfair dismissal.

## 16.4 Unfair dismissal

Protection against unfair dismissal is established in article 126 of the ERO.

### 16.4.1 Exclusions from the right

An employee cannot claim unfair dismissal if s/he is:

- a police officer, unless dismissal relates to an automatic unfair dismissal in a health and safety case (see section 15);
- in any employment in respect of which there is a designated dismissal procedure (agreed with unions and approved by the Department for Employment and Learning);
- a share fisherman;
- taking part in unofficial industrial action.

### 16.4.2 Length of service requirements

An employee must normally have been employed by the employer for at least one year before being able to claim unfair dismissal.

This length of service requirement may not apply if the dismissal is deemed to be an automatic unfair dismissal (see 16.4.6).

### 16.4.3 What is a dismissal?

An employee is dismissed if:

- the contract is terminated by the employer;
- s/he is employed under a fixed term contract which expires without renewal;
- s/he terminates her/his own contract but can show that the employer's conduct entitled the employee to do so (constructive dismissal). Specialist advice should be sought before such a termination because an employee who resigns may be deemed not to have been dismissed but to have left voluntarily if a tribunal finds there was not a constructive dismissal. See 16.4.7 on constructive dismissal.

### 16.4.4 What is unfair dismissal?

When an employee establishes that there has been a dismissal, or if this is not disputed by the employer, it is then up to the employer to show the reason for the dismissal.

At present the dismissal will be regarded as unfair unless the employer can prove that the dismissal was for one of the following reasons:

- the employee was incapable of doing her/his job (for example due to incompetence, inadequate qualifications, ill health, etc);
- the employee was guilty of misconduct (for example bad timekeeping, dishonesty, fighting at work, etc);
- the employee is being made redundant;
- the employee could not have been kept on without the law being broken (eg a driver loses her/his driving licence);
- there is some other substantial reason justifying dismissal;
- until 5 October 2012, retirement could have been a potentially fair reason for dismissal provided the employee was aged 65 or over Now retirement either has to be justified on grounds of capability or be objectively justified (which under unfair dismissal law would probably constitute 'some other substantial reason').

### 16.4.5 Reasonableness of the dismissal

Even if the employer can show that the dismissal was for one of the above reasons, the tribunal must go on to consider whether the employer acted in a reasonable way in treating the reason as sufficient for dismissing the employee.

In deciding whether the employer acted reasonably, a tribunal must take into account the size and administrative resources of the employer's firm.

On questions of reasonableness, the Labour Relations Agency (LRA) has prepared a Code of Practice on disciplinary and grievance procedures which came into effect on 3 April 2011. Industrial tribunals will generally expect employers to comply with it.

### 16.4.6 Automatic unfair dismissals

Dismissal of an employee for certain specified reasons is automatically unfair. In such circumstances, the tribunal will not have to look into the reasonableness or otherwise of the dismissal. Selection of an employee for redundancy on such specified grounds may also make the dismissal automatically unfair. Likewise, for certain dismissals, any length of qualifying employment which prevents employees claiming unfair dismissal will not apply.

This applies to the following dismissals:

- dismissal for certain family friendly related reasons, including the fact that the employee was pregnant, has given birth or has or is going to take maternity leave, parental leave, shared parental leave, time off under the dependants provisions, paternity leave or adoption leave or for a reason related to 'keeping in touch' days (see section 10);
- dismissal for health and safety related reasons (see section 15);
- dismissal for performing a role as a trustee of a pension scheme or as an employee representative for the purposes of a transfer of an undertaking or in relation to a collective redundancy situation;
- dismissal of a protected or opted out shop worker or on course betting worker in connection with Sunday working (see section 8);
- dismissal in relation to rights under the Working Time Regulations (NI) 1998 (see section 7);
- dismissal for asserting rights under the National Minimum Wage Act 1998 (see 6.1);
- dismissal in respect of protected public interest disclosures (see section 14);
- dismissal in relation to the right to be accompanied at disciplinary and grievance hearings (see section 17);
- dismissal for asserting rights as a part time worker (see section 11);
- dismissal due to enforcing rights under the Tax Credits Act 2002;
- dismissal for asserting rights as a fixed term worker (see section 12);
- dismissal for asserting statutory rights conferred under the 1996 Order or the rights in relation to statutory minimum notice, deductions from pay, union activities and time off, and rights under the Working Time Regulations 1998;
- dismissal for trade union membership or activities (see 9.1);
- dismissal for a reason related with the statutory right to apply for flexible working (see 9.2.3).

An employee who has been employed for a year will be treated as automatically unfairly dismissed if the employer dismisses her/him without following the statutory

dismissal and disciplinary procedures, unless one of the exceptions applies (see section 5).

### 16.4.7 Constructive dismissal

As noted above, there are circumstances where an employee can resign and claim unfair dismissal on grounds of the employer's conduct.

An employee wishing to claim constructive dismissal must fulfil the normal qualifying criteria (length of service and employee status).

S/he must also show that the resignation was in response to a repudiatory breach of contract by the employer and that s/he has not waived the breach.

A repudiatory breach of contract may either be breach of an express term (such as pay) or of an implied term (the duty of trust and confidence.) To qualify as a repudiatory breach of contract, the breach must be of such a fundamental nature that it undermines the contract.

The breach may be anticipatory rather than actual provided that the employer has indicated a clear intention not to fulfil the terms of the contract in the future. An example might be where an employer clearly notifies an employee that s/he going to demote her/him with effect from the following week.

Waiver of the breach of contract may happen if an employee delays in resigning following the breach or does anything else to affirm the contract. Whether or not a delay in resigning will constitute a waiver will depend on the circumstances of the case.

A constructive dismissal is not necessarily unfair. There may be limited circumstances where an employer might be able to show that there was in fact a fair reason for the dismissal.

Proving to an industrial tribunal that the criteria for constructive dismissal have been met can be very difficult. Advice should always be sought where an employee is contemplating resigning with the intention of claiming constructive dismissal.

### 16.4.8 Remedies for unfair dismissal

A person who is claiming unfair dismissal must identify which remedy s/he is seeking, ie her/his job back (reinstatement), re-engagement or compensation.

#### 16.4.8.1 Reinstatement

This takes effect as if the person had never been dismissed. Therefore, this involves full restoration of pay and other benefits, seniority and pension rights etc.

#### 16.4.8.2 Re-engagement

This occurs in situations where the tribunal thinks that reinstatement is not practicable. It allows the employer to offer the employee a different but comparable job, or other suitable job.

#### 16.4.8.3 Compensation

Compensation is normally made up of a basic award and a compensatory award. The basic award is similar to calculation of a redundancy payment (see 18.1), related to the person's length of service, age and wages. The compensatory award is based on loss of earnings for the period up to the tribunal hearing and any anticipated future loss.

