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# Employment Law for Hotels, Pubs and Restaurants

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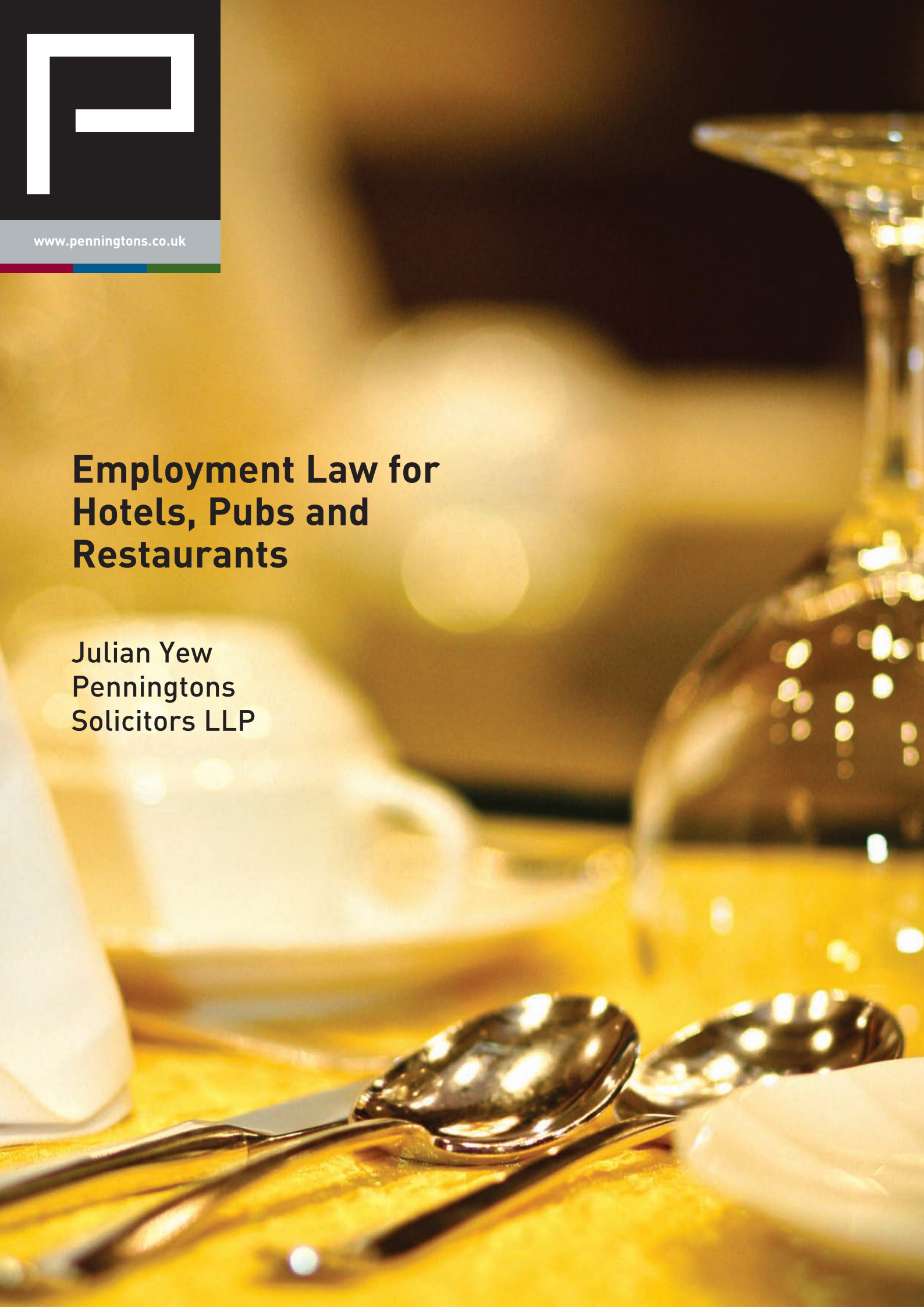

# Introduction

For most businesses, the introduction of new legislation, and new interpretations of existing rules and regulations, represent a major managerial headache. Few of these businesses have an in-house resource to advise and guide them yet new legislation is introduced almost every week, making it essential that today's business keeps up-to-date in a wide variety of legislative areas. Much to the bewilderment of many managers and proprietors, the Government's (any government's) propensity for bringing in new employment legislation is legendary. Not only have there been more changes of employment law than in almost any other area of legislation but some of the changes have also been fundamental. Needless to say, much of this new legislation heralds from Brussels or is greatly influenced by EU thinking.

