SPICe
The Information Centre

SPICe Briefing

Employment: Frequently Asked Questions

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This briefing looks at some common employment problems experienced by constituents, including national minimum wage, contracts of employment, unfair dismissal and redundancy.

SPICe would welcome feedback from MSPs and their staff on the contents of this briefing, particularly on whether there are other employment problems which should be covered.

Many employment rights come from European Union (EU) legislation. At the time of writing, there is no information available on the likely impact of the vote to leave the EU in this area. At present, the law as described in this briefing remains in place.

It is important to note that the answers to the following questions are general. A constituent's specific circumstances may mean that general advice is not appropriate. In these situations, the constituent should be referred to sources of more detailed advice.

The Scottish Parliament
Pàrlamaid na h-Alba

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DEFINITIONS

Employment legislation currently distinguishes between an employee, a worker and a self-employed person. The following definitions are used in this briefing. They mirror the definitions in the Employment Rights Act 1996, which is the UK's main source of legislation-based employment rights.

- **An employee** is someone who works under a contract of employment, although the contract does not need to be in writing.
- **A worker** includes someone who works under a contract of employment. It also covers workers who provide their services in person (for example, an agency nurse or a casual worker). However, the other party to the contract cannot be the client or customer of a business carried out by the worker. This would suggest they were self-employed.
- **A self-employed person** is someone who runs their own business and who may offer services to other businesses. Generally, it is a feature of their relationship with the other business that they can send someone other than themselves to undertake the work.

IS MY CONSTITUENT ENTITLED TO A MINIMUM LEVEL OF PAY?

Background

Almost all workers are entitled to be paid the national minimum wage. This is usually uprated in October each year.

The UK Government has also created the "national living wage". This applies, from 1 April 2016, to all workers aged 25 or over. The national living wage is governed by the same legislation as the national minimum wage and is enforced in the same way.

Minimum pay rates from October 2015 are as follows:

Workers aged 21 or over	**£6.70**
Workers aged 18-20	**£5.30**
Workers aged 16 or 17	**£3.87**
Apprentices (apprentices under 19 or 19 or over and in their first year of an apprenticeship)	**£3.30**
As of 1 April 2016, workers aged 25 or over are entitled to the "National Living Wage"	**£7.20**

Atypical types of employment

"Home workers" are given tasks to complete in their own time at home. "Piece workers" are paid per "piece" of work, such as carton of fruit picked or units assembled. Both types of worker are entitled to the national minimum wage. For example, if a piece rate is offered, the average worker should be able to produce enough in an hour to earn the national minimum wage[1].

Exceptions to minimum wage rights

Some people are not entitled to the national minimum/living wage. Common exceptions are listed below.

- **Self-employed people** – genuinely self-employed people are not entitled to the national minimum wage. However, employers sometimes describe people as self-employed to avoid employment responsibilities when this is not really the case. A key test[2] is whether the person in question is expected to perform the work themselves or whether they can send a substitute. If they must turn up themselves then they are likely to be an employee or worker.

- **Voluntary workers** – to be a voluntary worker for the purposes of national minimum wage legislation, a person must work for a charity, a voluntary organisation, an associated fund-raising body or a statutory body.

- **Volunteers** – a volunteer can work for any organisation. Whether someone is a volunteer will depend on the arrangements under which they work. Key tests are that they are not rewarded or paid at all (other than actual expenses incurred) and that they do not have to turn up to do work if they do not want to.

- **Work placements** – work placements taken on as part of a recognised further education course and lasting for no more than one year do not qualify for the national minimum wage. Neither do certain government-funded training schemes, including those connected with claiming social security benefits.

- **Certain people living in an employer's home** – this exemption covers people who live with their employer and share in household work and leisure activities, such as au pairs.

- **Members of the armed forces**

- **Agricultural workers** – agricultural workers are entitled to the agricultural minimum wage. This is usually higher than the national minimum wage. Where it is not, agricultural workers are entitled to at least the national minimum wage.

Enforcement

For information and advice about the national minimum wage, contact ACAS (the Advisory, Conciliation and Arbitration Service). Someone who believes they are not being paid the national minimum wage when they should be can try to speak to their employer in the first instance.

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[1] There is a technical calculation for setting the rate for piece workers – this is designed to allow those who work at a slightly below average rate to earn the national minimum wage.

[2] Note that there are a number of other factors which courts consider when deciding whether someone is self-employed or not.

However, if this is not possible, or is unsuccessful, they can bring a case to an employment tribunal or to the courts. Workers who have not been paid the national minimum wage can claim a payment which is twice the difference between what they were paid and their actual entitlement under national minimum wage legislation.

If Her Majesty's Revenue and Customs (HMRC) finds that an employer has not paid the national minimum wage, it will send them a notice for the arrears and levy a fine. HMRC can take employers to court on behalf of the worker if they still refuse to pay.

WHAT HOLIDAYS AND HOLIDAY PAY IS MY CONSTITUENT ENTITLED TO?

Background

All workers are entitled to 5.6 weeks' paid holiday per year[3]. Someone's contract of employment may give them more paid holiday, but it cannot give them less. This equates to 28 days per year for someone who works five full days a week.

A "week" reflects someone's normal working pattern, so that if they worked a standard Monday to Friday, they would be entitled to five days' holiday in a week (equating to 28 in a year). If they worked half-time, they would be entitled to 2.5 days (equating to 14 in a year). Where someone does not have a standard working pattern, the average over the past 12 weeks is used.

There is no additional statutory entitlement to bank holidays (i.e. bank holidays can be included in the 5.6 week minimum). However, a contract of employment may provide for additional leave for bank holidays. In addition, there is no statutory entitlement to have a bank holiday off or to be paid extra for working on one. A worker's rights in relation to bank holidays will depend on their contract of employment and the usual practice at their workplace.

Restrictions on taking leave

An employer is entitled to tell workers when they can take their holidays – such as requiring them to take annual leave to cover a bank holiday or a closure over Christmas. However, the rules must not be so strict as to prevent them taking holidays at all.

An employee should give notice as to when they want to take a holiday. The general rule is that a worker should give twice as much notice as the length of the holiday they intend to take. So a worker requesting one week's leave would be required to give two weeks' notice.

An employer can refuse a request for leave and should give as much notice as the period of leave requested. Continuing the example, an employer should inform an employee that their request for one week's leave has been refused one week before the leave was due to start. Note that this general rule is subject to any specific arrangements contained in the contract of employment, so it is possible for an employer to put longer or shorter notice periods into place.

Holiday pay

Workers are entitled to be paid for any holiday entitlement they have built up but haven't taken when they leave a job. It will usually be unlawful to pay employees rather than allow them to take holidays in other circumstances.

[3] Under the Working Time Regulations 1998.

"Rolled-up" holiday pay is where an employer tops up a worker's hourly rate of pay rather than providing actual paid holidays. The European Union's Court of Justice has held that this practice is unlawful[4]. This decision is binding on UK employers: however, rolling-up holiday pay is still common practice in some employment sectors.

Workers are entitled to be paid at their normal rate while on holiday. Again, where someone does not have a standard working pattern, the average pay over the past 12 weeks is used. The law remains unclear in relation to how issues such as bonuses, commission and overtime should be dealt with.

Enforcement

A worker who feels that they are not being treated according to the law should try, in the first instance, to speak to their employer. Further information and advice is available from ACAS (the Advisory, Conciliation and Arbitration Service). ACAS produces a leaflet dealing with holidays – "Holidays and holiday pay" (2014).