The compensation may be reduced if the employee is found by the tribunal to be partially to blame for her/his own dismissal.

From February 2016, a person can claim up to £79,100 as part of the compensatory element of her/his award. This maximum amount is usually increased annually. In practice, awards are normally for much smaller amounts.

From 3 April 2005, the Employment (NI) Order 2003 implemented provisions whereby compensation can be increased or reduced if statutory disciplinary or dismissal procedures are not followed internally before presenting an application to an industrial tribunal (see section 5).

# 17. RIGHT TO BE ACCOMPANIED TO DISCIPLINARY AND GRIEVANCE HEARINGS

Articles 12-17 of the Employment Relations (NI) Order 1999 make provision for a worker to be accompanied by a fellow worker or a trade union official to a disciplinary or a grievance hearing where this is reasonably requested by the worker.

Where the chosen companion is not available, the employer must postpone the hearing to an alternative time proposed by the worker (provided the alternative time is reasonable and falls within five working days).

A worker is protected against being subjected to a detriment and dismissal is automatically unfair if the reason for dismissal is because the worker sought to exercise the rights of accompaniment or postponement or to accompany a fellow worker as a companion. No qualifying period of continuous service will be required to claim unfair dismissal in these circumstances.

In considering the right to be accompanied, employers should comply with the Labour Relations Code of Practice on disciplinary and grievance procedures issued on 3 April 2011 which provides specific guidance on this issue.

# 18. REDUNDANCY

Pursuant to article 174 of the ERO, redundancy occurs:

- where an employer ceases to carry on business in a particular place (although the employee may be required by contract to move with the employer); or

- where the requirement of the business to carry out work of a particular kind ceases or diminishes.

In most cases, a simple definition of redundancy is that the employee's job no longer exists. If the employee has been replaced by another **employee**, it is not a redundancy. Where the replacement is an outside contractor this may still constitute redundancy.

If an employee is made redundant, s/he will be entitled to compensation known as a redundancy payment and sometimes will also be able to claim unfair dismissal (see 16.4 and 18.3).

## 18.1 Redundancy payments

These are paid by the employer. If the employer is bankrupt or in liquidation, the government may pay a redundancy payment out of the National Insurance Fund. The fund is under the control of the Department for Employment and Learning.

### 18.1.1 Who may claim a redundancy payment?

To be eligible for a statutory redundancy payment, an employee must have been working for the same employer for at least two years and must not be in certain jobs (including registered dock workers and Crown employees) which are excluded.

### 18.1.2 How much is a redundancy payment?

The law guarantees a minimum redundancy payment. This is calculated by reference to the employee's age and length of service, as below:

- half a week's gross pay for each year up to the age of 21;
- one week's gross pay for each year between ages 22 and 40;
- one and a half week's gross pay for each year over the age of 41.

From March 2016, the maximum weekly wage which may be taken into account is £500. This maximum wage usually increases annually. The maximum number of years which may be taken into account is 20. The 20 best years will count; therefore, the maximum statutory payment is presently £15,000 (ie £500 x 20 x 1½).

The employee is entitled to a written statement showing how her/his redundancy payment has been calculated.

Although online calculation tools are available to assist in calculating redundancy payments, caution should be exercised, as the maximum weekly wage applicable in Northern Ireland is lower in the rest of the UK.

**Note:** An employee may have entitlement to a much larger redundancy payment provided for by agreement as a result of individual or collective negotiations.

## 18.2 Suitable alternative employment

If an employee is being made redundant, the employer may offer her/him any suitable alternative employment within the firm. The employee may in certain circumstances refuse if the proposed employment is not suitable. However, an unreasonable refusal of suitable employment may mean the employee will lose her/his entitlement to the redundancy payment.

## 18.3 Unfair dismissal and redundancy

Dismissal on grounds of redundancy is one of the potentially fair reasons for dismissal identified in article 130 of the Employment Rights (NI) Order 1996.

If an employee is being dismissed on the grounds of redundancy, s/he may still claim unfair dismissal in any of the following situations:

- there is not a genuine redundancy situation (for example where a new employee has been taken on to do the job);
- the employee was dismissed unfairly in all the circumstances contrary to article 130 of the Employment Rights Order (NI) 1996 (see below);
- the employee was selected because of automatically unfair reasons (see 16.4.6).

### 18.3.1 Reason for the dismissal

It will be for the employer to show that the reason (or the main reason) for dismissal was redundancy. It is open to the employee to contend that the dismissal is not by way of redundancy at all, but is, in fact, for some other reason which may be unfair.

The test to be applied to decide whether there is a redundancy has two limbs: firstly, is there a redundancy situation as statutorily defined, and secondly, was that situation actually the cause of the dismissal?

### 18.3.2 Fairness and reasonableness of the dismissal

If the employer can establish that the reason for dismissal is redundancy, the industrial tribunal then has to look at whether the dismissal is fair or unfair. In assessing whether a dismissal on grounds of redundancy is fair a tribunal will look at the circumstances, including the size and administrative resources of the employer's undertaking, to determine whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the employee. The burden of proof in assessing reasonableness does not rest solely with either party, but is neutral.

While the employer will have to show that the reason for dismissal is genuinely redundancy, in assessing the reasonableness of a dismissal on grounds of redundancy a tribunal is not at liberty to look into the commercial merits or reasons for an employer's decision that redundancies are required. Arguments that a factory was actually economically viable, or that a certain reorganisation was not required are likely to get short shrift.

Tribunals do have some limited ambit to enquire into whether the decision to make redundancies was based on proper information and consideration of the situation, as this bears on the question of whether the dismissals are by reason of redundancy at all. However, they are unlikely to delve too deeply into the decision making process once it appears that there is some basis in fact for the decision.

An industrial tribunal may find that there is a genuine redundancy situation that makes it inevitable that an employee must be dismissed. However, it is not enough for an employer to show that it was reasonable to dismiss an employee. The tribunal must assess whether it is reasonable to dismiss the actual employee in question.

Therefore, even if it is inevitable that some employees must be dismissed, it is still necessary to consider the means and the reasonableness of the steps taken by the employer to choose the individual rather than some other employee for dismissal.

### 18.3.3 Statutory procedures

The statutory dismissal and disciplinary procedures apply to dismissals on grounds of redundancy unless one of the exceptions apply.

There are several exceptions where the procedures do not apply. Two in particular are relevant to dismissal on grounds of redundancy. Firstly, there is no need to follow the statutory procedures where an employer wishes to make 20 or more employees at the same establishment redundant within a 90-day period.