Julian Yew's new guide – Employment Law for Hotels, Restaurants and Pubs – deals with an area that causes the greatest number of problems for today's manager. It is no coincidence that the greatest number of calls to the British Hospitality Association's own legal helpline relate to employment matters.

The guide will, I am sure, become a valuable source of reference for those who are managing a hospitality business today. It steers them through the law covering the typical employment challenges affecting the industry, including such difficult areas as illegal workers, tips, service charges and troncs, disciplinary matters, health and safety, claims by employees for breach of contract, unfair dismissal and discrimination – and much more.

Written in a readable, easy-to-understand style, it should find its way onto every wise hospitality manager's bookshelf as a knowledgeable guide to what is a veritable minefield of legal tripwires. This publication treads a safe path through them and will be a constant source of information and reference.

**Martin Couchman OBE**
**Deputy Chief Executive**
**British Hospitality Association**

# Preface

Human capital is an important business asset because it is the people who drive and keep hotels, restaurants, pubs and caterers afloat to ensure that their employer's return on investment is realised. Without their people, businesses are unable to deliver the hospitality and brand promise which defines their establishment. It comes as no surprise that there is growing recognition within the industry that people and talent management are key priorities.

As labour laws evolve with successive governments and European legislation continues to influence the shape of UK laws, businesses often struggle to keep abreast of what is required of them as employers. With the increasing pressure on the costs of running a business, access to professional legal advice is limited and often engaged as a last resort. It is against this background that **"Employment Law for Hotels, Pubs and Restaurants"** was conceived as a resource to support the hospitality business in the UK.

The guide considers, amongst other things, the different types of business structures for hotels, restaurants and pubs, workforce configuration, changes to the rights of agency workers and apprentices. It also deals with what should be in the employment contract to protect employers in this sector.

At the heart of this publication is a chapter dedicated to the typical employment challenges affecting the hospitality industry with practical tips on risk management. There is, for example, discussion on illegal workers, tips, services charges and troncs, Bribery Act, disciplinary matters, health and safety and modern business threats such as pandemics and terrorism.

The publication concludes with an overview of claims by employees for breach of contract, unfair dismissal and discrimination and how employers can minimise such risks and liabilities claims with some suggested checklists.

Whilst this publication is not intended and should not be a substitute for the need to seek professional legal assistance, I hope that it can act as a useful source of reference for all those confronted with a personnel issue in their busy lives running a hotel, restaurant, pub or catering business.

This publication is governed by English law and the law stated is as at 1 January 2013.

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# 1. Who is the employer?

A contract of employment is a contract where a person (servant) agrees to provide personal services to another (master). The identity of the legal employer is, in most cases, straightforward but this may be less so depending on how the business is being structured, particularly in the hospitality sector. It is important to know who the legal employer is as it affects the following issues:

1. Who bears legal responsibility for the employees;
2. Who will be sued in the event of an employment dispute; and
3. What happens to the employees in the event your business is insolvent, sold or on the termination of the legal arrangements you have with any other third parties.

## 1.1 Hotels

Where the hotel is owned and managed, the legal employer will be the owner. This is therefore straightforward.

In the United Kingdom, "opco/propco" business structures started to gain popularity in the early 2000s following a departure from sales and lease back transactions. This is a type of business arrangement in which a subsidiary company (the property company) owns all the revenue-generating properties instead of the main company (operating company).

This allows all financing and credit rating related issues for the companies to remain separate. In a "prop/op" deal, a parent company creates a real estate income trust (REIT) by initially selling income-generating assets from the operating company to a subsidiary. The subsidiary then leases the property back to the operating company. The operating company can then spin off the subsidiary as a REIT. The advantage of doing this is that the company can then avoid the double taxation on its income distributions.

Behind this complex business structure lies a hotel management contract in which a hotel operator is appointed to manage the property for and on behalf of the owning company. Operators typically prefer long initial terms and several long renewal periods exercisable by the operator. The owner, on the other hand, may prefer a shorter duration without specific renewal rights.

Under such agreements, the hotel operator has almost exclusive control including the hiring and firing of employees. The employees are usually directly employed by the owning company but day to day control of the hotel's operation and staff is delegated to the hotel operator. In this complicated structure, employees are directly hired and paid by the owning company. This ensures that the employees remain with the owners should the hotel management contract be terminated later on.

