COUNTRY COMPARATIVE GUIDES 2022

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United Kingdom

EMPLOYMENT & LABOUR

Contributor

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This country-specific Q&A provides an overview of employment & labour laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
EMPLOYMENT & LABOUR

1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

The Coronavirus Job Retention Scheme (CJRS) was introduced in March 2020 to help employers, whose operations were severely affected by the Covid-19 pandemic, retain their employees. Under the scheme, employers were able to furlough employees and apply for a grant from the government covering a proportion of wage costs. The CJRS came to an end on 30 September 2021. No replacement scheme or additional enhanced protection against dismissal, where the dismissal arises from the impact of Covid-19, remains in place in the UK.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

Although there is a higher proportion of employees working remotely, or on a hybrid basis, in the UK since the start of the pandemic, no new rights or protections have been introduced as a result. However, flexible working rights are under review in the UK. Under existing legislation, employees have the right to request a flexible working arrangement, after 26 weeks of service with the same employer. In Autumn 2021, the government conducted a consultation on changes to the statutory flexible working regime, including the possible removal of the 26-week service requirement to be eligible to make a request. The consultation does not contain proposals to change the basic position that employees only have the right to request a flexible working arrangement, which can be rejected by an employer, rather than a statutory right to work flexibly or remotely. The outcome of the consultation is awaited.

3. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

An employer can effectively terminate the employment relationship for any reason. Employees are entitled to be given written notice of the reason for termination. Only some reasons are lawful and depending on the reason, the employer may be liable to pay compensation to the worker. Although uncommon in practice, the Employment Tribunal can order that the worker be reinstated or reengaged in their original employment. Employees (but not the broader category of workers) who meet the minimum qualifying period of employment of two years or more are protected from unfair dismissal. In order to avoid liability for unfair dismissal, an employer must only dismiss a protected employee for one of five fair legal reasons set out in the Employment Rights Act 1996. The five fair reasons are; (1) the capability or qualifications of the employee; (2) the employee's conduct; (3) redundancy (4) illegality and (5) some other substantial reason. A dismissal for one of these reasons is potentially fair but, to avoid liability for unfair dismissal, the employer must also ensure that the dismissal is fair in all the circumstances. Following a fair dismissal process is important, as is acting consistently.

Some reasons for dismissal are automatically unfair, whatever the circumstances. For example, where an employee is dismissed for asserting certain legal rights, or because the employee has made a protected disclosure (i.e. they are a whistleblower). The minimum qualifying period of employment is not generally required to bring a claim for automatic unfair dismissal.

An employer who dismisses an employee on the grounds, whether directly or indirectly, of one of the characteristics protected from discrimination under the Equality Act 2010, will be liable for a discrimination claim, in addition to an unfair dismissal claim.

4. What, if any, additional considerations

apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

If an employer proposes to dismiss 20 or more employees within a 90 day period or less, the employer will be required to inform and consult with representatives of affected employees on a collective basis. These obligations are set out in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The definition of 'redundancy' to which they apply is wider than that applying to individual redundancies under the Employment Rights Act 1996. A proposal to dismiss employees for a reason not related to the individuals will fall within the scope of redundancy under TULRCA. This includes, for example, a proposal to dismiss employees for failing to agree to new terms and conditions of employment.

If the employer is proposing to dismiss 100 employees or more within a 90 day period, consultation with the affected employees must begin at least 45 days before the first of the dismissals takes effect. If the proposal is to dismiss 99 or fewer employees, consultation must begin at least 30 days before the first of the dismissals takes effect.

An employer that fails to comply with its obligations to inform and consult with employee representatives, is liable to pay a protective award to employees. The amount is decided by an Employment Tribunal, having regard to what is just and equitable in the circumstances. The starting point is that a maximum punitive award of 90 days' actual pay, per employee can be awarded, although in practice the actual award is often less.

An employer must notify the Secretary of State where it proposes 100 or more redundancies within a 90 day period (see question 12 below).

5. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

The Transfer of Undertakings (Protection of Employment) Regulations 2006, which implement the European Acquired Rights Directive in the UK, protect the rights of employees on the sale of a business or a service provision change falling within the regulations (commonly referred to as an outsourcing). The dismissal of an employee either before or after the transfer of their employment, where the transfer is the sole or principal reason for the dismissal, will be automatically unfair, provided the employee has been employed for at least two years. The only exception is where an 'economic, technical or organisational reason entailing changes in the workforce' applies to the dismissal (broadly, this means where a genuine redundancy arises, including as a result of a change of location).

An employee dismissed in the context of a business transfer or service provision change may also bring a claim if the employer has failed to inform and consult with the employee through employee representatives, about the transfer. The obligation to inform and consult representatives of affected employees applies to both transferors and transferees. Employers are required to provide a prescribed list of information, including what measures the employer envisages taking in relation to the employees in connection with the transfer. The transferor must also provide employees with information about measures that the transferee proposes to take in relation to the employees. If measures are proposed the employer must consult with the representatives of the affected employees about these, with a view to seeking their agreement.

The employer can be liable to pay an award of up to 13 weeks' actual pay for each employee in respect of a failure to inform and consult affected employees.

6. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

Employees who have been continuously employed for one month or more are entitled to a prescribed minimum period of notice from their employer. This is one weeks' notice if the employment is for less than two years. For two years' employment it is two weeks' notice, rising by one week for each additional year of employment, up to a maximum of twelve weeks' notice. Employees are required to give a minimum of one week's notice to their employer, or such additional notice as may be prescribed in the contract of employment.

Contractual notice periods are often longer, commonly one month for junior employees, rising to six months for senior managers and directors. The contractual notice period required from the employee is often, but need not be, the same as from the employer.

Where the reason for termination of employment is the employee's gross misconduct, the employer is entitled to terminate the employment immediately without notice

on the grounds that the employee has repudiated the contract. If an employer fundamentally breaches the contract of employment, the employee is entitled to terminate the employment without giving notice and to claim that he has effectively been dismissed by the employer, known as constructive dismissal. A fundamental breach of the contractual obligation to maintain the relationship of trust and confidence between employer and employee which is implied into every contract of employment is often cited as the relevant breach.

7. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Yes, provided the employer has included a right to make such a payment, which is known as a payment in lieu of notice, in the contract of employment. If no right is included in the contract of employment, the termination of employment will be in breach of the contract terms and the employee may not "accept" the breach, leaving the contract to continue. If the breach is accepted, the notice monies are treated as compensation for the contractual breach. For tax purposes, the proportion of the compensation payment that reflects basic pay for any part of the notice period not served, must be treated as earnings and subject to tax and NICs.

Many employers prefer to rely on an express right to make a payment in lieu of notice, because if the contract is terminated in breach, the employer may not be able to enforce other provisions that would otherwise have survived its termination. For example, post-termination covenants restricting an individual's involvement with certain clients and types of work, and obligations to protect confidential information.

8. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

This is possible if the employer has the right to require the employee to take garden leave under the contract of employment. It is common practice to include such a provision, particularly for senior employees or those in customer/client facing roles. If the contract does not contain such a provision, it may still be possible to put the employee on garden leave, but this will depend on the circumstances. Employees whose skills may become less valuable during a period away from work or who are remunerated primarily by reference to performance through commission or bonus may in particular be able to demonstrate that they have a "right to work" while in employment. They may be able to argue that placing them on garden leave is a breach of contract.

9. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

Termination of the employment relationship will be valid whether or not the employer follows any prescribed procedures. But if the dismissal is found to be unfair, a possible although uncommon remedy is for the Employment Tribunal to order that the employee be reinstated.

As well as terminating the relationship for a fair reason, the termination must also be fair in all the circumstances and this means that procedural fairness must be observed. What is required differs from case to case but the principles including ensuring that the employee has the obligation to respond to allegations against him, treating employees consistently and allowing a right of appeal.

