

W4MP Guide: Employment Rights

This guide aims to provide a basic outline of the main employment rights issues that are relevant to staff who are responsible for recruiting new staff, employees of MPs who want to know their rights, and caseworkers who need to help a constituent with an employment issue. Given the breadth of the guide, it should be apparent that each section is an outline only and does not contain a great deal of detail.

The guide is NOT intended to provide you with legal advice in the event of a dispute (and has not been written by a qualified lawyer). If a problem arises, you should contact ACAS (the employment relations service)

<http://www.acas.org.uk/index.aspx?articleid=1461> , your Trade Union Representative if you have one, the Citizens Advice Bureau or a qualified employment lawyer.

Contents

Given the length of the guide, the following explanation of each section should help you decide whether it is relevant to you. However, if you have time, it is worth reading the whole guide as some of the points are interlinked.

1. **Employment Rights - Basics:** an explanation of the difference between statutory, contractual, express and implied terms in contracts. A useful starting point for all.
2. **Written Particulars** - an explanation of the obligation on employers to provide employees with certain key terms. Useful for those who are responsible for recruitment of staff as they should ensure the terms are provided to the new employee. Also useful for caseworkers who may wish to check that a constituent who has an employment problem was provided with the correct terms at the start of their contract.
3. **Termination of Employment** - an explanation of the different methods by which employment may be terminated. This is a very important section as it covers the statutory minimum notice period which, if breached, can result in an action for wrongful dismissal. Useful for people who are drafting employment contracts or thinking about dismissing an employee, or for employees who have been dismissed. Also useful for caseworkers who are contacted by a constituent who has been dismissed.
4. **Wrongful Dismissal** - an explanation of what constitutes a wrongful dismissal. Useful for everyone to understand.
5. **Unfair Dismissal** - an explanation of what constitutes unfair dismissal. Useful for everyone to understand.
6. **Statutory Disciplinary, Dismissal and Grievance Procedure** - an explanation of the minimum procedure which must be followed. Useful for anyone wishing to lodge a grievance or discipline an employee.
7. **Redundancy** - an explanation of what constitutes a genuine redundancy. Mainly useful for caseworkers dealing with constituents who have been made redundant.
8. **Family Friendly and Worker Protection Provisions** - an explanation of some of the key rights regarding the Working Time Regulations, Maternity and Paternity rights and Flexible Working. A useful section for all.
9. **Discrimination** - an explanation of what constitutes discrimination. Useful for caseworkers who suspect a constituent has been unlawfully discriminated against or for those who suspect they may be being unlawfully discriminated against.

1. Employment Rights - Basics

Broadly speaking there are two types of employment rights - statutory and contractual. Statutory rights might be particular to individuals, such as protection against unlawful discrimination, or 'collective rights', for example, union recognition where there is sufficient support. Contractual rights stem from contracts of employment - some of these rights will be express terms (they are expressly stated at the interview or in writing) but sometimes the court will imply terms (such as the duty of care).

2. Written Particulars

As outlined in the previous section, not all employment rights are written down. However, an employer has an obligation to provide employees with a statement of written particulars within the first two months of employment. If an employer fails to supply the written particulars the employee can apply to the Employment Tribunal who may determine what should have been contained in the written statement. The key matters to be contained in the written particulars include (but are not limited to)¹:

- the names of the employer and employee*;
- the date when the employment began*;
- the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period)*;
- the scale or rate of remuneration or the method of calculating remuneration*;
- the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals)*;
- any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours)*;
- any terms and conditions relating to any of the following—
 - (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated)*,
 - (ii) incapacity for work due to sickness or injury, including any provision for sick pay, and
 - (iii) pensions and pension schemes,
- the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;
- the title of the job which the employee is employed to do or a brief description of the work for which he is employed*;

¹ s1 Employment Rights Act 1996

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- where 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;
- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer*; and
- any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made.

NB - The points with an asterisk by them are all to be included in a single document.

If there are no particulars to be provided under any of the above points, this fact must be stated in the contract. In addition, there is no requirement to provide particulars to employees whose employment continues for less than one month. Employment contracts usually have many more terms and conditions than those specified above - they should be seen as the bare minimum.