Secondly, there is also no need to follow the statutory procedures where the employer's business suddenly and unexpectedly ceases to function because of an event unforeseen by the employer, and it becomes impracticable to employ any employees. An example might be where the premises burn down.

Unless one of the exceptions apply, dismissal of an employee without following the statutory procedures will normally lead to a finding of automatic unfair dismissal.

### 18.3.4 Other procedures

Even before implementation of the provisions relating to statutory procedures, it was recognised that procedures in redundancy dismissal were clearly important.

In cases where employees are represented by an independent trade union recognised by the employer, a reasonable employer will seek to act in accordance with the following five principles:

- **Warning** - The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be

affected to take early steps to inform themselves of the relevant facts; consider possible alternative solutions; and if necessary, find alternative employment in the undertaking or elsewhere.

- **Consultation** - The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employee as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employee to be made redundant. When a selection has been made, the employer will consider with the union whether the selection had been made in accordance with the criteria.
- **Fair selection criteria** - Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely on the opinion of the person making the selection but can be objectively checked on such things as attendance record, efficiency at the job, experience or length of service.
- **Fair application of selection criteria** - The employer will seek to ensure that selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
- **Seeking alternative employment** - Instead of dismissing an employee, the employer will seek to offer alternative employment. (Where an employer is making an employee redundant during the time she is off on maternity leave, the employer is under a duty to offer her any suitable alternative jobs that are available. Not to do so would make any subsequent dismissal automatically unfair.)

Where employees are not represented by a trade union, consultation with individual employees should still take place. It would be best practice for an employer to follow the above five principles even if there is no recognised trade union in the workplace. Also, even where there is a recognised trade union, the employer should also consult individually with employees who may be liable to dismissal by reason of redundancy.

The five principles are not intended to be ticked off on a shopping list as to whether or not proper procedures have been complied with in each redundancy case. In the event of any one or more not having been complied with, it does not follow that a dismissal will be unfair automatically. What the tribunal must look at is what a reasonable employer will seek to do if circumstances permit. The extent to which any one or more of the principles applies in a given case depends on the circumstances of that particular case.

In addition, failure by an employer to follow procedures above the statutory minimum will not of itself make an employer's actions unreasonable if the employer can show that s/he would have decided to dismiss the employee if s/he had followed the procedures.

Therefore, if the employer has followed the statutory procedure, but failed to follow other fair procedures (as outlined above), it can still escape a finding of unfair dismissal if it can satisfy the tribunal that, on the balance of probabilities (ie above 50 per cent chance), the employee would have been dismissed anyway if those other fair procedures had been followed.

# 19. MONEY OWED ON AN EMPLOYER'S INSOLVENCY

## 19.1 Introduction

Where an employer is insolvent and owes employee money, the employee may have priority to other persons owed money if the debt falls within the definition of a preferential debt. Certain debts owed to an employee on the insolvency of an employer may be paid by the Department for the Economy (DfE). Details of these are set out below.

An employee is able to recover a redundancy payment from DfE in certain circumstances even if the employer is not insolvent but an application to the industrial tribunal is required.

For the purpose of clarifying what payments may be made by DfE it is important first of all to understand the precise meaning of insolvency.

## 19.2 What is insolvency?

To be classed as insolvent, it is not enough that a company or individual has simply ceased trading or is unable to pay debts as they fall due. In the case of a company, one of the events specified below must take place for the company to be treated as insolvent. Where the employer is a partnership, all partners in the firm must have been adjudged bankrupt before monies become payable out of the National Insurance Fund.

### 19.2.1 Proving insolvency

To claim a payment from DfE, the onus of proving that an employer is insolvent rests with the employee. The employer must be insolvent as defined in article 228 of the Employment Rights (NI) Order 1996.

### 19.2.2 Insolvency of individuals

Where the employer is an individual, s/he must have been adjudged bankrupt or have made a composition or arrangement with her/his creditors.

### 19.2.3 Insolvency of companies

Where the employer is a company, it will be treated as insolvent if:

- winding-up order or an administration order has been made or a resolution for voluntary winding up has been passed with respect to the company;
- a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge of any property of the company comprised in or subject to the charge; or
- a voluntary arrangement proposed in the case of the company for the purposes of Part II of the Insolvency (NI) Order 1989 has been approved.

#### 19.2.4 Insolvency of limited liability partnerships

Where the employer is a limited liability partnership it will be treated as insolvent if:

- winding-up order or an administration order has been made or a resolution for voluntary winding up has been passed with respect of the limited liability partnership;
- a receiver or a manager of the undertaking of the limited liability partnership has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge of any property of the limited liability partnership comprised in or subject to the charge; or
- a voluntary arrangement proposed in the case of the limited liability partnership for the purposes of Part II of the Insolvency (NI) Order 1989 has been approved under that Part.

## 19.3 Payment of redundancy payments by DfE

An employee can recover a redundancy payment from DfE even if the employer is not insolvent.

Where the whole or part of a statutory redundancy payment remains unpaid an employee can apply to DfE for payment if either:

- the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has only paid part and refused to pay the balance; or
- the employer is insolvent.

'Legal proceedings' as set out above does not include proceedings before the industrial tribunal. Where the employer is not insolvent, the employee must have a decision from the industrial tribunal confirming entitlement to a redundancy payment in order to then claim the payment from DfE.

There are no time limits set out in the legislation within which the payment can be claimed from DfE. However, caselaw indicates that an employee of an insolvent employer should make her/his claim for a redundancy payment to the employer and to

DfE within the time limits prescribed for claiming a redundancy payment. Therefore, if the employee is out of time for claiming against the employer, DfE will not be liable for a redundancy payment.

## 19.4 Other debts payable by DfE

If, on an application to DfE in writing by an employee, DfE is satisfied that:

- the employee's employer has become insolvent;
- the employee's employment has been terminated; and
- on the appropriate date the employee was entitled to be paid the whole or part of any applicable debt (specified below),

DfE will pay the employee out of the Northern Ireland National Insurance Fund an amount which in the opinion of DfE the employee is entitled to.

The relevant applicable debts are as follows:

- any arrears of pay (subject to the statutory weekly limit) in respect of not more than eight weeks;
- any amount which the employer is liable to pay for a period of statutory notice (subject to the statutory weekly limit);
- any holiday pay or accrued holiday pay (subject to the statutory weekly limit) to which the employee became entitled during the previous twelve months (not exceeding six weeks' holiday pay or accrued holiday pay);
- any basic award of compensation for unfair dismissal;
- any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk.

In relation to notice pay, only an amount for actual loss suffered will be paid. Therefore, if an employee received social security benefits or pay from another job, this will reduce the amount payable by DfE. The employee is under a duty to mitigate her/his loss by looking for work and claiming the social security benefits to which s/he is entitled.