Where it is not possible to resolve the dispute with their employer, a worker can usually take their case to an employment tribunal. In some circumstances it may be necessary to take court action instead. Enforcing employment rights is discussed in more detail on page 26.

ARE THERE LIMITS TO HOW MANY HOURS MY CONSTITUENT CAN BE REQUIRED TO WORK?

Background

Workers cannot be required to work more than 48 hours a week unless they work in one of a few exempted sectors. These sectors include the armed forces, the police and the emergency services as well as domestic servants and certain categories of shipping and transport workers.

In calculating whether someone works more than 48 hours per week, hours of work are averaged over a 17 week period. It is therefore possible to work more than 48 hours in one week without contravening the law, as long as fewer hours are worked in the following weeks.

The law states that workers are free to enter into a written agreement with their employer where they voluntarily agree to waive their right not to work more than 48 hours a week. Employers are not allowed to dismiss someone or treat them unfairly because they refuse to waive their right not to work more than 48 hours a week.

Young people

There are stricter restrictions on the number of hours young people (that is people able to leave school but under 18) can work. As a general rule, the maximum hours young people can work are eight hours a day and 40 hours a week – although there are exceptions.

Children under the age of 13 are not legally allowed to do any work[5], and there are complex rules in place for children between 13 and 16.

[4] See C.D. Robinson-Steele and others v R.D. Retail Services Ltd. and others (2006) C-131/04.
[5] There are exceptions for modelling and acting.

Enforcement

In the first instance, workers should approach their employer if they feel their rights in relation to the hours they work are being breached. Further information and advice is available from ACAS (the Advisory, Conciliation and Arbitration Service).

Where it is not possible to resolve the matter with an employer, workers can take their case to an employment tribunal (see "Can my constituent take their case to an employment tribunal" on page 26).

WHO IS RESPONSIBLE FOR HEALTH AND SAFETY IN THE WORKPLACE?

Background

Employers have a general duty to maintain a safe working environment. They are required to identify any risks to health and safety and put in place appropriate steps to mitigate those risks. As well as a general duty to protect health and safety, there are regulations which apply to specific industries and forms of work.

In turn, employees also have general duties in relation to health and safety. They must take reasonable care in relation to their own health and safety and the health and safety of those who might be affected by their actions. They must also co-operate with their employer in relation to health and safety requirements.

Employers must also consult with their employees on health and safety issues through elected representatives. They can consult directly in smaller workplaces.

The Enterprise and Regulatory Reform Act 2013[6] changed the way employer liability for breaches of health and safety law works. Under the old regime, employers were liable for workplace injuries where there had been a breach of any specific health and safety regulations. The 2013 Act removed the assumption of employer liability in these circumstances.

It is still be possible for those injured in the workplace to pursue court claims for compensation on the basis of negligence. However, in many cases, those claims will be harder to prove.

Whistleblowing

Workers[7] who "whistleblow" (disclose information about wrongdoing at their workplace) on health and safety grounds are protected from adverse treatment.

The law usually requires that the disclosure is made to their employer, or a person nominated by the relevant government minister. There are exceptions to this rule (for example, where an employee reasonably believes that evidence will be covered up if they tell their employer).

A disclosure made for personal gain is not protected so, while revealing information to the media may be protected in certain, serious circumstances, selling a story will not be.

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[6] Section 69 of the Enterprise and Regulatory Reform Act 2013.

[7] Note that, in the specific circumstances of whistleblowing, the term "worker" has a wider meaning than is generally the case. For example, it covers self-employed people or those who are employed by others but who have done work in a particular workplace.

Enforcement

The Health and Safety Executive (HSE) has responsibility for work-related health and safety issues. It enforces health and safety law, including investigation and prosecution in serious incidents. It also provides guidance and support in dealing with health and safety issues.

Serious work-place health and safety incidents should be reported to the HSE under their RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrence Regulations 2013) procedures. Local authorities have responsibility for enforcing health and safety legislation in certain areas, such as shops, cinemas, hotels, restaurants and pubs.

WHAT IF MY CONSTITUENT HAS A PROBLEM AT WORK?

Background

The first step when dealing with a problem at work is to discuss it informally with the person concerned. The vast majority of issues can be resolved quickly and easily in this way.

However, the state of personal relationships may mean that this is not possible. Alternatively, an employee may try to resolve a workplace situation but face a colleague or manager who is not prepared to deal with the matter.

Where it has not been possible to resolve an issue informally, the next step will usually be to engage the workplace disciplinary and grievance procedures.

Disciplinary procedures can be used by an employer to deal with what they see as problem conduct on behalf of an employee, including poor performance. Grievance procedures can be used by employees who wish to raise a work-related problem with their employers.

Sometimes both procedures are used in tandem. An example could be where an employer wishes to take disciplinary action against a member of staff, who in turn raises a grievance because they feel they are being discriminated against.

ACAS guidance

ACAS (the Advisory, Conciliation and Arbitration Service) has produced a statutory code of practice outlining how disciplinary and grievance issues should be handled – "Code of Practice on Disciplinary and Grievance Procedures" (ACAS 2015). Failing to follow the code does not itself constitute breaking the law. However, an employment tribunal will take the code into account when dealing with relevant cases.

The tribunal may adjust an award (increasing the award against an employer or decreasing the award given to a worker) where a party, without good reason, failed to follow the code. In this respect, employees are usually expected to have tried to resolve issues through their workplace grievance procedure before bringing a case to an employment tribunal.

ACAS has also produced more detailed guidance – "Discipline and grievances at work: the ACAS guide" (ACAS 2015) – to accompany the code of practice. However, this does not have a statutory basis and is not considered where a case goes to an employment tribunal.

The ACAS code requires that disciplinary and grievance procedures take the form of clear, written policies. Issues should be dealt with promptly and should be investigated sufficiently.

Where it is decided that an employee has a disciplinary case to answer, they should be informed in writing of the problem and the possible consequences of a finding against them.

In the case of grievances, it may be helpful for an employee to consider what action they would like their employer to take to resolve the issue in advance of any hearing. This should be outlined in their written grievance.

A worker has a legal right to be accompanied to a disciplinary or grievance hearing[8]. The companion may be a colleague or a union representative who is a full-time union official or who has been certified by the union as suitably trained or experienced. Some workplace policies are more generous than this, allowing workers to be accompanied to a wider range of meetings or by a wider range of people.

The ACAS code states that an employee should be informed in writing of the outcome of the hearing. Where disciplinary action is taken, employees should be told how long any warning will last, the consequences of any future misconduct and which changes of behaviour are expected in what timescale. There should be an opportunity to appeal any decision an employee disagrees with.

Throughout (and especially if they appeal), a constituent should be aware of the time limit for bringing a case to an employment tribunal. This is usually three months from the date the incident occurred (often described as “three months minus one day”). The deadline is **not** extended because workplace disciplinary or grievance processes are ongoing.

It is possible for misconduct to be so serious that it results in summary dismissal – i.e. employment is terminated without notice, or payment in lieu of notice. However, the process leading up to this decision should still be fair.

WHAT IF MY CONSTITUENT DOESN’T HAVE A WRITTEN CONTRACT OF EMPLOYMENT?

Background

The statutory definition of employment does not require that a written contract is in place. There can be an oral agreement instead, which need not cover all details. Indeed, courts and tribunals can imply terms into any agreement if these are needed to make it work.