3. Termination of Employment

Contracts of employment usually contain a provision which enables either party to terminate the contract by giving notice. In addition, there is a substantial amount of legislation giving employees statutory rights, including rights to minimum notice on termination and protection against unfair dismissal. Therefore, when looking at termination of employment, either by dismissal or resignation, there are two aspects which must be considered: first, whether the termination has been contractually lawful (i.e. without a breach of any term of the employment contract) and second, whether the termination contravenes any legislation.

If there is a contractual breach on termination, for example failing to give the required contractual notice, a breach of contract will have occurred and the offended party may bring an action for wrongful dismissal (see below). If a dismissal occurs in contravention of a statutory right the dismissal may be unfair and an employee would be entitled to apply to an employment tribunal claiming unfair dismissal (see below).

There are a number of different methods by which employment may be terminated, not all of them contentious, but the following are the most relevant:

Mutual agreement:

This is where both parties agree to end the contract.

Expiry of a fixed term contract without renewal:

There are 3 types of fixed term contract - i) a contract for a set period, ii) a contract for a specific project, and iii) a contract terminating on a specific occurrence. It is worth noting that employees who have been employed under a series of fixed term contracts for four years or more will automatically become permanent employees unless continuing the fixed term contract can be objectively justified.

Dismissal on notice:

Either party can terminate the employment contract by giving the other side the period of notice stated in the contract.

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Whatever the contractual provisions, the notice period given by the employer must not be less than the statutory minimum period of notice. If there is no contractual notice period, the statutory minimum period of notice should be used. If the contractual period is longer than the statutory minimum period of notice, the contractual notice period must be used.

The statutory minimum period of notice an employer must give an employee is calculated as follows²:

- Employees continuously employed for more than 1 month but less than 2 years should get 1 week minimum notice period;
- Employees continuously employed for more than 2 years but less than 12 years should get 1 week for each complete year employed; and
- Employees continuously employed for 12 years or more have a cap of 12 weeks minimum notice.

Therefore, the maximum statutory notice period an employee is entitled to is 3 months, unless the contract provides for a longer period. Failure to adhere to the statutory minimum notice period results in the dismissal being wrongful (see below).

Particular care should be taken when drafting notice period clauses because, for example, an employee who has a contract with a one month notice provision could choose to sue their employer for wrongful dismissal if they worked for the employer for 5 years and were dismissed with only 4 weeks' notice, as they were entitled to 5 weeks' statutory minimum notice.

It is therefore prudent to amend any notice period clause so that the notice period is not a fixed amount of time and instead to tabulate the amount of notice due according to the statutory minimum periods of notice as set out above.

Employee's Notice Obligation

Employees are required to give their employer at least one weeks' notice if employed for one month or more. However, if the contract stipulates that the employee should provide a longer period of notice, the longer period must be adhered to.

Pay in Lieu of Notice Clauses

A PILON (Pay in Lieu of Notice) clause in the contract provides the employer the right to terminate the contract immediately and pay the employee his salary in relation to the notice period. The employment ends on the day the payment is made to the employee. If there is no express PILON clause in the contract, the employer will be in breach of contract if he pays in lieu without consent of the employee.

Summary dismissal by employer (gross misconduct):

'Summary' means without notice. Only if the employee has committed a serious breach of contract (e.g. assaulting a fellow employee, theft or abuse of the internet) is the employer entitled to treat the contract at an end without notice or payment in lieu of notice.

Constructive dismissal:

² s86 Employment Rights Act 1996

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To establish constructive dismissal, the employee asserts that the employer has committed a serious breach of contract that goes to the heart of the employment relationship. This allows the employee to resign and claim dismissal i.e. the employer left him with no alternative than to resign. Although there is no actual dismissal by the employer, the end result is the same. Examples include the employer not paying the employee, sudden demotion for no reason, bullying or harassing the employee. This is very hard to prove and legal advice should be sought before the employee leaves their job.

Genuine resignation:

If an employee genuinely resigns, and has not been constructively dismissed, there is no dismissal. The wording of the resignation must be clear so it is usually best for the employee to confirm it in writing.