It should be noted that where the amount of the debt is referable to a period of time, the total amount payable in respect of the debt may not exceed the statutory limit for any one week (currently £500 from March 2016). Thus, for example under the 2016 statutory limit, if an employee is owed two weeks' notice pay and is normally paid £510 per week, her/his claim will be limited to £500 for each of the two weeks.

It should also be noted that in relation to wages or holiday pay, an amount equal to tax and national insurance contributions which would have been payable in the ordinary course should be deducted after the statutory cap has been applied. For higher earning individuals, the tax which would normally be applicable to their weekly salary will significantly reduce the final amount they receive.

## 19.5 How to apply to DfE

If proper notice is not received, Form IP2, obtainable from the Redundancy Payments Service of the Department for the Economy (DfE), should be completed and forwarded to DfE as soon as the statutory notice period has ended. For payments other than notice, Form RP1, obtainable from the employer's representative (ie the receiver, liquidator or trustee) should be forwarded to the Redundancy Payments Service of DfE.

## 19.6 Complaints to an industrial tribunal

An employee who has applied for a payment from DfE may present a complaint to an industrial tribunal if DfE fails to make any payment, or if any payment that has been made by DfE is less than what should have been paid. When completing the application Form ET1, the respondent should be named as '*Department for the Economy'.* The complaint to a tribunal must be made within three months of the date from which DfE communicates its decision to the employee. The tribunal can extend this time limit if it is not satisfied that it was not reasonably practicable for the complaint to be presented within three months.

If the industrial tribunal finds that DfE ought to make a payment, the tribunal will make a declaration to that effect and declare the amount of any payment that it finds DfE ought to make.

## 19.7 Preferential debts

Where an employee of an insolvent employer has not been able to obtain all money owed by her/his employer from DfE (either because the amount claimed goes beyond the statutory limit or because it is not a debt which DfE can pay), the only recourse is as a creditor in the winding up or the distribution of a bankrupt's estate.

In a winding up of a company or in the distribution of a bankrupt's estate certain 'preferential' debts are to be paid in priority to other debts. Preferential debts rank equally with each other after the expenses of the winding up or bankruptcy have been paid in full.

If the assets of a company or the realisation of a bankrupt's estate are insufficient to pay general creditors, the preferential creditors are to be paid first in equal proportions.

### 19.7.1 Preferential debts concerning employees

Remuneration payable to an employee in respect of the four-month period before the insolvency of the employer is treated as a preferential debt. Such remuneration payable to an employee will include the following:

- a guarantee payment;
- a payment for a medical suspension;

- a payment for time off work on trade union duties, or to look for other work during redundancy notice, or for time spent having ante-natal care;
- a protective award;
- wages or salary (including commission);
- accrued holiday pay;
- remuneration payable in respect of absence from work due to sickness.

Any monies which are not treated as a preferential debt may still be paid if there are sufficient monies available after preferential debts have been paid.

# 20. TRANSFER OF UNDERTANKINGS

This section deals with the rights of employees when the ownership of a business is transferred from one employer to another or where responsibility for providing a service transfers from one employer to another. The definition of 'employee' for these purposes is wider than that contained in the ERO and may include, for instance, some workers.

Where an undertaking or business is transferred from one to another, the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply. Where a contract relating to the provision of services is transferred, the Service Provision Change (Protection of Employment) Regulations (NI) 2006 apply. For the purposes of this brief summary, both regulations will be referred to collectively as TUPE.

The law surrounding TUPE is very complex and this section is intended only as a very brief overview. In any situation where TUPE may apply, expert legal advice should be obtained.

## 20.1 Transfer of undertaking

A business transfer occurs when there is a change of ownership of an economic entity which retains its identity.

An economic entity is an organised grouping of resources which has the objective of pursuing an economic activity. In many cases it will be clear that there is an organised grouping of resources pursuing an economic activity. For example, if a factory is sold the subject of the sale will most likely include tangible and intangible assets: premises, machinery, customers, goodwill etc.

A change of ownership can occur between both public and private undertakings engaged in economic activities regardless of whether or not they are operating for gain.

A share transfer alone will not constitute a transfer under TUPE (but a share transfer may also involve a transfer of business which would come under TUPE). An administrative reorganisation of public administrative authorities or the transfer of

administrative functions between public administrative authorities is not a transfer for TUPE. So, for example, the Review of Public Administration in Northern Ireland does not fall within TUPE (although the government has decided that TUPE should be effectively deemed to apply.)

It is not necessary for there to be a transfer of property for TUPE to apply. Therefore the grant, termination, surrender or assignment of a lease can be a TUPE transfer. So if the tenant of, for example, a pub or a petrol station changes (either reverting back to the landlord or to another tenant) and it continues to be run as the same business, the employees working there will also transfer.

The economic entity transferred must retain its identity. Simply speaking, if, for example, a shoe shop is sold and continues to operate as a shoe shop, TUPE will apply (assuming all other relevant TUPE conditions are fulfilled). However, if a shoe shop is sold and the new owner decides to start trading as a butcher's shop, TUPE will not apply.

Complications in TUPE can arise for many reasons. However, problems in particular arise where there has been only a partial transfer of a business, where there is an interruption in activities before or after transfer, where the business is fragmented after transfer or where there is a change in the nature of the business post-transfer.

## 20.2 Service provision change

A service provision change will involve either:

- contracting out of activities from a client to be carried out on the client's behalf to a contractor;
- reassignment of activities carried out on behalf of a client from the original contractor to a subsequent contractor; or
- assignment of work in-house (regardless of whether or not the services were previously carried out by the client before).

The regulations only apply if immediately before the service provision change:

- there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the activities concerned on behalf of the client; and
- the client intends that the activities will, following the service provision change, be carried out by the transferee, other than in connection with a single specific event or task of short-term duration; and
- the activities concerned do not consist wholly or mainly of the supply of goods for a client's use.

Typically, a service provision change might involve the transfer of a cleaning contract by a hospital from one cleaning company to another. It would be unlikely to cover a

transfer of a contract for the provision of security at a music festival (as this is a one off event of short duration).

As with a business transfer, complications in relation to service provision change can arise for many reasons. Problems in particular may arise where a contract is transferred to a number of different parties or where there is a change in the nature of the contracted work post-transfer.

## 20.3 Effect of TUPE

The regulations provide that contracts of employment and employment rights of all employees engaged in an undertaking or business immediately before it is transferred to a new owner are automatically transferred to the new proprietor unless the affected employee objects.

The same applies to all employees assigned to a contract immediately before the transfer of that contract.