There are certain tests which can be used to help decide whether an employment relationship exists. For example, a contract of employment will generally require someone to do work personally (rather than send a substitute). There must also be “mutuality of obligation” – in other words, a willingness to give work and to undertake work given. Ultimately, however, it is up to a court or tribunal to decide whether someone is employed, and this will depend very much on the circumstances of the particular case.

Right to a statement of employment particulars

Employees have certain statutory rights, such as the right to a statement of employment particulars. This statement must cover the main terms of their employment[9], such as the name

[8] Under section 10 of the Employment Relations Act 1999.
[9] For a full list of the terms and conditions which must be included, see sections 1 to 3 of the Employment Rights Act 1996.

of the employer, the date employment began, the rate and period of pay, notice periods and hours of work.

An employee must be provided with such a statement within two months of starting employment (although the information may be provided in instalments rather than all at once). Where any of the terms change, the employee must be notified in writing within one month of the change.

Right to an itemised statement of pay

Employees also have the right to an itemised statement of pay when, or before, a payment of wages is made. This must include gross pay, net pay and the reasons for any deductions. Where some payments are variable (for instance overtime or bonuses) and some are set, these must be shown separately.

Other statutory rights

Employees are entitled to the full range of statutory rights – for example, to be paid the minimum wage, to get maternity leave, not to be unfairly dismissed – regardless of anything stated in their contract of employment.

CAN AN EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT MY CONSTITUENT'S AGREEMENT?

Background

A contract of employment has the same status as any other contract – i.e. it is an agreement between the parties. It is not possible for one party to alter its terms without the agreement of another.

However, an employer is legally able to dismiss an employee as long as the statutory notice period or, alternatively, the notice period specified in the contract, is given. Entitlement to notice is discussed in more detail under "What are my constituent's rights if their contract of employment is terminated" on page 12.

It is therefore open to an employer to dismiss an employee who does not agree to changes to their contract and to re-employ them (or, indeed, someone else) on the new terms and conditions.

An employee who has been dismissed by their employer may be able to claim unfair dismissal at an employment tribunal (see page 25 for more information about this process). However, the tribunal will accord an employer fairly wide discretion in relation to a decision to dismiss, so long as the employer acts reasonably.

For an employer to argue that they have acted reasonably, they must be able to demonstrate certain things. These include that the employer attempted to get advance agreement to the contractual change from the employee, and that the views of any employee who could not agree were taken into account. The employer must also show that they had a genuine business reason for seeking the change.

Therefore, an employee has a relatively weak bargaining position when it comes to unilateral changes to a contract of employment. However, it may still be possible to negotiate with an employer to gain better terms than those initially proposed.

Nevertheless, where an employee has not been dismissed – and cannot be deemed to have agreed to changes to their contract of employment – the old conditions will continue to apply.

Objecting to changes

Where an employee objects to changes to their contract of employment, it is important that they make this clear to their employer. If they continue to work for the employer under the new conditions, they may be deemed, by their conduct, to have accepted them. They will then lose the right to challenge the changes.

It is unclear what behaviour or time periods may be required in law for it to be deemed that new conditions have been accepted. A leading case on the matter[10] suggests that the key question is whether an employee's conduct, through continuing to work, can only be ascribed to accepting changes to their contract of employment.

This is likely to be the case in relation to major changes which immediately affect the employment relationship – for example in relation to new hours of work or a change in rate of pay. However, continuing to work may not indicate acceptance of changes with less immediate impact, for example in relation to pension entitlement or redundancy conditions.

Where a change is imposed by the employer, it may be possible for the employee to claim what is called "constructive dismissal". Constructive dismissal can occur where an employer's conduct is so poor that it causes a fundamental breach of the contract of employment. In this situation, an employee can resign and claim the same rights as if they were dismissed.

Constructive dismissals can be pursued as unfair dismissals (see page 25) where the qualifying criteria are satisfied.

Where an employee does not accept changes to their contract of employment, they should notify their employer. In these circumstances an employee can seek compensation for any financial loss through court action.

Legal action should be instigated as soon as possible in order to avoid any risk that the employee is deemed to have agreed to the changes. A solicitor should be consulted to discuss the costs and risks of such an approach.

WHAT ARE MY CONSTITUENT'S RIGHTS IF THEIR CONTRACT OF EMPLOYMENT IS TERMINATED?

Notice

Where a contract of employment is ended, an employee (see definitions on page 4) will usually be entitled to a notice period. The exception to this is where someone is dismissed for gross misconduct.

[10] Solectron Scotland v. Roper [2004] I.R.L.R. 4.

The contract of employment may provide for payment in lieu of notice, so that the employer can pay the employee for the equivalent period, rather than allowing them to work. Separately, someone who is wrongfully dismissed (in other words, without notice) will be able to claim damages in the form of the pay they should have received during their notice period.

Contracts of employment will usually contain a term stating how much notice is required. This is often between four and eight weeks, but can be significantly more, especially for those in senior positions.

The Employment Rights Act 1996 sets down minimum statutory notice requirements. These can be described as follows:

- Someone who has been employed for more than one month but less than two years is entitled to one week's notice.
- Someone who has been employed for two or more years but less than twelve years is entitled to one week's notice for every full year they have worked.
- Someone who has been employed for 12 or more years is entitled to 12 weeks' notice.

An employee's entitlement to notice is the longest of their contractual or statutory entitlement.

An employee may be entitled to other payments if they are dismissed, including holiday pay and unpaid wages.

Enforcement

A constituent who hasn't worked (or been paid in lieu for) their notice period should discuss the matter with their employer in the first instance. ACAS (the Advisory, Conciliation and Arbitration Service) can provide further information and advice.

A failure to give the required notice constitutes breach of contract. It will usually be possible to take a case to an employment tribunal on this basis, but there may be circumstances where court action is also an option. Enforcing employment rights is discussed in more detail under "Can my constituent take their case to an employment tribunal?" on page 26.

Unfair dismissal

The law protects employees from what is called "unfair dismissal" in certain circumstances. What constitutes unfair dismissal is discussed in more detail on page 25.

Other reasons for dismissal

Employees may have other rights on dismissal depending on the circumstances of the case. For example, an employee who is made redundant may be entitled to a redundancy payment (discussed on page 22 below).

An employee may be dismissed due to problems with their behaviour or performance at work. In this situation, their employer should follow the advice in the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). Problems at work are discussed in more detail on page 9.

WHAT RIGHTS DO AGENCY WORKERS HAVE?

Background

Employment agencies supply the services of workers on their books to organisations with a need for that sort of work. An agency worker is someone who is working under this form of arrangement. It is common practice in certain sectors, for example catering and social care.

Agency working can leave the agency worker vulnerable in relation to employment rights. This is because they may not have an employment relationship with either the agency or the hiring organisation.

It is possible for courts and tribunals to decide that an employment relationship does exist with either the agency or the hiring organisation. However, this will not always be the case.

The Agency Workers Regulations 2010

The Agency Workers Regulations 2010 give agency workers the right to a degree of equal treatment with comparable workers within the hiring organisation in certain circumstances.

Agency workers are entitled to equal access to shared facilities from the first day of their assignment, unless limiting access can be "objectively" justified. Examples of shared facilities might include a crèche or canteen. They are also entitled to information about job vacancies at their place of work.

After 12 weeks on the same assignment, agency workers are entitled to equal treatment in relation to basic working conditions such as pay, working time, rest periods and holidays[11]. However, if there is no "comparable worker", there is no entitlement to equal treatment. For example, there will be no comparable worker if your constituent works as a cleaner in an office but the hiring organisation does not have any of its own cleaners.