4. Wrongful Dismissal

Wrongful dismissal is a claim for breach of contract. If an employer dismisses an employee in breach of the contractual (or statutory minimum, if greater) obligation to provide notice, and the employee has not committed an act of gross misconduct, then the dismissal will be wrongful. Wrongful dismissal claims must usually be brought within 3 months of the date the employment was terminated if pursued in the Employment Tribunal, or 6 years in the courts.

5. Unfair Dismissal

An unfair dismissal occurs when the reason for the dismissal is not one of the six statutory reasons. The six statutorily acceptable reasons for dismissal are:

- Capability - generally falls into three categories: qualifications, illness, incompetence.
- Conduct - generally refers to something which could be improved, whereas capability concerns something more innate.
- Redundancy - this occurs essentially when either the job or place of work goes.
- Statutory illegality - this occurs if the employee could not continue working without contravening a duty or restriction i.e. a bus driver who loses their driving licence.
- Retirement - in order for a dismissal to be considered to be a fair retirement, the employer must follow a statutory retirement procedure which involves giving the employee at least six months notice of retirement and considering any request to work past retirement.
- Some Other Substantial Reason - this is a catch all category which may include, for example, the dismissal of an employee who was taken on as temporary maternity leave cover or the dismissal of a person who has been imprisoned.

An employee no longer needs to work a certain number of hours per week to qualify. However, in most cases, the employee must be able to show that they have one year's continuous employment. The one year qualifying period is not required for dismissals on the grounds of sex, race, sexual orientation, religion or belief, and disability.

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For an employee to bring a claim, they must be able to show there has been a dismissal, either express dismissal by the employer, an expiry of a fixed term contract or constructive dismissal (see above). An unfair dismissal claim must be commenced within 3 months of the dismissal.

'You may have heard of the expression 'automatically unfair dismissal'. It is a colloquial expression used to describe dismissals for certain statutorily specified reasons. If a dismissal is for one of those reasons, the tribunal must find that the dismissal was unfair, although it does have discretion as to how much compensation to award. Some examples of reasons for dismissal which are currently automatically unfair, and **do not** require the one year qualification period, include:

- i. Union membership related dismissals
- ii. Health and safety representative related dismissals
- iii. Dismissals for asserting statutory rights
- iv. Maternity related dismissals
- v. Dismissals for refusal to work over 48 hours
- vi. Dismissal for insisting on being paid the National Minimum Wage

The following examples will also be automatically unfair, but they **do** require the one year qualifying period:

- i. Dismissals following a failure to complete the statutory dismissal and disciplinary procedure where the failure was wholly or mainly attributable to the employer (see below)
- ii. Dismissals for a spent conviction or failure to disclose one.

Please note that particular types of employment (including those working for the police) are expressly excluded from the unfair dismissal provisions set out in the Employment Rights Act 1996.

In short, to be successful in establishing unfair dismissal, the following criteria must be met:

1. The employee must qualify for the right to claim (be employed for at least one year, commence the claim within three months of dismissal and not be within the excluded categories);
2. There must have been a dismissal; and
3. The employer must not be able to rely on one of the six fair reasons for dismissal.

6. Statutory Disciplinary, Dismissal and Grievance Procedures

The Employment Act 2002 (Dispute Resolution) Regulations 2004 sets out a standard three step procedure for both a disciplinary action (instigated by the employer) and a grievance action (instigated by the employee). The three steps are:

1. A **letter** outlining the proposed disciplinary action/grievance.
2. A **meeting** at which the contents of the letter is discussed. The employee has a right to be accompanied at the meeting.
3. An **appeal** procedure allowing for any decision at the meeting to be appealed.

Employers contemplating disciplinary action or dismissal must follow the standard three step procedure. Any dismissal following the employer's failure to follow the disciplinary and dismissal procedure will be automatically unfair.

Employment Tribunals are required to increase or decrease compensation by 10-50 percent where the statutory procedures have not been completed and that failure is attributable to one of the parties.

The Employment Bill 2007-08 removes all statutory procedures and instead gives Tribunals the power to decide whether following the correct procedure would have made any difference to the outcome. If the Tribunal finds that it would have made a difference, the dismissal will usually be deemed unfair, but the tribunal should still reduce the compensation payable. In appropriate cases the reduction may be reduced to nil.