A Code of Practice applies to grievances and dismissals for misconduct or poor performance. Employers have no legal obligation to follow the Code, and an employee cannot bring a claim against the employer on the grounds that they have not followed it. But a failure to comply with the Code can be taken into account by an Employment Tribunal Judge in relation to another complaint and as a result the employer can be required to pay an increased sum of compensation (up to 25%).

Employers may also be obliged to follow contractual dismissal procedures included in the contract of employment.

10. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

A dismissal is more likely to be found to be unfair if the Code of Practice applying to grievances and dismissals is not followed by the employer. Fairness is required in all the circumstances, including in relation to procedures followed (see question 3 above). This also applies to claims arising out of grievances, for example, discrimination claims.

An employee who is affected by their employer's failure to follow any prescribed procedures cannot bring a stand-alone complaint in relation to such a failure, but it can be taken into account in relation to another complaint, for example, unfair dismissal. If such a complaint is successful, the Employment Tribunal can award an uplift in compensation of up to 25%. There is also the potential for the Employment Tribunal to order reinstatement of the employee, although in practice this is rarely used.

11. How, if at all, are collective agreements relevant to the termination of employment?

Collective agreements will be relevant to the termination of employment if they contain terms relevant to procedures for the termination of employment, including in relation to redundancy selection, and/or to sums payable on the termination of employment. Outside of the public sector and privatised, labour intensive industries, collective bargaining is relatively uncommon in the UK.

12. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

There are no circumstances in which a failure to notify a third party will void the termination of employment.

An employer who proposes to dismiss as redundant 20 or more employees within a 90 day period must notify the Secretary of State of such planned redundancies using a prescribed form. Failure to make the required notification is a criminal offence and a fine may be payable.

13. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Workers are protected from discrimination on the termination of employment (as well as during employment and the recruitment process) on the grounds of protected characteristics prescribed by the Equality Act 2010. These are; age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Discrimination can be direct, if the employer treats a worker less favourably than other workers on the grounds of a protected characteristic. It can also be indirect, where an employer applies a provision, criterion or practice (for example a rule or policy) equally to workers with and without protected characteristics but the provision, criterion or practice puts workers with a protected characteristic at a particular disadvantage compared to other workers. For example, a requirement that all workers are required to work full-time hours, is likely to put women who are most likely to be the main carer of children, at a disadvantage and may be indirectly discriminatory.

With the exception of age, direct discrimination cannot be justified by an employer. It is possible to justify indirect discrimination if the applicable provision, criterion or practice is a proportionate means of achieving a legitimate aim.

An employer will also be liable for discrimination if the employer fails to comply with its obligation to make reasonable adjustments for a worker with a disability.

Workers are protected from harassment of a sexual nature that is related to sex or gender reassignment. Harassment can also take the form of other unwanted conduct in relation to the other protected characteristics which either violates the victim's dignity or has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

A worker who brings a claim under the Equality Act, or does anything in connection with the Act (for example, providing information or giving evidence), or whom an employer believes may do such things, is protected from suffering a detriment (including the termination of employment) as a result of such act.

14. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

An employer is vicariously liable for the acts of individuals committed in the course of employment. Whether or not the employer knew or approved of the discriminatory act is irrelevant but it is a defence for the employer to show that it took all reasonable steps to prevent the individual from doing the discriminatory act or acts of that type.

If an employer is liable for discrimination the Employment Tribunal can order the employer to pay

unlimited compensation. The amount of compensation in each case will depend on the extent of the financial losses suffered by the individual. Employers can also be ordered to pay a lump sum in respect of injury to feelings. This is compensation for non-financial loss which can be up to £45,600 in the most serious cases. In the most serious cases an additional sum of aggravated damages may also be awarded. A further category of punitive, exemplary damages may be awarded in exceptional and rare circumstances.

An Employment Tribunal can make a declaration of the employer and employee's rights arising from the case. This is usually in addition to, but can be instead of, awarding compensation. It can also make a recommendation for reducing the adverse effect on the claimant of the matters to which the employment tribunal proceedings relate. The scope of such recommendations is however rather narrow.

15. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 apply to employees engaged on contracts of employment for a specific time period or which will end when a specified event happens. Employees working under such contracts are entitled to be treated in the same way as permanent employees who are employed at the same place and to do similar work. Different treatment is capable of objective justification.