The 12 week working period necessary to qualify for equal treatment is defined with some flexibility. If an agency worker does any work on a particular assignment in a week, it will count towards the 12 week qualifying period. In addition, certain breaks do not disrupt the qualifying period, including breaks in assignment of up to six weeks, sick leave (of up to 28 weeks) and maternity leave.

The agency is responsible for ensuring that an agency worker receives equal treatment after 12 weeks on the same assignment. The hiring organisation is responsible for supplying the employment agency with details of the appropriate terms and conditions.

An employment agency may choose to directly employ agency workers to prevent them becoming entitled to equal treatment as outlined above. To stop entitlement arising, the contract of employment offered by the employment agency must include a requirement to pay the agency worker between assignments. The agency worker must be entitled to at least four weeks' pay between assignments.

[11] Note that equal treatment does not extend to other terms and conditions, such as pension provision or contractual sick pay.

Enforcement

Workers should raise any concerns that they are not being afforded rights under the 2010 Regulations with their employment agency in the first instance. An agency worker can make a written request for information about relevant terms and conditions to the employment agency (or, in some circumstances, the hiring organisation). More information about agency worker rights is available from ACAS (the Advisory, Conciliation and Arbitration Service).

Where it is not possible to resolve the matter directly, an agency worker can bring a case to an employment tribunal (see page 26 below).

WHAT CAN MY CONSTITUENT DO IF THEY FEEL THEY ARE BEING DISCRIMINATED AGAINST AT WORK?

Background

Under the Equality Act 2010, people are protected from being discriminated against on certain grounds. These are known as the "protected characteristics". They are as follows:

- age
- disability
- gender re-assignment
- marital or civil partnership status
- pregnancy and maternity
- race (including colour, citizenship, national or ethnic origin)
- religion or belief (covering philosophical beliefs and atheism)
- sex
- sexual orientation.

Discrimination legislation is complex and includes different types of protection for different characteristics. If a constituent feels they are being discriminated against, they should be directed to seek advice from a solicitor, trade union representative or independent advice agency.

Trade union members may be able to get advice and support from their union. The Equality and Human Rights Commission can take on individual cases in certain, limited circumstances. Its website contains a range of practical information on discrimination issues. The Equality Advisory and Support Service has a helpline (0808 800 0082) which provides information and support on equality issues.

The Equality and Human Rights Commission produces guidance aimed at employees. The publication "Your Rights to Equality at Work: Pay and Benefits" (2015) covers general discrimination issues as well as equal pay between men and women.

The Equality and Human Rights Commission also produces statutory codes of practice. These are discussed below.

Direct and indirect discrimination

Discrimination can be direct or indirect. Direct discrimination happens when an employer treats a worker (or potential worker) less favourably because they have one of the characteristics listed above[12].

Indirect discrimination happens when an employer puts in place a requirement which applies to a broad group of staff but puts people sharing one of the protected characteristics[13] at a particular disadvantage. An example might be where a work benefit was only offered to staff who worked a certain number of hours. If the majority of part-time staff who could not take advantage of the benefit were women, this may be indirect discrimination. Indirect discrimination can be justified if it is a proportionate way of achieving a legitimate aim.

Harassment and victimisation under the Equality Act 2010

It is against the law to harass someone in a work-related setting by using offensive or intimidating behaviour linked to one of the protected characteristics[14] which has the effect of humiliating or undermining its target. It is also against the law to victimise someone (treat them less favourably) because they made a complaint about discrimination or supported someone who was making such a complaint.

Bullying at work

If someone feels they are being picked on or disadvantaged at work but it is not linked to one of the characteristics above, it may be that they are being bullied. There is no direct statutory protection against bullying. However, employers are required to look after the health and safety of their workers, including taking steps to protect against damaging behaviour like bullying.

It may be possible to resolve a bullying situation informally by raising it with a manager or colleague. If not, the matter can be pursued through a workplace grievance procedure (see “What if my constituent has a problem at work?” (page 9).

Where someone has suffered as a result of the bullying, they may be able to take the matter to court. There are costs and risks associated with court action, so a solicitor should be consulted in advance.

It may also be possible to bring a constructive unfair dismissal case to an employment tribunal. Unfair dismissal is discussed in more detail on page 25. Constructive dismissal occurs where an employer behaves so poorly that there is a fundamental breach of the contract of employment. This entitles the employee to resign and claim the same rights as if they were dismissed.

The duty to make reasonable adjustments for disabled people

Where a worker (or potential worker) has a disability which puts them at a substantial disadvantage, an employer has a duty to make reasonable adjustments to the working

[12] In certain circumstances, it is possible to discriminate against people with a certain protected characteristic where it is an occupational requirement of the job.
[13] Pregnancy and maternity is excluded
[14] Marital or civil partnership status and pregnancy and maternity are excluded.

environment. The purpose of making reasonable adjustments is to give the disabled person the same opportunity to do a job as everyone else.

Reasonable adjustments could cover:

- physical adaptations to a building to facilitate access for a wheelchair-user;
- specialist equipment to allow a blind person to use a computer; or
- changing the duties in a job description to make it easier for a disabled person to do that job.

It should be noted that an employer is only required to make adjustments which are reasonable given the nature and resources of the organisation.

Disability is defined in the Equality Act 2010 as an impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. A substantial effect is something that is "more than minor or trivial". Long-term is defined as lasting, or being expected to last, for at least 12 months.

Equal pay

Men and women working for the same employer are entitled to enjoy the same terms and conditions where they are doing one of the following:

- work which is the same or broadly similar;
- work which has been rated as equivalent in a formal job evaluation study; or
- work which is of equal value (this will ultimately be decided by a court or employment tribunal).

An employer can defend a claim on the basis that the difference in terms and conditions is the result of a factor other than the sex of the employee (e.g. time served). Differences in terms and conditions can also be justified where they are a proportionate way of achieving a legitimate aim.

In order to bring an equal pay claim, an employee must find a "comparator". This is someone of the opposite sex who works in the same establishment or is employed under the same terms and conditions and does similar work.

Note that the comparator does not always need to have the same employer. A solicitor, trade union representative or independent advice agency can provide further information.

The Equality Act 2010 makes provision for unequal pay to be challenged on grounds of direct discrimination where it is not possible to find a comparator for the purposes of an equal pay claim.

Enforcement

It may be possible to resolve concerns about discrimination informally, by talking to work colleagues or managers about the issue. However, a constituent may benefit from advice and support from an external organisation.

Discrimination legislation is complex. Further advice is available from the sources mentioned above.

If it is not possible to resolve the matter informally, a constituent may choose to take legal action. Whether it is most appropriate to take action in the courts or an employment tribunal will depend on the circumstances of the case. Legal advice is therefore recommended. The Equality and Human Rights Commission can take on individual cases in certain, limited circumstances.

The Equality and Human Rights Commission's Statutory Code of Practice on Employment (2011) gives detailed, technical guidance on discrimination in employment. It can be taken into account by tribunals and courts when considering a case. There is also a Statutory Code of Practice on Equal Pay (2011), plus a supplementary document.

MY CONSTITUENT IS OFF WORK SICK, WHAT SICK PAY ARE THEY ENTITLED TO?