It is usual for staff benefits to be offered by the hotel operator and for staff to be transferred to other properties of the hotel operator as part of their career development. These peculiarities tend to blur the legal relationship as to who is the legal employer. Employees may perceive themselves as being employed by the hotel operator whereas their legal employer is actually the owner. Senior managers such as the General Manager and Finance Director may be directly employed by the hotel operator so that they can be easily redeployed within the hotel operator's properties but this is not always the case.

## 1.2 Pubs

In the United Kingdom, pubs are either tenanted or managed.

In a freehold situation, which is more commonplace in the countryside, the owner employs its own employees and is the legal employer.

In a tenancy situation, the tenant pays the pub owner an agreed rent, normally on a three-year rolling contract. At the end of the term, a rent review is agreed with the brewery or chain of pubs. If the tenant wishes to leave, it will be required to give notice of between three and six months typically. At the end of the notice period, the new tenant or brewery then pays the outgoing tenant for liquor and fixtures and fittings. In this scenario, the tenant will usually be the legal employer of its own staff.

In a leasehold situation, the owner will usually purchase a lease from an outgoing leaseholder or, if it is a new lease, from a brewery or chain of pubs typically for 10 or 20 years.

If there is an existing lease, the new owner will inherit the employees of the outgoing leaseholder under UK TUPE laws. If it is a brand new lease, the leaseholder will need to directly employ its own staff. If the new leaseholder wishes to leave after an initial non-assignable period (typically the first two years), the lease will be put up for sale. Should this happen, the purchaser of the lease then inherits the employees of the outgoing leaseholder.

### 1.3 Restaurants

A franchise business is a business in which the owners (franchisors) sell the rights to their brand, trademark and business model to third parties (franchisees). Franchises are extremely common in the restaurant trade and are adopted by the likes of McDonalds, Burger King, Pizza Hut and Subway.

Typically, the franchisee must first pay an initial fee for the rights to the franchisor's business, training, and the equipment required by the franchise. Thereafter, the franchisee will generally pay the franchisor a management fee calculated as a percentage of the franchise operation's gross sales.

The franchisee will not have as much control over the business compared to being an outright owner but it has the benefit of investing in an established and successful brand. Generally, the franchiser will require the franchisee to use the uniforms, business methods, signs or logos particular to its business. The responsibility is on the franchisee to invest in premises, equipment, stock and hiring its own employees to run the business. There are usually restrictions on who the franchisee is able to sell the business to. Should a business sale occur, the franchisee's employees will usually transfer to the franchisor or new franchisee as the case may be under UK business transfer laws (Transfer of Undertakings (Protection of Employment) Regulations 2006) commonly known as TUPE laws.

### 1.4 Catering and outsourcing

Outsourcing involves the buying in from third parties services that are previously provided in-house or performed by another contractor. The day-to-day management of the outsourced activity is delegated to the third party for an annual fee.

Outsourcing catering is prevalent in the catering industry both in the private and public sector including the management of airline food, staff and student canteens and corporate hospitality. In this scenario, the catering company will directly employ its own employees to provide the services at the client site. If the catering contract is terminated and awarded to a new supplier or in-sourced by the client, employees of the outgoing company who are principally assigned to the catering contract will transfer to the new supplier or the client (as the case may be) under TUPE laws.

# 2. Workforce configuration

Due to fluctuating operational needs in the hospitality sector, it is customary practice for hotels, pubs and restaurants to structure their workforce in such a way that not only meets customer demands and guest service standards but also achieves cost efficiencies in terms of wage costs.

In the hotel industry, it is not uncommon to hire permanent employees who can meet 50% to 70% of your property's occupancy levels and to supplement the workforce with agency workers or casual workers to meet any other additional demand. In addition, it is important to configure your workforce accordingly as different types of staff have different rights under UK employment law.

## 2.1 Employees

The Employment Rights Act 1996 defines an employee as an *"individual who has entered into or works under a contract of employment"*. When deciding if someone is an employee, certain minimum requirements must be present:

- You must require the individual to provide the work personally;
- There must be what is called "mutuality of obligation". If the individual is free to choose whether or not to take on work when it is available and you are under no obligation to offer work, then there will be no mutual obligation and the individual will not be an employee;
- You must control how the work is done by the individual;
- The individual must be fully integrated into your business (e.g. he or she is entitled to employee benefits, subject to the company's disciplinary code and pays tax and NIC under your PAYE system).

If the above legal test is not fully satisfied, then the individual could be deemed as either self-employed or a "worker" (see below).