Part-time workers are entitled to similar protection under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which also derive from European law. Part-time workers are entitled to be treated in the same way as comparable full-time workers and are protected from being subject to less favourable contractual terms or any other detriment, on the grounds that the worker is part-time. This concept is subject to the 'pro-rata' principle, that it is not less favourable to pay part-time workers *proportionately* less pay and benefits than full-time workers.

If the principal reason for dismissal of a worker is that they have asserted their rights as part-time workers or fixed-term employees, the dismissal will be automatically unfair.

16. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Yes. The Employment Rights Act 1996 protects workers and employees who have made a protected disclosure from suffering a detriment, including the termination of employment, in consequence of making such disclosure. The worker must believe that they are making the disclosure in the public interest and it must fall within one of six prescribed categories. The disclosure must also be made in one of six prescribed ways. In practice, in order to qualify for protection, the worker must usually make his disclosure to his employer, although there are circumstances where this is not necessary or the disclosure may be protected even if made externally.

The dismissal of a worker because the worker has made a protected disclosure will be automatically unfair and the minimum period of employment that usually applies to unfair dismissal claims does not apply. The cap on compensation that would otherwise apply is also not relevant.

There is no need for the disclosure to be made in good faith but an award of compensation may be reduced by up to 25% if it is not made in good faith and the employment tribunal considers it just and equitable to make such a reduction.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

Employers are legally obliged to give workers the minimum notice required under their contract of employment, or the minimum statutory notice, if this is greater. If the worker's engagement continues during the notice period, they will be paid as normal. If it is intended that the worker's contract will terminate immediately, the worker may be entitled to receive a lump sum payment equivalent to the sums specified in the contract as pay in lieu of notice. In such circumstances, the contract may specify that the worker is under an obligation to mitigate his losses and that such sums will be paid subject to him making reasonable efforts to do so.

If no right to pay in lieu of notice is included in the contract and it is terminated by the employer without giving the required notice, the worker will be entitled to

compensation for breach of the contract, subject to the employee's obligation to mitigate his losses by looking for alternative employment.

Where the reason for dismissal is redundancy, an employee who has two or more years of service will be entitled to a statutory redundancy payment. The employee's age and length of service are used to calculate the relevant multiplier for a week's pay, subject to a maximum cap. Many employers offer enhanced payments, either on a case by case basis or as a contractual entitlement, if the termination of employment is by reason of redundancy.

Employers must pay employees for any outstanding holiday entitlement on the termination of employment.

Unless the employer has a contractual obligation to make any other payment to a worker on the termination of employment, it will not be obliged to do so. However, where a dispute exists between the employer and the employee it is common for some compensation to be paid relative to the sums the worker claims he would be entitled to in the Employment Tribunal or Court.

If a dismissal is found to be unfair by an Employment Tribunal, it can award compensation. This is calculated in accordance with the losses suffered by the worker, arising from the dismissal, including projected future losses, up to a maximum of 52 weeks' pay or the statutory cap (£89,493 from April 2021), whichever is the lower.

Where the employee is a company director, shareholder approval for the payment of compensation, may be required.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

A worker can validly waive his right to bring claims under employment legislation by entering into a settlement agreement, provided certain conditions are met. Firstly, the agreement must be in writing and it must relate to specified proceedings or complaints. The worker must also have received advice from a named independent adviser, who is covered by a contract of insurance, on the terms of the agreement and its effect on the worker's ability to bring a legal claim against the employer. The agreement must also state within it that the conditions regulating settlement agreements have been satisfied.

Employers commonly impose confidentiality or non-disclosure provisions in settlement agreements. The government intends to legislate to introduce limitations on the use of such clauses. The effect of the limitation is expected to be to prohibit the clause from preventing disclosures to the police, regulated health and care professionals and legal professionals.