Statutory sick pay

Statutory sick pay is a national insurance contributions-related social security benefit. It is paid by employers to employees (see definitions on page 4) who are off sick and meet the qualifying criteria. Note that agency workers can also qualify for statutory sick pay. However, agricultural workers have a separate sick pay system.

Statutory sick pay is paid at a flat rate of £88.45 a week (2016/17). Employees will usually be entitled to receive statutory sick pay for up to 28 weeks.

Someone who is not entitled to statutory sick pay may be able to claim employment and support allowance from the JobCentre.

A Citizens Advice Bureau or local authority welfare rights service can provide more information about statutory sick pay. Problems should be raised, in the first instance, with the constituent's employer. Her Majesty's Revenue and Customs (HMRC) employee enquiry line (0300 200 3500) can deal with complaints.

Contractual sick pay

An employee may also have an entitlement to sick pay through their contract of employment. This is known as "contractual sick pay". The rate it is paid at, and how long it is paid for, will depend on what the contract says.

Contractual sick pay is paid instead of statutory sick pay where it is available. However, it cannot be paid at a rate less than statutory sick pay.

An employer can refuse to pay contractual sick pay where the requirements set down in any terms and conditions have not been met. For example, an employer can require that its policy on notifying sickness absences is followed.

Whether a case about contractual sick pay should be brought in the courts or at an employment tribunal will depend on the specific circumstances of the case. Enforcing employment rights is discussed under "Can my constituent take their case to an employment tribunal?" on page 26.

Medical certificates

After seven days of sickness absence, an employer can require a medical certificate from a GP verifying the reasons for the absence. This is often called a “fit note” (replacing the previous term “sick note”).

A GP can use the fit note to state that an employee is not fit for work, or may be fit for some work. The GP can also recommend adjustments which could be made to the work environment to make it easier for someone to return to work. For example, the GP could recommend a change to working hours or lighter work for a limited period.

An employer will not usually have to put in place any adjustments a GP recommends. These are a matter for negotiation between the employer and employee. However, an employee who has a disability (as defined in the Equality Act 2010) can require an employer to make reasonable adjustments to the working environment. Disability discrimination is discussed on page 15.

Holidays and sick leave

Someone who falls ill just before or during a pre-scheduled period of annual leave is able to notify their employer that they wish to take the period as sick leave instead. However, they can be paid sick pay for this period, which may be less than holiday pay.

Someone who is on sick leave continues to build up entitlement to annual leave. However, this may only apply to their statutory entitlement to annual leave (5.6 weeks, discussed on page 6).

Someone who is on sick leave can request to take holidays during this period. If a request is granted, the employee is entitled to be paid holiday pay for the period in question. This is the case even where the employee is no longer being paid because they have used up their entitlement to sick pay.

The European Court of Justice has dealt with several cases looking at the effect of sick leave on holiday entitlement[15]. UK courts and tribunals must follow these decisions.

It has held that an employee who was not able to take their full entitlement to statutory annual leave in the leave year due to sickness should be able to carry leave over to the next year. They can also be paid for any holiday entitlement not used at the end of their employment.

Dismissal due to incapacity

It is possible for an employer to dismiss an employee who is not able to do the work they were employed to do because of illness. This is often referred to as dismissal on “capability grounds”.

Capability has the potential to be one of the “fair” grounds for dismissal in relation to the right not to be unfairly dismissed (discussed in more detail on page 25). However, an employer must act reasonably in reaching a decision to dismiss. This will include considering whether adjustments to work requirements can be made which would allow the employee to return to work.

It is unclear how long an employee must be on sick leave before an employer can dismiss them. This will depend on the specific circumstances of the case, including terms in the contract of employment.

[15] For example, Pereda v Madrid Movilidad SA [2009] E.C.R. I-8405.

Employers sometimes take action under the workplace disciplinary and grievance policy as part of the process of demonstrating someone is no longer capable of work. This can upset staff who see themselves as having done nothing wrong. It is preferable for employers to have separate capability procedures to use in these circumstances.

MY CONSTITUENT HAS CARING RESPONSIBILITIES, WHAT HELP IS AVAILABLE TO ENABLE THEM TO BALANCE WORK DEMANDS?

Flexible working

Making a request

All employees (see definitions on page 4) with 26 weeks' service will usually have the right to make a flexible working request. In some circumstances, agency workers also have the right to make a flexible working request.

Flexible working can cover a range of different working patterns, from reducing the hours worked, to working from home, to working during term time only. It should be stressed however, that employers do not have to agree to a flexible working request (although they must consider it in a reasonable manner). Therefore, options will be limited by what is practical from an employer's perspective.

An employee who wishes to work flexibly can make a "statutory request". A statutory request must:

- be in writing and be dated;
- state the change which is requested and the date from which it should apply;
- explain the effects the proposal may have on the employer and how any effects could be dealt with; and
- state whether a previous flexible working application has been made (and, if so, when).

An employer must deal with an employee's statutory request in a reasonable manner. An employer must reach a decision within three months (although a longer period can be agreed between employer and employee). Employees can only make one statutory request in a year.

Legislation sets out statutory grounds for refusing a flexible working request. These include[16]: that it would: cost too much; reduce ability to meet customer demand; and that it is not possible to re-organise work among existing staff.

It is open to employers and employees to agree to a flexible working arrangement without engaging the statutory process. In this case, it is up to employers and employees to decide how to deal with a request. Some employers may also have flexible working policies which are more generous than the statutory right.

[16] The full list can be found in section 80G(1)b) of the Employment Rights Act 1996.

ACAS code of practice

ACAS (the Advisory, Conciliation and Arbitration Service) has produced a code of practice setting out how employers should deal with flexible working requests. This is entitled "Handling in a reasonable manner requests to work flexibly" (2014). The code can be taken into account by employment tribunals when dealing with cases about flexible working.

ACAS also provides more detailed guidance on flexible working – "The right to request flexible working: an ACAS guide" (2014). This does not have a statutory basis and is not considered where a case goes to an employment tribunal.

Practical considerations

Where a statutory request for flexible working is agreed, it is important to understand that this results in a permanent change to an employee's terms and conditions. This means that it will not be possible to go back to the previous working pattern without making a further flexible working request.

Some employees may only want to alter their working pattern for a short time. In these situations, an informal arrangement is likely to be more suitable.

It is a good idea for employees making a flexible working request to carefully consider the likely impacts on themselves and their work colleagues. If they can present potential solutions to any problems, then their request is more likely to be granted. In particular, an employee should consider whether there is likely to be a pay reduction as a result of the request, and how they would cope with this.

It may also be that an employer does not agree the initial request but is prepared to negotiate. It is open to employees to put forward or agree alternative proposals.

Enforcement

Issues with how a flexible work request has been dealt with are best raised with the employer in the first instance. ACAS (the Advisory, Conciliation and Arbitration Service) can provide further information about the right to make a flexible working request.

An employment tribunal (see page 26) can deal with complaints that an employer has not dealt with a flexible working request according to the law; or that the employer has based its decision on incorrect facts. It may also be possible to take action on the basis that the decision was discriminatory on the basis of one of the protected characteristics discussed on page 15.

Time off to care for dependants

Employees (see definitions on page 4) have a statutory right to take time off to care for dependants in certain circumstances. The employee is not entitled to be paid for this time (although some employers have more generous policies).

A dependant includes:

- a child;
- a spouse/civil partner;
- a parent;

- someone who lives in the same household as the employee (excluding tenants/lodgers and employees); and
- anyone who reasonably relies on the employee when they are ill or injured, or to make their care arrangements.