The regulations apply both to a person employed immediately before the transfer and to a person who would have been so employed if s/he had not been dismissed by reason of the transfer or for a reason connected to the transfer. Thus an employer cannot seek to evade the TUPE regulations by dismissing employees before the transfer takes place. In such circumstances, the employees will be deemed covered by the TUPE regulations.

The new proprietor/contract principal automatically becomes employer of those employees on the same terms and conditions as before, subject to some exceptions, for example, occupational pension scheme membership.

An employer is not allowed to vary an employee's contract of employment if the sole or main reason for the variation is a TUPE transfer or is connected to the transfer. In such circumstances, an employer is not permitted to vary the terms and conditions of any employees affected by the transfer to their detriment so as to harmonise them. It is arguable that a variation of contract in relation to a TUPE transfer where such variation is to the benefit of the employee may be permissible. Also, special rules apply where the transfer is from an insolvent transferor (see below).

All rights, powers, duties and liabilities of the transferor under or in connection with such contracts also transfer. This means that the new employer inherits liability for any acts or omissions of the old employer and thus can be liable for claims of discrimination, personal injury, health and safety breaches and breaches of statutory rights (eg rights under the WT Regulations, minimum wage, maternity rights etc) which employees might have had against their old employer. The transferee can also be liable in unfair dismissal which will be considered below.

## 20.4 Contract variations permitted by TUPE

There are limited circumstances when employees' terms and conditions can be varied where a TUPE transfer has occurred. These are variations:

- by reason of an economic, technical or organisational reason entailing changes in the workforce (ETO reason); and
- variations agreed with the purpose of safeguarding jobs by ensuring the survival of an insolvent organisation.

For either of these exceptions to apply there needs to be careful consideration given to the circumstances of the case.

In relation to the ETO exception, the change must be either a change in the numbers of the overall workforce or a change in the functions of members of the workforce. An example may be where, as a result of a transfer, an organisation needs to reorganise senior management (perhaps due to duplication of roles or the need to rationalise functions) by merging roles, creating new positions etc.

In relation to variations in the insolvency context, the objective of agreeing the variation must be to safeguard jobs by ensuring the survival of the undertaking.

'Relevant insolvency proceedings' are those:

> '*which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.*'

It is generally accepted that a company's voluntary arrangements and an administrative receivership will fall under this definition and case law has now confirmed that administration also does.

## 20.5 Unfair dismissal and TUPE

The following types of dismissal claims can arise in relation to TUPE:

- automatic unfair dismissal;
- unfair dismissal in relation to an ETO reason;
- 'ordinary' unfair dismissal;
- constructive dismissal;
- material detriment dismissal.

Unfair dismissal claims can only be brought by employees who satisfy the narrow definition of employee in the ERO (see 1.1).

### 20.5.1 Automatic unfair dismissal

A dismissal will be automatically unfair if the sole or main reason for it is a TUPE transfer or a reason connected with a TUPE transfer that is not an ETO reason (see 20.4 for discussion of ETO reasons). This protection applies not only to employees of the transferor but also to employees of the transferee if they are dismissed by reason of or for a reason connected to the transfer.

To qualify for protection from TUPE related dismissals, an employee must have at least one year's service. This is in contrast to most other claims for automatic unfair dismissal where no qualifying period is required.

### 20.5.2 Unfair dismissal in relation to an ETO reason

A dismissal for an ETO reason may constitute a fair dismissal on grounds of redundancy or some other substantial reason. However, if the decision to dismiss was not reasonable in the circumstances and/or if fair procedures were not followed then dismissal for an ETO reason may be unfair.

### 20.5.3 Ordinary unfair dismissal

If an employee is dismissed for a reason wholly unconnected to the TUPE transfer the normal rules of unfair dismissal will apply.

### 20.5.4 Constructive dismissal

An employee can claim constructive dismissal in relation to a TUPE transfer if there has been a repudiatory breach of contract by the employer (see section 16.4.7 on constructive dismissal).

### 20.5.5 Material detriment dismissal

Where a TUPE transfer involves or would involve a substantial change in working conditions to the material detriment of an employee, s/he can bring a claim for unfair dismissal.

To bring such a claim under the TUPE regulations the employee does not need to show that there has been a breach of contract. All that needs to be shown is a substantial change in working conditions which cause material detriment. 'Working conditions' is a broad concept and could cover a wide range of circumstances beyond an employee's contractual terms and conditions. The inclusion of the words 'substantial' and 'material detriment' would rule out trivial changes but previous caselaw indicates that detriment does not need to be a 'physical or economic' consequence.

It is clear that a claim of material detriment dismissal should be easier to bring than a traditional constructive dismissal claim but just how much easier such a claim is will have to be clarified by the courts.

### 20.5.6 Who to sue for unfair dismissal?

As outlined above, the TUPE regulations are deemed to apply to employees dismissed before the transfer by reason of or for a reason connected to the transfer. Accordingly, liability for employees dismissed prior to a transfer will normally pass to the transferee.

However, there are circumstances where the transferor could retain liability, or example, if an employee objects to a transfer and resigns on the grounds of material

detriment. Alternatively, if an employer dismissed an employee prior to a TUPE transfer for a reason wholly unconnected to the transfer, liability for such dismissal would not pass to the transferee.

Careful consideration needs to be given in each case as to who proceedings should be brought against. There may be real doubt as to who is potentially liable. In the example given in the paragraph above of an 'ordinary' unfair dismissal claim, it might not be clear to the employee whether the dismissal was related to the TUPE transfer or not. In such circumstances it would be essential to name both transferor and transferee as respondents in order to protect the employee's position.

Legal advice should be sought if there is any doubt over who may be liable for a dismissal.

## 20.6 Duty to inform and consult employees

The TUPE regulations impose an obligation on both the transferor and transferee to inform and consult appropriate representatives of employees who may be affected by the transfer.

The duty to inform requires the employer to provide employees with certain basic information *'… long enough before a relevant transfer to enable the employer of any affected employees to consult…'*. The basic information required is:

- the fact that transfer is to take place;
- the date of the transfer;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for any affected employees;
- the measures that the employer envisages s/he will take (or if no measures are envisaged, confirmation of that);
- where the employer is the transferor, the measures which s/he envisages the transferee will take.

There are detailed provisions governing the election of appropriate representatives. However, if there are no appropriate representatives, the employer must still provide individual employees with the above information.

A duty to consult only arises where 'measures' are envisaged. 'Measures' is not defined but it has been held that minor changes in the administrative arrangements of employees' pay were measures which triggered the duty to consult. Consultation should take place '*with a view to seeking agreement'*.

The regulations do not set out a timescale for consultation but it would appear that consultation should be completed prior to transfer. Given that the aim of consultation is with a view to seeking agreement, it may be difficult for an employer to justify last minute consultation on measures.