A Tribunal's discretion to increase or decrease any award for failure to follow the statutory procedures will be repealed along with the procedures themselves. Instead, there will be a new discretion for the tribunal to increase or decrease any award of compensation by no more than 25% where an employer or employee fails unreasonably to follow the relevant statutory code.

The Bill had its second reading in July 2008 and is thought to come into force in April 2009. Until this time, the Statutory Disciplinary, Dismissal and Grievance Procedures remain in force.

7. Redundancy

Redundancy is one of the six potentially fair reasons for dismissal set out in the Employment Rights Act 1996 (s98). To be fair, the redundancy must fall within the statutory definition set out in s139 Employment Rights Act 1996 - an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the closure of the business, the closure of the workplace or a diminution in the need for employees. The employer must also show that the selection for redundancy is procedurally fair.

If eligible, the redundant employee is entitled to receive statutory redundancy pay. They could also receive unfair dismissal compensation if the reason and/or procedure is

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unfair. To qualify for statutory redundancy pay, an employee needs to have been continuously employed for 2 years and must bring the claim within 6 months.

8. Family Friendly and Worker Protection Provisions

The Working Time Regulations

The Regulations limit the average weekly working time to 48 hours (although individuals can choose to work longer). They also specify minimum periods of daily and weekly rest. Adult workers are entitled to 11 consecutive hours' rest in each 24 hour period and rest periods of 24 hours in each 7 day period. Where a worker's daily working time is more than six hours, he is entitled during that time to a rest break of no less than 20 minutes.

In addition, the Regulations provide the right to paid annual leave. All workers have the right to 4.8 weeks' paid holiday. This equates to 24 days for a full-time worker. Bank holidays count towards the 4.8 weeks' entitlement and are not additional. From 1 April 2009 this entitlement will increase to 5.6 weeks (28 days for a full time worker).

The Regulations also restrict night workers' average working time to 8 hours per night. Night workers are also to be provided with the opportunity of a free health and safety assessment.

Please note that the Regulations do not apply to genuinely self-employed people.

Maternity Rights

The main statutory maternity rights are as follows:

Paid ante-natal care:

A pregnant woman who has made an appointment for the purposes of ante-natal care on the advice of a registered doctor, midwife or health visitor, must not be unreasonably refused time off during working hours to attend the ante-natal appointment (including relaxation and parentcraft classes as well as medical check-ups) and should be paid for the absence at normal rates.

Maternity leave:

There are three types of maternity leave - ordinary, compulsory and additional. Ordinary maternity leave (OML) is for a period of 26 weeks. During OML, the employee is entitled to all the contractual rights (such as pension or holidays) she would have received had she not been on leave. The only right that does not continue is the employee's salary/wages. Compulsory maternity leave (CML) lasts for 2 weeks from birth (or 4 weeks for factory workers) but is not in addition to OML, it is taken as part of it. Additional maternity leave (AML) lasts for a further 26 weeks after the end of the OML.

Therefore, the minimum amount of maternity leave a woman can take is 2 weeks but she can choose to take up to 1 year. There is no obligation to take AML or even the full amount of OML, but if the employee chooses to take the full amount, the employer has an obligation to agree to it. It should be noted that where the contract of employment provides for maternity leave, the employee may take advantage of whichever right (contractual or statutory) is more favourable.

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Employees must provide advance notification no later than the end of the 15th week before the expected week of childbirth of the fact she is pregnant, the expected week of childbirth and the date she intends to commence maternity leave. The employee can choose the date maternity leave is to commence but it must be no earlier than the beginning of the 11th week before the expected week of childbirth. If the employee wishes to change her date of return from maternity leave, she must give 8 weeks notice.

Maternity pay:

Statutory maternity pay (SMP) comprises:

- 6 weeks' pay at 9/10th of average weekly earnings; and
- 33 weeks' pay at the statutory limit (which at the time of writing is £117.18).

Payment begins when OML commences. Employers are reimbursed 92% of the SMP (104.5% for small employers whose National Insurance liability was under £40,000 in the previous year).

To qualify for SMP, the employee must have 26 weeks' service as at the 15th week before the expected week of childbirth.