The statutory right to time off applies where the employee is needed to:

- provide assistance to a dependant who is ill, injured or gives birth;
- make care arrangements for a dependant who is ill or injured;
- deal with the death of a dependant;
- deal with an unexpected disruption to care arrangements for a dependant; or
- deal with an unexpected incident at a dependent child's school.

An employee must tell their employer as soon as possible the reason for their absence and how long they expect to be away.

An employee who believes their request for time off to care for a dependant has been unreasonably refused can take their case to an employment tribunal (see page 26).

Note that some employers may have more generous policies for leave to care for a dependant. These may allow for leave in a wider range of circumstances or allow some leave to be paid. When relying on such provisions, an employee should follow any processes set out in the policy.

MY CONSTITUENT HAS BEEN SELECTED FOR REDUNDANCY. WHAT ARE THEIR RIGHTS?

Definition of redundancy

Only employees (see definitions on page 4) can be made redundant. The Employment Rights Act 1996[17] contains a definition of redundancy. In order for a dismissal to be by reason of redundancy, the redundancy must be caused by one of the following circumstances:

- the business (or part of it) closing down;
- the business (or part of it) moving; or
- the employer having reduced need for labour of a particular kind (usually because of reduced demand for certain work or because work is to be organised in a different way).

An employer may try to argue that an employee is being dismissed for a reason other than redundancy in order to avoid liability for redundancy payments. It is possible to challenge this decision at an employment tribunal.

[17] Section 139.

An employee with at least two years' service is entitled to a redundancy payment from their employer. An employee may also be entitled to other payments. These may include:

- holiday pay,
- pay in lieu of notice,
- unpaid wages, and
- compensation for lack of consultation in relation to the redundancy.

Requirement to act reasonably

Employers will often have a duty to act reasonably when dealing with redundancy. This duty comes from the law on "unfair dismissal" (discussed in more detail on page 25).

Usually employees must have at least two years' service with their employer to be protected in law from unfair dismissal. However, there are some circumstances where unfair dismissal protection is available to an employee from the beginning of their employment.

Unfair dismissal law[18] requires an employer to demonstrate that a dismissal was reasonable in the circumstances. This is judged on the basis of the size and administrative resources of the organisation.

The key requirements for redundancy procedures to be reasonable are generally considered to be[19]:

- that there must be meaningful consultation with employees (note that there are specific legal requirements for consultation where 20 or more employees are being made redundant),
- that a fair basis for selecting for redundancy must be adopted, and
- that there must be consideration of whether any employee selected for redundancy can be offered suitable alternative employment.

It is also possible for "bumping" to occur in redundancy situations. Here, a person who was at risk of redundancy is moved to a different post and the person in that post is made redundant instead. Such a decision must be within the definition of "reasonable" discussed above.

Entitlement to a redundancy payment

In order to be entitled to a statutory redundancy payment, an employee must have two or more years' service with their employer and be made redundant.

An employee may lose their entitlement to a statutory redundancy payment if:

- they refuse an offer of reasonable alternative employment, or
- they leave the job before the end of their redundancy notice period to take up another offer of employment.

[18] See section 98 of the Employment Rights Act 1996.

[19] These requirements are generally said to be defined in the case of Polkey v A E Dayton Services ltd. [1987] UKHL 8.

Redundancy pay is calculated for each full year of employment with that employer, up to a maximum of 20 years. It is calculated on the following basis:

- half a week's pay for each year the employee was under 22
- one week's pay for each year the employee was under 41
- one and a half week's pay for each year the employee was 41 or over.

Note that there are statutory caps on what constitutes a week's pay, as well as on the amount of an overall award. This means that those in higher paid jobs may not have their redundancy payment calculated on the basis of their actual pay.

Employers can also offer contractual redundancy payments beyond the statutory minimum. There may be additional conditions attached to a contractual redundancy payment.

Other rights in a redundancy situation

An employee who been given notice that they will be made redundant, and has at least two years' service, will be entitled to time off work. The time off must be used to look for work or to arrange training which will aid future employment. The requests for time off must be "reasonable".

Where an employer refuses a reasonable request for time off, an employee can take the matter to an employment tribunal.

Enforcement

It is best if an employee can discuss any issues or concerns about a redundancy process with the employer as quickly as possible. As noted above, the employer has a specific duty to consult, so there should be opportunities to do this.

ACAS (the Advisory, Conciliation and Arbitration Service) provides advice to employers about handling redundancies which may be useful. The website provides information about small scale redundancies. A booklet – "Handling large-scale redundancies" (2014) provides information on redundancy situations involving 20 or more staff.

Disputes about redundancy payments and the redundancy process can be taken to an employment tribunal. Disputes about contractual redundancy payments can also be taken to court. This is discussed in more detail under "Can my constituent take their case to an employment tribunal?" on page 26.

An employee who believes they are entitled to a redundancy payment should make a request in writing to their employer.

Business insolvency

Your constituent's situation may be complicated if the organisation which employs them has become insolvent. In this case, there may be no money available to make payments to staff.

Where a company is formally insolvent, an accountant (also called an "insolvency practitioner") known as a liquidator will be appointed to wind up its affairs. This will usually involve selling any assets the company has.

The process is similar for partnerships and sole traders. The process is called bankruptcy and the accountant who winds up the business's affairs is called a "trustee".

Where the business has insufficient assets to make redundancy and other payments, it is possible to make a claim to the "National Insurance Fund"[20]. The liquidator/trustee should instigate this process.

The Redundancy Payments Helpline - 0330 331 0020 – may be able to provide information about a liquidator. Advisers will also be able provide general support with claiming a redundancy payment.

A much bigger problem is situations where a firm is not formally insolvent. It is possible for the owners of a business to simply walk away from the business without taking steps to deal with the debt.

In this situation, no liquidator or trustee is appointed to wind up the business's affairs. There is therefore no one to make a claim to the National Insurance Fund on behalf of your constituent.

It is possible for an employee to bring a case to an employment tribunal in this situation. If the tribunal finds that money is due to the employee, a claim can then be made to the National Insurance Fund. Making a claim to an employment tribunal is discussed on page 25.

WHAT CONSTITUTES UNFAIR DISMISSAL?

Definition

Employees (see definitions on page 4) who have worked for their employer for at least two years have the right not to be unfairly dismissed. This is defined in legislation[21].

Unfair dismissal occurs where an employer cannot show that the reason for dismissal is one of the "fair" ones provided for in legislation. These are where the principal reason for the dismissal is:

- related to the capability or qualifications of the employee to perform their job;
- related to the conduct of the employee;
- because the employee is redundant;
- because the employee cannot continue to work without contravening the law; or
- for "some other substantial reason"[22] which justifies the dismissal.

Once an employer has demonstrated that a dismissal is for one of the "fair" reasons, they must also show that the dismissal was reasonable in the circumstances. This is judged taking into account the size and administrative resources of the organisation.

[20] The National Insurance Fund holds national insurance contributions and is used to pay associated benefits.
[21] See section 98 of the Employment Rights Act 1996.
[22] The "some other substantial reason" option is designed to deal with reasonable dismissals which do not fall into the other categories. It could cover dismissal due to business reorganisation which did not constitute redundancy, or where a major client has requested that an employee be removed.

Some dismissals are laid down in legislation as automatically unfair. This includes dismissals which relate to asserting a statutory right, such as the right to a written statement of employment terms or to be paid the national minimum wage. Dismissal which constitutes discrimination under the Equality Act 2010 (discussed on page 15) is also automatically unfair.