Failure to properly inform and consult can lead to a claim to an industrial tribunal, which must be brought within three months of the date of the transfer. The tribunal can award up to thirteen weeks' gross pay to each affected employee. Where a union or employee representative is involved, then s/he must bring the claim on the employees' behalf.

## 20.7 TUPE and insolvency

Insolvency of the transferor may have a significant impact on the application of the TUPE regulations to the transfer. Set out below is a very brief summary of the key implications that insolvency may have. However, it should not be assumed that any of the provisions referred to apply simply because a transferor is in financial difficulty. There are specific criteria to be fulfilled in order for a particular provision of the TUPE regulations to apply. Accordingly, specialist legal advice should always be sought in relation to insolvency.

### 20.7 1 Disapplication of certain TUPE provisions

The key provisions of the TUPE regulations (for example protection from dismissal and automatic transfer of terms and conditions of employment) will not apply if the transferor is subject to insolvency procedures *instituted with a view to liquidating the transferor's assets*. There was some doubt as to whether or not administration constituted such insolvency procedures but case law has now clarified that it does not. Further, case law indicates that the insolvency proceedings have to have commenced before the transfer takes place.

Accordingly, if a company goes into compulsory liquidation prior to a transfer, the transferor may dismiss its employees before the transfer and such dismissal will not constitute an automatic unfair dismissal.

### 20.7.2 Variation of terms and conditions of employment

Where the transferor is subject to 'relevant insolvency proceedings', it may be possible for terms and conditions of transferred employees to be varied (see 20.4 above).

### 20.7.3 Non-transfer of debts

Where the transferor is subject to 'relevant insolvency proceedings' (see 20.4 above) certain debts (eg statutory redundancy payments, unpaid wages or holiday pay) will not transfer to the transferee. Rather, these debts will be paid by the Redundancy Payments Service.

# 21. BRINGING A CLAIM

Overall responsibility for industrial tribunals and employment law rests with the Department for the Economy (DfE). Day to day responsibility for the running of the industrial tribunals is administered by a president (Ms McBride) who is assisted by a vice president (Mr Kelly).

The Office of Industrial Tribunals is situated at Killymeal House, 5 Cromac Quay, Ormeau Road, Belfast BT7 2JD. All documents and correspondence should be addressed to this office.

## 21.1 How and where to bring a claim

Industrial tribunals are the principal venue for adjudicating on disputes in employment law.

The aim of setting up the tribunal system was to provide an informal venue where decisions could be quickly granted and each party could be represented in person. However, the increase in statutory rights created by domestic and EC legislation has meant that the law governing the employment relationship has become more complex. This has made it difficult in practice for a person to effectively present a case without legal representation.

**Unlike in England and Wales, in Northern Ireland there are no fees applicable to any part of the Industrial Tribunal process.**

## 21.2 Legal aid

Legal aid is available under the Green Form Scheme but only for advice and assistance of up to two hours unless an extension is granted by the Legal Services Commission (formerly the Legal Aid Department). It is not normally available for representation in an industrial tribunal. Therefore, individuals must normally pay for legal representation themselves unless a trade union, the Equality Commission or some other organisation is prepared to meet the costs of or provide legal representation.

The terms of any household or other insurance policy are worth checking as occasionally these can cover the costs of an industrial tribunal case. This is provided the terms of the policy are adhered to, for instance in relation to seeking the authority of the insurance company in advance of any claim.

## 21.3 Rules of procedure

Industrial tribunals are constituted under the Industrial Tribunals (NI) Order 1996. The rules of procedure governing conduct up to and during the hearing are now contained in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005. Schedule 1, known as the Industrial Tribunals Rules of Procedure, is the set of rules

which is applicable to most claims. (Note that DEL has recently completed a consultation period on a new set of Rules intended to replace the current legislation.)

The tribunal is not subjected to any formal rules of evidence and is required to seek to avoid formality. However, by convention, certain formalities do exist in tribunals. For instance, the usual procedure is for a party on whom the burden of proof rests to open the case. For example, in unfair dismissal cases, the employer has to prove the reason for dismissal and should go first. The opening party normally then gives evidence and is cross-examined and calls her/his witnesses who are also cross examined. The other party then does likewise, before making a closing speech. The party who opened then normally makes a closing speech.

## 21.4 The claim form

A person wishing to start a claim (the claimant) must present a claim to the Office of the Industrial Tribunals. There is no fee payable to the tribunal office for lodging the claim form

A form ET1 should be used to present a claim to an industrial tribunal. It can be obtained from a local Jobmarket or the Office of Industrial Tribunals. It is possible to submit an ET1 online at **www.employmenttribunalsni.co.uk**.

## 21.5 Time limits

All claims to the industrial tribunal must be presented within a specific time. For instance, in a case of unfair dismissal, the case must be with the Office of Industrial Tribunals within three months of the effective date of termination of employment.

Almost all claims referred to in these notes will have to be lodged within three months of the matter complained about. Exceptions include claims of equal pay (six months), redundancy pay (notice to employer or other action within six months) and some claims of discrimination on grounds of religious belief or political opinion.

If the claim is not presented within the prescribed time limit, the tribunal cannot consider the claim unless it can be persuaded to exercise the limited discretion granted by statute to extend time. The tribunal rarely extends time unless there is a very good reason to. Extension of time can be easier to argue for in claims of discrimination, where the legal test is different, but it will remain difficult to persuade the tribunal to do so.

## 21.6 The response

When the claim is received by the tribunal, it is entered in a public register. A copy is then forwarded, together with a standard Form ET2, to the respondent with an enclosed blank response, Form ET3.

If the respondent wishes to defend the application, s/he must complete and return the response within 28 days of being sent a copy of the claim, setting out on what grounds s/he intends to resist the claim.

## 21.7 Conciliation

The claim and response are copied to the Labour Relations Agency (LRA).

The LRA is granted power under the Industrial Relations (NI) Order 1992. Its duties are to promote the improvement of industrial relations. The LRA has officers (known as Conciliation Officers) who seek to conciliate between the applicant and respondent if so requested. Anything said to a Conciliation Officer cannot be disclosed to the tribunal without the consent of the person issuing the communication.

Most claims are settled after involvement of a Conciliation Officer and relatively few proceed to hearing.

## 21.8 Management of proceedings and interlocutory matters

An industrial tribunal can make various orders in advance of a hearing to allow clarification of any issues in the claim or response. An industrial tribunal can make an order on the application of a party or of its own motion.

Under the 2005 Rules, a tribunal has wide powers to manage the progress of cases by giving directions and setting timetables.