Right to return from maternity leave:

An employee is entitled to return after OML, to the job in which she was employed before her absence. An employee is entitled to return after AML, if she chooses to take the additional leave, to the job in which she was employed before her absence, or if this is not reasonably practicable, to another job which is both suitable for her and appropriate for her to do in the circumstances.

In either case, the right is a right to return on terms and conditions no less favorable than those which would have applied if she had not been absent.

Protection from detriment or dismissal:

An employee has the right not to be dismissed for a reason related to pregnancy or having taken leave. In addition, they have the right not to be subjected to any detriment by an act of the employer (or failure to act) for a reason related to pregnancy or having taken leave.

Paternity Rights

Employees have the right to take one or two consecutive weeks paternity leave within the first 8 weeks following birth/adoption and to be paid Statutory Paternity Pay for this period (at the same rate as SMP), and to return to his exact job following leave.

To qualify for this right, the employee must be the father or civil partner or partner of the child's mother/adopter (meaning a woman can apply for paternity leave). In addition, they must have 26 weeks' continuous employment ending with the 15th week before the expected week of childbirth or ending with the date of the placement notification (in case of adoption).

In case of birth, the employee must notify the employer of the expected week of childbirth, whether he has chosen to take one or two weeks and the date on which he wishes the leave to start, at least 15 weeks before the expected week of childbirth.

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In case of adoption, the employee must notify the employer of the date of notification of adoption, the date of the expected placement of the child with the adopter, whether he has chosen to take one or two weeks and the date on which he wishes the leave to start, within 7 days of receiving official notification of a match with a child.

Flexible Working

Parents of young children and carers of adults have the right to make a request to work flexible hours (e.g. a change in hours, times required to work, days worked) and employers are required by law to give such a request proper consideration. To qualify, an employee must have been employed for 26 weeks at the date the application is made and must not have applied to work flexibly in the last 12 months.

In addition, parents must be the parent of a child aged under 6 (or under 18 where the child is disabled), be responsible for the child, and make the application to enable them to care for the child.

Carers of adults who are in need of care must be or expect to be caring for a spouse, partner, civil partner or relative or live at the same address as the adult in need of care.

Applications must be in writing (including email) and they need to specify the change in working pattern applied for. It must also explain the effect the applicant thinks the change would have on the employer and how such an effect might be remedied. The employer and the applicant must meet to discuss the application within 28 days of it being made and the employee applicant can take a companion along to the meeting. Within 14 days of the meeting, the employer must provide a written and dated notification of its decision.

If the application is rejected, the notification must state which of the grounds for rejection are considered to apply (see below), explain why the ground applies and set out the appeal procedure. If an appeal is requested within 14 days, then (within a further 14 days) the employer must either uphold the appeal or meet the employee to discuss the appeal. The decision of the appeal meeting must be conveyed to the employee in writing within 14 days of the appeal hearing.

An employer can only reject an application because of:

- a) burden of additional costs;
- b) detrimental effect on the ability to meet customer demand;
- c) inability to reorganise work among existing staff;
- d) inability to recruit additional staff;
- e) detrimental impact on quality or performance;
- f) insufficiency of work during periods that the employee proposes to work; or
- g) planned structural changes.

It should be noted that where an employer has not complied with its obligations, a Tribunal can order it to reconsider its decision, award compensation or consider an unfair dismissal claim if dismissal has also taken place. However, the Tribunal cannot order employers to implement flexible working arrangements.

9. Discrimination

Unlawful discrimination in employment occurs when an employer discriminates on grounds which have been expressly prohibited by statute. Discrimination in the field of employment is unlawful if it was on grounds of sex, race, disability, religion or belief, sexual orientation or age. If an employer discriminates on the above grounds in relation to:

- the arrangements made for determining who should/should not be offered employment;
- refusing/omitting to offer a person a job;
- the terms of employment;
- giving a worker fewer benefits, facilities or services;
- opportunities for promotion, transfer, training or other benefit;
- dismissal; or
- subjecting an individual to any other detriment;

it will be unlawful, providing the act of discrimination falls within one of the four types of discrimination (direct, indirect, harassment or victimisation).

Conclusion

It should be noted that the area of employment law changes rapidly with large quantities of new legislation coming into force every year. The information contained in this guide is correct at the time of publishing, but should be verified if you come to rely on it in case things have changed.