Where a dismissal is automatically unfair, an employee does not need to have worked for their employer for at least two years before they can claim. However, the award they can receive from an employment tribunal is usually lower.

Impact

Protection from unfair dismissal is a key right for employees. It acts to stop employers dismissing at will. The reasonableness requirement also incentivises employers to follow fair procedures when dealing with issues which could result in dismissal.

It remains possible to, for example, dismiss someone on sick leave. In this case their capability to do the job is in question. An employer must follow a fair process and act reasonably.

Enforcement

An employee who has been unfairly dismissed can take their case to an employment tribunal. If the claim is successful, they may receive a “basic award” calculated in the same way as a redundancy payment (see page 22). They can also receive a “compensatory award” which compensates them for loss of earnings. There are caps on the sums which can be awarded.

ACAS (the Advisory, Conciliation and Arbitration Service) can provide further information and advice on unfair dismissal.

CAN MY CONSTITUENT TAKE THEIR CASE TO AN EMPLOYMENT TRIBUNAL?

What types of case can an employment tribunal deal with?

Most legislation-based employment rights can be enforced at an employment tribunal. In addition, employment tribunals can deal with certain breach of contract cases up to a value of £25,000, but only where they are related to the termination of the contract.

This means, for example, that a case involving a claim for unfair dismissal and failure to provide contractual pay in lieu of notice can be dealt with by a tribunal. This removes the need to bring an employment tribunal case to deal with unfair dismissal and a separate court case to deal with contractual breaches in some circumstances.

However, there are other contractual breaches which must be the subject of court action rather than action at an employment tribunal. This is a particular issue where the breach is not connected to the termination of the contract.

Courts can deal with any breach of contract case, regardless of value. They can also deal with certain legislation-based employment rights, such as failure to pay the national minimum wage. However, most statutory rights can only be enforced at an employment tribunal.

Fees

Anyone who wants to bring a case to an employment tribunal must pay the relevant fee, although those on low income may be fully or partially exempt. The .gov.uk website has further information about applying for help with court and tribunal fees.

The SNP, Green and Labour Party manifestos for the 2016 Scottish Parliament elections contained commitments to abolish employment tribunal fees. This can only be taken forward once the relevant powers have been devolved under the Scotland Act 2016.

There is a fee to submit a case and a further fee if the case results in a hearing. There are also two different sets of fees – Type A and Type B – depending on the complexity of the case.

The table below details the current fee structure for individual claims (2016/17). There is a different structure for group claims. There may also be other fees, depending on how the case progresses. Further information is available from the Citizens Advice Scotland website.

Fee type	Type A claims	Type B claims
Issue fee	£160	£250
Hearing fee	£230	£950
Total	£390	£1,200

Source: Citizens Advice Scotland online.

Where a worker is successful in their case, they will usually be able to recover any fees they have paid from their employer. However, it is not always easy to get employers to pay up. It may be necessary to take formal enforcement action (discussed below).

Time limits

In most cases, the deadline for bringing a claim to an employment tribunal is three months from the date the event being complained about happened. This is often described as “three months minus one day”.

A notable exception is a statutory redundancy payment, which can be claimed up to six months from the date of redundancy. Where there is a series of events, the three month timescale starts from the last of those events.

An employment tribunal can choose to hear cases presented outwith these deadlines but only where it is fair to all involved to do so.

Constituents should also note that the time limit is not affected by the use of work disciplinary and/or grievance procedures. It may sometimes be necessary to lodge an employment tribunal claim while these processes are ongoing if the deadline would otherwise be missed.

ACAS early conciliation

Before a case can be submitted to an employment tribunal, the person bringing the claim must notify ACAS[23] (the Advisory, Conciliation and Arbitration Service). The person bringing an employment tribunal claim is known as a claimant.

ACAS contacts all prospective claimants to offer early conciliation. If the claimant accepts, ACAS staff will contact both parties to try to resolve the dispute without the need to progress to an employment tribunal. The service is free.

The ACAS leaflet "Conciliation Explained" (2015) provides more information about the process.

The deadline for bringing a claim to an employment tribunal may be extended during early reconciliation. However, if early reconciliation is not successful, the countdown resumes. It is therefore important to move quickly to lodge an employment tribunal claim after this.

A claimant does not need to agree to resolve a dispute through early conciliation to bring a case to an employment tribunal. In addition, an employer can also choose not to participate. However, a case will not be accepted by the tribunal unless it has an ACAS reference number, so initial contact must still be made.

Employment tribunal powers

Where a claimant wins their employment tribunal case, the tribunal will usually make a financial award. There may be several elements to this, including compensation for being without a job.

It is also possible for the employment tribunal to order an employer to do something to improve the work environment. For example, an employer could be required to put in place an adjustment that allows an employee to return to work.

An employment tribunal can also require an employer to give the claimant their job back. However, this is very rare. If there has been a breakdown in the relationship between employer and employee, this is not a realistic option.

Enforcement

The employer is responsible for paying any award made by an employment tribunal. However, a UK Government survey (Department for Business, Innovation and Skills 2013, page 6) found that only around half of claimants were paid in full. It may therefore be more difficult than a constituent is expecting to get money awarded by an employment tribunal.

It has recently become possible for employers to be fined if they do not pay within 28 days of receiving a reminder to do so. Claimants can fill in a form to start this process 42 days after the employment tribunal's judgment was issued.

The fine is set at half the outstanding amount of the award, with a minimum of £100 and a maximum of £5,000. The fine is paid to the government, but the employer remains responsible for paying the tribunal award to the claimant.

Claimants can also contact court officers (usually "sheriff officers") to take action to make the employer pay the award. This will usually involve seizing money from the business in a bank

[23] There are certain, limited, exceptions, such as those involved in a group claim where someone else in the group has undergone early conciliation.

account or till, or seizing goods belonging to the business. Court officers can provide more information about the options available.

A claimant will have to pay a fee to use the services of a court officer in this way. However, the costs are recoverable from the employer.

Note that, where an employer genuinely has no assets, it will not be possible to enforce the employment tribunal award. It is worth considering what action may be taken in the event an employer does not pay a tribunal award before raising the case in the first place.

Comparing employment tribunals and courts

Employment tribunals are more user friendly than courts so, for example, they avoid formal procedure and technical language. This means that it may be easier for someone to bring a case to an employment tribunal without the help of a solicitor. However, many of those who use employment tribunals regularly emphasise the importance of expert advice.

Users must pay fees regardless of whether they bring a case to an employment tribunal or a court. However, if a court case is lost, the losing side will usually be required to pay the winner's legal expenses (covering things like solicitors' fees and witness costs). This is very unlikely to happen at an employment tribunal. Thus, the risk of taking action at an employment tribunal is reduced.

Nevertheless, it may cost less in fees to bring some types of cases to court. And, if a constituent needs to employ a solicitor, they are likely to be able to recover some of these costs if they take the case to court and win.

Employment tribunals have strict deadlines in which cases must be raised (usually three months minus one day). But the deadline for raising a court case for breach of contract is usually five years. Thus, in some cases, it will be possible to bring a court case even although it is no longer possible to bring an employment tribunal case.

The clearest reason for choosing court over a tribunal is because the claim has a high value. Employment tribunals can only deal with (certain) breach of contract cases up to £25,000 in value. There are also caps on the amount of compensation which can be awarded in other areas.

Constituents who are unsure whether to take a case to court or to an employment tribunal should be advised to speak to a solicitor.