In the majority of cases, employees are employed on a permanent basis subject to your right to terminate on notice (e.g. for cause).

If there is a need for employees to perform a specific task (e.g. to assist with a hotel opening, to cover peak or seasonal periods or to cover a colleague on maternity leave), a fixed term employment contract is usually used so that the employment automatically comes to an end on the expiry of the fixed duration or task completion.

When using fixed term contracts, it is important to ensure that you do not discriminate between fixed term employees and your permanent employees. You must ensure that fixed-term employees receive:

- the same pay and conditions as your permanent staff;
- the same or equivalent benefits package;
- information about permanent vacancies in the organisation; and
- protection against redundancy or dismissal.

If there is any difference in treatment, this must be objectively justified by law. For example: If you are unable to offer a fixed term employee a benefit such as pension or a year-end bonus which you offer to all your permanent staff, you should offer them an alternative benefit to ensure that their overall package is not worse off.

Part-time workers must also not be treated less favourably in relation to terms and conditions of employment compared with full time employees. For example: It would be unlawful to exclude part-time workers from training or to select them for redundancy because of their part-time status. Unlike discrimination on grounds of fixed term status which is limited to employees, the law on part-timers is much wider in scope because it applies to "workers".

Remember that employees have the most legal rights under employment law and these include the right to:

- A written statement of particulars of employment
- Maternity Leave and Pay, Adoption Leave and Pay and Paternity Leave and Pay
- Antenatal care
- Parental leave
- Time off to care for dependants
- Apply for flexible working
- Not to be unfairly dismissed
- Fair disciplinary and dismissal policy
- A grievance procedure at work
- Statutory redundancy pay (after two years' continuous service)
- Time off for public duties (e.g. magistrate duties, trade union activities and jury service)
- An itemised pay statement
- Protection against discrimination at work
- Under the Working Time Regulations (e.g. paid holiday leave, restrictions on working hours and the right to rest breaks and rest periods)
- National Minimum Wage
- Statutory sick pay
- Be accompanied to a disciplinary or grievance meeting
- Protection for whistle-blowing
- Health and safety protection
- Protection against unlawful wage deductions.

### 2.2 Agency Workers and Agency Workers Regulations 2011

The Agency Workers Regulations (AWR) came into force on 1 October 2011. This affects businesses that are involved in the supply and use of agency workers to supplement their permanent workforce.

**Agency workers' rights after 12 weeks' continuous engagement with you**

The AWR require the temporary work agency (TWA) to ensure that an agency worker who has completed a 12-week qualifying period with you receives the same basic working and employment conditions as he or she would be entitled to for doing the same job had you recruited them directly. A temporary break in engagement in certain types of situations will not break the 12 week cycle. Legal compliance in respect of the accrual of these qualifying period rights is the joint responsibility of you, the hirer and the TWA.

The relevant terms covered by the equal treatment rule are limited to pay; the duration of working time; night work; rest periods; rest breaks and annual leave (including contractual leave, subject to any qualifying conditions applicable to your own employees). There is no obligation on the TWA to match contractual benefits (e.g. pensions, contractual sick pay, contractual redundancy pay, contractual notice periods, season ticket loans, employee incentive schemes and the like).

The right to equal treatment only applies in relation to terms that would be ordinarily included in the agency worker's contract had you recruited them directly. This will depend on a number of things including the relevant pay scale for the job in question, company handbooks, and custom and practice within the hospitality industry. So long as the TWA has matched the relevant terms and conditions of the agency worker with the terms you usually give to a comparable employee, the TWA has complied with the law.

**Day one rights**

Agency workers are also entitled to a number of rights that apply from day one of an assignment. These are the right to access your collective facilities (e.g. staff canteen) and amenities and the right to be informed of any vacant posts in your establishment.

**Payment of tips and service charges**

The definition of 'pay' under the AWR is very wide and covers any sums payable to a worker in connection with their employment, including any bonus, commission or other emolument referable to the employment.

Under the AWR, any *'bonus, incentive payment or reward which is* ***not*** *directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service'* is excluded from the definition of pay.

Unfortunately, the issue of tips and service charges is not very clear under the AWR and accompanying Government Guidance.

For example: You have an agency worker working as a waiter in your restaurant. If a customer leaves a tip for the waiter, it seems that the tip will be directly attributable to the quality of the work done and, as such, should fall within the worker's 'pay'. Where tips are shared among your staff collectively, and the system is administered either by you or a troncmaster, the position is less clear.