The prescribed conditions do not apply to the waiver of contractual claims which are commonly included in the same agreement as statutory claims.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

The starting position for employers is that such an obligation is void as being in restraint of trade. However, employers can impose obligations (commonly referred to as restrictive covenants) that restrict where an employee can work after the termination of employment, provided that the purpose of such an obligation is to protect a legitimate interest of the employer and the obligation is no more restrictive than is necessary to protect this interest. Protection from competition itself is not a legitimate interest but the protection of confidential information, customer and supplier connections, goodwill and the stability of the workforce are all legitimate interests that can be protected. Restrictive covenants are commonly found in contracts of employment for directors and senior management employees, as well as those who have access to the employer's confidential information, and/or to customers and suppliers and information about the employer's dealings with them. The validity of restrictive covenants is assessed at the time employer and employee enter into them, and the employer should therefore regularly review them. No additional payment is required and the maximum period courts are likely to enforce for the most senior employees is one year. (See question 23 below for possible reform of non-compete clauses.)

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

The law requires workers to keep an employer's trade

secrets confidential after the termination of employment. Employers can only require workers to maintain the confidentiality of other types of confidential information, after the termination of employment, by express contractual agreement. Most contracts of employment contain an express obligation to protect identified categories of confidential information after employment as only limited types of confidential information fall into the category of "trade secrets" and it can be difficult to identify these.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

Generally, employers are not obliged to seek references or to provide references when requested to do so by former workers or prospective employers. If a reference is requested the employer must comply with its duty towards the individual who is the subject of the reference, to take reasonable care to ensure that it is gives an accurate description and is not misleading. The employer owes a similar duty not to mislead the recipient of the reference.

Separate obligations apply in the financial services sector. Certain regulated employers are required to give a reference for individuals in regulated roles, when requested to do so by a prospective employer. Depending on the type of employer, it may be necessary to give this information in a prescribed format. The employer has a continuing obligation to update such a reference in certain circumstances, with any new information that becomes available.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

Terminating employment is most contentious when either before or during the termination process employees raise issues or act in a way, which, if linked to the termination, can significantly increase the employer's liability. For example, a worker who raises a grievance about their treatment by a colleague, discloses an incident of apparent wrongdoing in the organisation or is absent due to sickness once a process that may end in the termination of employment has been initiated or in anticipation of it being initiated. This commonly arises where the potential termination is on the grounds of the worker's poor performance, but can happen whatever the circumstances of termination, including redundancy.

Assessment of an employee's performance before the employee achieves the two years' service that is required to bring most claims of unfair dismissal can be helpful. If necessary, steps can then be taken to terminate the employment before such a right has accrued.

Prolonged sickness absence can be difficult to manage particularly where the underlying reason is a mental rather than physical condition. If the worker has a disability under the Equality Act, the employer will need to avoid discrimination on the grounds of disability as well as complying with its positive duty to make reasonable adjustments for the disabled employee. For a dismissal to be fair, a fair process must be followed and this will usually involve consultation with the employee and in the context of sickness absence, medical reports or evidence. If the employee is too unwell to engage in such consultation or will not cooperate, the employer is faced with the choice of continuing to attempt to engage the employee with the consultation process or taking a decision to dismiss which could be found to be unfair and/or discriminatory.

Employers can prepare for these situations by seeking medical information at an early stage, working with the employee to identify any reasonable adjustments that could be made to enable the employee to continue working, and limiting an employee's contractual entitlement to sick pay, which could still be offered on a discretionary basis.

23. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The government has conducted a consultation looking at reform of post termination non-compete covenants. It is considering two possible options: the introduction of mandatory compensation to be paid to the employee for the duration of the non-compete period or, a complete ban on non-compete clauses. Although the outcome of the consultation is unknown and the introduction of any change will not occur for several months, employers should begin reflecting on the provisions included in contracts of employment to protect the business. In particular, they should review the extent to which non-compete clauses are necessary in light of other protections which apply post-termination, such as non-

solicitation and non-dealing of customer covenants. They should also consider the protection afforded by garden leave clauses. It is possible that in the future employers may need to rely on alternative restrictive covenants in conjunction with longer notice periods and the use of garden leave clauses as a means to protect business interests.

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