Examples of orders which may be made are orders:

- as to the manner in which proceedings are to be conducted, including any time limit to be observed;
- that a party provide additional information and/or discovery of documents;
- requiring the attendance of any person in Northern Ireland to give evidence and to produce documents or information;
- requiring the provision of written answers to questions put by the tribunal;
- that a witness statement be prepared or exchanged;
- as to the use of experts or interpreters in the proceedings.

It is common for parties to make requests for both documents ('discovery') and further information from each other, in order to get all the relevant written evidence and to get a clearer idea of what the case against them is.

## 21.9 Notice of hearing

The date of the hearing must be sent at least fourteen days in advance to the parties by the Office of Industrial Tribunals. In practice, the tribunal nearly always gives much greater notice than this.

A tribunal has discretion to postpone a hearing but there is no automatic right to a postponement, even if both parties agree, and the tribunal may be reluctant to do so.

## 21.10 Preparation of bundles

Often, documentary evidence will need to be placed before the tribunal. For instance, the claimant may wish to rely on a term in the contract of employment or to produce evidence of jobs applied for, earnings and social security benefits claimed since the loss of employment.

It is helpful to produce a written index listing documents to be relied on for ease of reference during the tribunal hearing.

Normally, at least five copies of the documents to be relied on should be produced. These are for the witness, the three members of the tribunal panel and the opponent's representative.

## 21.11 The hearing

Many, although not all, hearings are heard in the Office of Industrial Tribunals at Killymeal House, 2 Cromac Quay, Ormeau Road, Belfast BT7 2JD .

There, the parties sit with their representatives at a large table in modern rooms. At a slightly raised position in front of the table sits the tribunal panel. This is normally comprised of three persons; a legally qualified Judge and two lay members. One of the lay members is chosen from a panel appointed after consultation with organisations representative of employers and the other from a panel appointed after consultation with organisations representative of employees.

Hearings are conducted in public.

Tribunals may sit in private, in certain cases if, in their opinion, evidence of matters is to be given which would be against the interests of national security to be heard in public.

The tribunal may also sit in private where evidence may consist of information:

- which could not be disclosed without a breach of a statutory prohibition; or
- which has been communicated or obtained by a witness in confidence; or
- which, if publicly disclosed, could substantially damage a witness's undertaking for commercial reasons.

## 21.12 Voluntary arbitration

An alternative route for resolving unfair dismissal and flexible working claims is by voluntary arbitration through the LRA.

The scheme was introduced by the Labour Relations Agency (Arbitration) Scheme Order (NI) 2002 which came into operation on 28 April 2002.

Initially the scheme was limited to determination of whether a dismissal is unfair and resolution of disputes regarding flexible working.

From 27 September 2012, under the Labour Relations Agency (Arbitration) Scheme Order (NI) 2012 the current scheme has been extended to cover claims under most jurisdictions including breach of contract, redundancy and discrimination.

Access to the scheme can only be made if both parties agree in writing. There is no power to order a disclosure of documents or attendance of witnesses. The parties are required to submit written statements of the case together with accompanying documentation at least fourteen days before hearing. The hearing is heard in private. Legal representatives can attend but they are not awarded any special status. There is no cross examination. Instead questions can be put through the arbitrator. Decisions made by the arbitrator are binding and have the same effect as those made by a tribunal. Awards made by the arbitrator are confidential.

# 22. FURTHER INFORMATION

The various organisations listed below and in section 23 provide a considerable variety of detailed information material, mostly free, on various aspects of employment law.

Care should be taken because, although the effect of employment law in Northern Ireland is substantially the same as in England and Wales, it is often found in different legislative provisions and does sometimes differ.

| **Site** | **Web address** |
|---|---|
| **MAIN SOURCES OF INFORMATION** | |
| **Law Centre (NI)** | www.lawcentreni.org |
| **Department For Business Innovation and Skills**<br>GB government site with some useful resources for advisers. Comprehensive employment law links. | www.gov.uk/government/organisations/department-for-business-innovation-skills |

| | |
|---|---|
| **Labour Relations Agency**<br>Responsible for providing advice on good employment practices and assistance with the development and implementation of employment policies and procedures. It is also active in resolving dispute through its conciliation, mediation and arbitration services. The website has useful links to current employment legislation and Codes of Practice in Northern Ireland. | www.lra.org.uk |
| The equivalent in Britain is **ACAS.** | www.acas.co.uk |
| **Office of Industrial Tribunals and Fair Employment Tribunals**<br>Independent judicial bodies which hear and determine complaints under various aspects of employment protection legislation in Northern Ireland. The site now carries tribunal decisions from January 2007 on. | www.employmenttribunalsni.co.uk |
| **Department for the Economy (DfE)**<br>Government department responsible for employment law in Northern Ireland | www.economy-ni.gov.uk |
| **IDS**<br>Site of the well known employment publishers. Some useful material but subscription required for full access | www.incomesdata.co.uk |
| **EMPLAW**<br>Employment law website with some useful free content. Subscription required for full access | www.emplaw.co.uk |

| | |
|---|---|
| **Employment Appeal Tribunal**<br>Useful resource of GB employment case law | www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/employment-appeals |
| **Equality Commission**<br>Site of Northern Ireland anti discrimination authority | www.equalityni.org |
| **Northern Ireland legislation** | www.legislation.gov.uk/browse/ni |
| **Employment caselaw**<br>N. Ireland Industrial Tribunal decisions | www.bailii.org/recent-decisions-nie.html#nie/cases/NIIT |
| **Information Commissioner's Office**<br>Responsible for ensuring organisations are processing data in line with statutory obligations | www.ico.gov.uk |
| **OTHER WEBSITES - based in Great Britain but useful in describing how similar provisions in Northern Ireland work.** | |
| **National minimum wage** | Government services and information<br>www.gov.uk/browse/working/tax-minimum-wage |
| **Working time regulations and holidays** | Government services and information<br>**www.gov.uk/browse/working/time-off** |
| **Working parents**<br>Maternity, paternity, flexible working etc | 1. Government services and information<br>www.gov.uk/maternity-benefits<br>2. Working Families<br>www.workingfamilies.org.uk |
| **Part time workers** | Government services and information<br>www.gov.uk/part-time-worker-rights |
| **Fixed term workers** | www.gov.uk/fixed-term-contracts |
| **Discrimination and equal pay**<br>Equal Opportunities Commission (EOC), now under Equality and Human Rights Commission | 1. England<br>www.equalityhumanrights.com/your-rights<br>2. Scotland<br>www.equalityhumanrights.com/scotland<br>3. Wales<br>www.equalityhumanrights.com/wales |

| | |
|---|---|
| **Whistleblowing, public interest disclosures** | www.pcaw.co.uk |
| **OTHER USEFUL SITES** | |
| Her Majesty's Revenue & Customs | www.hmrc.gov.uk |
| **Advice NI**<br>Association of independent advice centres in Northern Ireland | www.adviceni.net |
| **Citizens Advice**<br>Northern Ireland Association of Citizens Advice Bureaux | www.citizensadvice.co.uk |
| **Northern Ireland Human Rights Commission** | www.nihrc.org |
| **Northern Ireland Ombudsman** | www.ni-ombudsman.org.uk |
| **The Pensions Regulator** | www.thepensionsregulator.gov.uk |
| **Parliamentary and Health Service Ombudsman** | www.ombudsman.org.uk |
| **Law Society of Northern Ireland** | www.lawsoc-ni.org |
| **Northern Ireland Assembly** | www.niassembly.gov.uk |