MY CONSTITUENT HAS LOST THEIR JOB, WHAT CAN THEY DO?

An employee (see definitions on page 4) who has worked for their employer for at least two years may be entitled to compensation for redundancy or unfair dismissal. These are discussed in more detail on pages 22 and 25 above.

An employee or worker may be entitled to other payments on the termination of their job, such as statutory notice or pay in lieu of notice, and holiday pay. These are also discussed above.

Someone who has lost their job may also find advice about entitlement to social security benefits helpful. There are a range of benefits available to those who are out of work or whose disabilities or caring responsibilities prevent them from working. Support is also available to cover housing costs.

A Citizens Advice Bureau or local authority welfare rights adviser will be able to provide more information on entitlement to social security benefits.

Someone who has no money to meet their essential living costs may be able to claim a "crisis grant". Crisis grants are available in certain circumstances where there is a serious risk to the health and safety of the claimant or their family.

Applications for crisis grants should be made to the local authority. Details about where and how to apply are available from the Scottish Government website.

WHAT SOURCES OF INFORMATION AND ADVICE ARE AVAILABLE TO A CONSTITUENT WITH A WORK PROBLEM?

In most cases, workplace problems can be resolved informally by discussing them with an employer or manager. Constituents may benefit from advice, either to do this, or to take the matter further if they are unsuccessful.

The following sources of advice and information may be helpful:

- **Trade unions and professional associations** – trade unions and professional associations provide advice, support and often representation to members on work-related matters. They may be able to offer or fund legal advice too.

- **Citizens Advice Bureau service** – local Citizens Advice Bureaux can provide advice on work-related matters. Some also have staff who can attend employment tribunals with their clients. The Citizens Advice Scotland website provides extensive online information.

- **Solicitors** – solicitors can provide legal advice about work issues, as well as represent clients in courts and employment tribunals. Legal aid may be available to cover some of the costs of advice from a solicitor. The Law Society of Scotland website has a "find a solicitor" service.

- **ACAS** – the Advisory, Conciliation and Arbitration Service is a government-funded organisation responsible for providing employment advice and resolving workplace disputes. ACAS provides online information and a range of leaflets (some of which are statutory codes of conduct) on employment matters. ACAS also provides telephone advice (0300 123 1100).

- **Equality Advisory and Support Service** – the Equality Advisory and Support Service provides telephone advice (0808 800 0082) on discrimination issues. Its website has some information as well as template letters.

- **Equality and Human Rights Commission** – the Equality and Human Rights Commission provides online advice on discrimination issues. Its legal team is also able to take up individual cases in certain, limited circumstances.

SOURCES

.gov.uk. *Apply for help with court and tribunal fees*. Available at: https://www.gov.uk/government/publications/apply-for-help-with-court-and-tribunal-fees [Accessed 11 May 2016]

.gov.uk. *Employment and support allowance*. Available at: https://www.gov.uk/employment-support-allowance/overview [Accessed 27 April 2016]

.gov.uk. *Employment tribunal: penalty enforcement*. Available at: https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement [Accessed 17 May 2016]

.gov.uk. *Pay and work rights*. Available at: https://www.gov.uk/pay-and-work-rights [Accessed 17 March 2016]

.gov.uk. *Statutory Sick Pay*. Available at: https://www.gov.uk/statutory-sick-pay/overview [Accessed 27 April 2016]

ACAS. Available at: http://www.acas.org.uk/index.aspx?articleid=1461 [Accessed 17 March 2016]

ACAS. *Handling small-scale redundancies – A step-by-step guide*. Available at: http://www.acas.org.uk/index.aspx?articleid=4547 [Accessed 4 May 2016]

ACAS. (2014) *Handling in a reasonable manner request to work flexibly*. London: ACAS. Available at: http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf

ACAS. (2014) *Handling large-scale redundancies*. London: ACAS. Available at: http://www.acas.org.uk/media/pdf/c/p/Handling-large-scale-collective-redundancies-advisory-booklet.pdf

ACAS. (2014) *Holidays and holiday pay*. London: ACAS. Available at: http://www.acas.org.uk/media/pdf/5/h/Acas-guide-Holidays-and-holiday-pay.pdf

ACAS. (2014) *The right to request flexible working: an ACAS guide*. London: ACAS. Available at: http://www.acas.org.uk/media/pdf/s/7/The-right-to-request-flexible-working-the-Acas-guide.pdf

ACAS. (2015) *Code of Practice on Disciplinary and Grievance Procedures*. London: ACAS. Available at: http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf

ACAS. (2015) *Conciliation Explained*. Available at: http://www.acas.org.uk/media/pdf/o/g/Conciliation-Explained-Acas.pdf [Accessed 18 May 2016]

ACAS. (2015) *Discipline and Grievances at work – the ACAS Guide*". London: ACAS. Available at: http://www.acas.org.uk/media/pdf/b/l/Discipline-and-grievances-Acas-guide.pdf

Brodie, D. (2008) *The Contract of Employment*. Edinburgh: W. Green and Son Ltd.

Citizens Advice Scotland. *Advice for Scotland – Work*. Available at: https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement [Accessed 17 May 2016]

Citizens Advice Scotland. *Employment tribunals – how much will it cost to make a claim?* Available at: https://www.citizensadvice.org.uk/scotland/work/problems-at-work/employment-tribunals-from-29-july-2013/what-will-it-cost-to-make-a-claim-to-an-employment-tribunal/employment-tribunals-how-much-will-it-cost-to-make-a-claim/ [Accessed 11 May 2016]

Craig V. and Walker S. (2007) *Employment Law – an Introduction*. 3rd ed. Edinburgh: W. Green and Son Ltd.

Department for Business, Innovation and Skills. (2013) *Payment of Tribunal Awards*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf [Accessed 17 May 2016]

Equality Advisory and Support Service. Available at: http://www.equalityadvisoryservice.com/app/home [Accessed 27 April 2016]

Equality and Human Rights Commission. Available at: http://www.equalityhumanrights.com/ [Accessed 27 April 2016]

Equality and Human Rights Commission. *Equal Pay: Statutory Code of Practice*. Available at: https://www.equalityhumanrights.com/en/publication-download/equal-pay-statutory-code-practice [Accessed 8 June 2016]

Equality and Human Rights Commission. (2011) *Employment Statutory Code of Practice.* Available at: https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice [Accessed 8 June 2016]

Equality and Human Rights Commission. (2015) *Your Rights to Equality at Work: Pay and Benefits*. Available at: https://www.equalityhumanrights.com/sites/default/files/your_rights_pay_and_benefits_30-12-14.pdf [Accessed 8 June 2016]

Health and Safety Executive. Available at: http://www.hse.gov.uk/index.htm [Accessed 26 April 2016]

Health and Safety Executive. *RIDDOR*. Available at: http://www.hse.gov.uk/riddor/index.htm [Accessed 26 April 2016]

Law Society of Scotland. *Find a solicitor*. Available at: http://www.lawscot.org.uk/find-a-solicitor/ [Accessed 17 May 2016]

Scottish Government. *Scottish Welfare Fund – How to Apply – Local Authority*. Available at: http://www.gov.scot/Topics/People/fairerscotland/scottishwelfarefund/howtoapplytothescottishwelfarefund [Accessed 18 May 2016]

Scottish Legal Aid Board. *Civil cases*. Available at: http://www.slab.org.uk/public/civil/ [Accessed 17 May 2016]

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