If, for example, all your waiters receive an equal share of the money collected, regardless of the quality of service provided, it is unlikely to amount to a bonus based on individual performance and would therefore not come within the definition of 'pay'.

If a service charge is automatically added to the restaurant bill, it would seem that a compulsory service cannot fall within the equal treatment principle relating to pay. However, if the customer

is given the option of declining to pay the service charge, then it is arguable that any service charge then paid could be claimed as part of the agency worker's 'pay' after 12 weeks.

Should tips and service charges form part of "pay", these should be paid by you or the troncmaster to the agency worker as you would do for your own employees.

**The Swedish derogation contract model**

TWAs can potentially avoid their statutory obligation to match pay for their agency workers after 12 weeks as long as a so-called "Swedish derogation" contract is in place. The exemption only applies to pay, so the other rights conferred by the AWR, such as the right to equal treatment in respect of rest breaks after 12 weeks' employment in a given job and day one rights are not covered.

For the exemption to apply, the agency worker must sign a permanent contract of employment with the TWA which meets certain minimum requirements. One of the key requirements of the Swedish derogation contract model is that the agency worker is entitled to be paid between assignments. This downtime pay must be 50% of the normal pay (calculated with reference to the highest actual pay received by the agency worker in the pay reference period in the 12 weeks preceding the termination of the last assignment) or the national minimum wage, whichever is the higher. The TWA is also obliged to take reasonable steps to find suitable alternative work for the agency worker during this period.

Remember that the statutory obligation imposed by the AWR falls on the TWA, not on you as the end user. However, the commercial reality is that the TWA may seek to pass on some of the compliance costs to you in order to maintain its profit margins.

To ensure legal compliance and protect your business, you should:

- Evaluate the composition of your workforce as against your operational needs to ensure that you have the right balance of permanent employees, casual workers, self-employed persons and agency workers so that legal risks are appropriately managed across your business;
- Consider if commercial outsourcing arrangements are feasible rather than relying on the use of agency workers;
- Consider increasing the use of casual workers or staffing banks. You should minimise the risks of employment status disputes by ensuring that such atypical workers are separate to your permanent employees and that any 'umbrella contracts' for any 'as and when' workers are for less than two years to minimise risks of unfair dismissal claims;
- Consider if formal job grading and pay structures can be implemented within your business to distinguish permanent employees from agency workers. If you wish to do this, you must ensure that there are qualitative differences between your permanent employees and the agency workers at your establishment.

For example, the accompanying Government Guidance provides that it would be lawful to pay agency workers less by applying '"starter grades'" based on their experience provided that those starter grades are also applied by you to your own direct recruits. In this case there is no different treatment based on employment status so the law is not broken;

- Negotiate Swedish derogation contracts with your TWAs. The potential areas for negotiations between you and the TWA would include exclusivity, duration of the contract, volume of work and commercial indemnities;

- Comply with your statutory obligations under the AWR by passing on information to the TWA to enable them to match their workers' pay and benefits with a comparable employee in your business where the agency worker has met (or will meet) the 12 weeks qualifying period;
- Ensure that you have appropriate indemnities in your commercial contract with the TWA against employment status claims by their staff (e.g. if they claim to be your employees because they have worked at your establishment for many years).

### 2.3 Casual workers

This category of staff is usually referred to as *"as and when"* workers. They are in your staffing bank to call upon when there is a need to supplement your permanent workforce.

Casual workers are staff who are neither employees nor self-employed. In law, they are "somewhere in the middle". A "worker" is defined as a person who is providing personal services to you but you are not their client or customer, therefore they are not self-employed. They are not employees either despite the mutuality of obligation that exists between you and the worker because the person is separate from your permanent workforce.

An individual cannot be classified as a 'worker' for employment law purposes if he or she has a genuine and unfettered right to substitute someone else to do the work. Although HMRC may require you to subject your "workers" to PAYE, this is a tax administration issue and does not necessarily mean that they become employees in the legal sense.

"Workers" have certain employment protection rights and these include:

- Protection against discrimination at work
- Rights under the Working Time Regulations (e.g. paid holiday leave, restrictions on working hours and the right to rest breaks and rest periods)
- Right to the national minimum wage
- Right to statutory sick pay
- Right to be accompanied to a disciplinary or grievance meeting
- Protection for whistle-blowing
- Health and safety protection
- Protection against unlawful wage deductions.