# 23. LEGISLATION

**The Employment Rights (NI) Order 1996**

**The Shops (Sunday Trading & c.) (NI) Order 1997**

**The Working Time Regulations (NI) 1998**

**The National Minimum Wage Act 1998**

**The National Minimum Wage Regulations 1999**

**The Public Interest Disclosure (NI) Order 1998**

**The Public Interest Disclosure (Prescribed Persons) Amendment Order (NI) 2014**

**The Employment Relations (NI) Order 1999**

**The Employment Relations (NI) Order 2004**

**The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000**

**The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (NI) 2002**

**The Employment (NI) Order 2002**

**The Health and Safety at Work (NI) Order 1978**

**The Statutory Sick Pay (General) Regulations (NI) 1982**

**The Statutory Sick Pay (Medical Evidence) Regulations (NI) 1985**

**The Management of Health and Safety at Work Regulations (NI) 2000**

**The Maternity and Parental Leave etc Regulations (NI) 1999 (as amended)**

**The Statutory Maternity Pay (General) Regulations (NI) 1987 (as amended)**

**The Paternity and Adoption Leave Regulations (NI) 2002**

**The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (NI) 2002**

**The Work and Families (NI) Order 2006**

**The Employment Rights (Time Off for Study or Training) (NI) Order 1998**

**The Industrial Tribunals (NI) Order 1996**

**Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005**

**Fair Employment Tribunal (Rules of Procedure) Regulations (NI) 2005**

**The Labour Relations Arbitration Scheme Order (NI) 2002**

**The Flexible Working (Procedural Requirements) Regulations (NI) 2003**

**The Flexible Working (Eligibility, Complaints and Remedies) Regulations (NI) 2003**

**The Employment (NI) Order 2003**

**The Employment (NI) Order 2003 (Dispute Resolution) Regulations (NI) 2004**

**The Disability Discrimination Act 1995**

**The Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004**

**The Disability Discrimination (Meaning of Disability) Regulations 1996**

**Employment Rights (Increase of Limits) Order (NI) 2015**

**The Sex Discrimination (NI) Order 1976 (as amended)**

**Equal Pay Act (NI) 1970**

**Equal Pay (Questions and Replies) Order (NI) 2004**

**The Disability Discrimination (Questions and Replies) Order (NI) 2004**

**Employment (NI) Order 2003 (Dispute Resolution) Regulations (NI) 2004**

**Transfer of Undertakings (Protection of Employment) Regulations 2006**

**The Service Provision Change (Protection of Employment) Regulations (NI) 2006**

**Fair Employment and Treatment (NI) Order 1998**

**Race Relations (NI) Order 1997**

**The Employment Equality (Sexual Orientation) Regulations (NI) 2003**

**The Employment Equality (Age) Regulations (NI) 2006**

**The Employment Act (NI) 2011**

**Pensions (No.2) Act (Northern Ireland) 2008**

**The Children (Northern Ireland) Order 1995**

**The Agency Worker Regulations (NI) 2011**

**The Work and Families Act (Northern Ireland) 2015**

**The Paternity and Adoption Leave (Amendment) Regulations 2015**

**The Shared Parental Leave Regulations (Northern Ireland) 2015**

**The Statutory Shared Parental Pay (General) Regulations (Northern Ireland) 2015**

**The Maternity and Parental Leave etc (Amendment) Regulations (Northern Ireland) 2015**

**The Flexible Working Regulations (Northern Ireland) 2015**

**The Time Off to Attend Adoption Appointment (Prospective Adopters) Regulations (Northern Ireland) 2015**

**The Working Time Regulations (Northern Ireland) 2016**

**Employment Act (Northern Ireland) 2016**

# 24. USEFUL CONTACTS

### Labour Relations Agency

Head office
2-8 Gordon Street, Belfast, BT1 2LG
Tel: 028 9032 1442
Fax: 028 9033 0827

Regional office
1-3 Guildhall Street
L'Derry BT48 6BB
Tel: 028 7126 9639
Fax: 028 7126 7729

### Office of the Industrial Tribunals and Fair Employment Tribunal

Killymeal House, 2 Cromac Quay
Tel: 028 9032 7666

Belfast BT7 2JD Fax: 028 90250100

**Equality Commission Northern Ireland**

Equality House, 7-9 Shaftesbury Square Tel: 028 9050 0600
Belfast BT2 7DP Fax: 028 90248687

**Department for the Economy**

Adelaide House, 39-49 Adelaide Street Tel: 028 9025 7777
Belfast BT2 8FD

Redundancy Payments Service Tel: 0800 585 811

Industrial Relations Division Tel: 028 9025 7777

**Health & Safety Executive (Promotion of Health & Safety)**

83 Ladas Drive, Belfast, BT6 9FJ Tel: 028 9024 3249

**Irish Congress of Trade Unions** Tel: 028 90247940

**UK Pay and Work Rights Helpline** Tel: 08009172368

**Her Majesty's Revenue & Customs Employers' Helpline** Tel: 0300 1231100

**Information Commissioner (Data Protection)** Tel: 016 2554 5745

**Certification Officer**

10-12 Gordon Street, Tel: 028 90 237773
Belfast BT1 2LG

**Industrial Court** (A tribunal whose main function is to adjudicate on applications relating to statutory recognition and derecognition of trade unions for collective bargaining purposes.)

Second Floor, Adelaide House, Tel: 028 9025 7599
39-49 Adelaide Street, Belfast BT2 8FD Fax: 028 9025 7555

**The Pensions Regulator** Tel: 0870 6063636
Napier House, Trafalgar Place,
Brighton BN1 4DW

**Law Centre (NI)**

Central Office Tel: 028 9024 4401

124 Donegall Street, Belfast BT1 2GY

Western Area Office Tel: 028 7126 2433
9 Clarendon Street, L'Derry BT48 7EP

The Law Centre operates an advice line, open to member agencies from 9.30 am to 1.00 pm, Monday to Friday.