### 2.4 Apprentices

An apprenticeship is usually for a fixed term of one to four years and/or until a level of qualification is reached. Apprentices are employees and therefore entitled to the National Minimum Wage. The training element of the apprenticeship is usually fully or partially government funded.

When recruiting an apprentice, you should ensure that you do not limit the age of applicants for your schemes on the basis of funding eligibility as this will indirectly discriminate against older applicants. You should ensure that your apprentices receive the national minimum wage at the apprenticeship rate.

Apprentices also benefit from all rights that workers are entitled to under the Working Time Regulations 1998. Apprentices under the age of 18, but over compulsory school age, have additional rights in relation to young workers.

You can employ an apprentice in one of two ways:

- Under a "traditional" contract of apprenticeship governed by the common law; or
- Under an apprenticeship agreement governed by statute (i.e. the Apprenticeships Skills, Children and Learning Act 2009 (ASCLA 2009)).

The ASCLA 2009 introduced the new concept of an "apprenticeship agreement". Such an agreement is deemed to be a contract of service and is specifically not a contract of apprenticeship. The distinction is important, as apprentices working under contracts of apprenticeship traditionally have greater rights than ordinary employees working under contracts of service.

The following four conditions are required for an agreement to qualify as an apprenticeship agreement:

- The apprentice must undertake to work for you;
- The agreement must be in the "prescribed form" containing the basic terms of employment required to be given to employees under section 1 of the ERA 1996 and also include a statement of the skill, trade or occupation for which the apprentice is being trained under the relevant apprenticeship framework;
- The agreement must state that it is governed by the law of England and Wales; and
- The agreement must state that it is entered into in connection with a qualifying apprenticeship framework.

Do bear in mind that you have only a limited right of dismissal in relation to apprentices engaged under common law contracts of apprenticeship. For example, you cannot make an apprentice redundant unless there is a business closure or a fundamental change in your business.

If a common law contract of apprenticeship is terminated prematurely, your apprentice can sue you for enhanced damages for early termination. The agreement can, however, be terminated by mutual consent but you should consider entering into a compromise agreement to avoid legal claims. Apprentices engaged under a statutory apprenticeship agreement can be dismissed in the same way as your ordinary employees.

# 3. Terms of the employment contract

## 3.1 Employment contract and staff handbook

Under section 1 Employment Rights Act 1996, all employees are entitled to written statement of particulars of employment within the first two months of their employment. This statement should provide the following information:

- Identity of the employer
- Date of commencement
- Job title
- Place of work
- Salary
- Hours of work
- Holidays
- Sick pay
- Notice period for termination
- Disciplinary and grievance procedures
- Pensions
- Collective agreements.

Typically, the statement forms part and parcel of the employment contract itself so there is no need to issue a separate statement. The employment contract sets out what are the contractual rights and obligations of the respective parties.

If a section 1 statement is not provided, your employee can apply to the tribunal for a determination of the terms. If they win their tribunal claim, they may also be awarded an additional two to four weeks' pay if there has been a failure to provide a section 1 statement.

In addition to the employment contract, you may have workplace rules, policies and managers guidelines which you do not necessary wish to have contractual force (e.g. disciplinary and grievance policies are normally non-contractual so that you have the flexibility to depart from them depending on the particular situation). Workplace policies are usually set out in the Employee Handbook instead.

If you have an Employee Handbook which has a combination of contractual and non-contractual provisions (e.g. you may prefer to keep the employment contract itself short or bespoke for a particular employee and for general terms of employment to be in the Employee Handbook), then you need to ensure it is clear which sections in the Employee Handbook are contractual. This clarification is best set out in the introduction page to the Employee Handbook to avoid confusion.

## 3.2 National minimum wage

Workers must be school leaving age (usually 16) or over to qualify for the minimum wage. This includes employees, part-time workers, agency workers and apprentices in their first year. Work experience and internships are not entitled to the minimum wage if they are doing work experience as part of a higher education course, a volunteer or doing voluntary work or work shadowing.

You are required to pay the minimum wage regardless of the size of your business. The minimum wage rate you need to pay depends on your worker's age and if they are an apprentice. The rates increase in October each year. If you provide a worker with service accommodation, the accommodation costs (such as rent, charges for gas, electricity, furniture and laundry) can be taken into account when calculating the minimum wage but only up to a certain amount a day.

It is a criminal offence not to pay your worker the minimum wage or to falsify payment records. You must also keep records for three years proving that you are paying the minimum wage.

HM Revenue & Customs (HMRC) officers have the right to carry out checks at any time and ask to see your payment records. They can also investigate your business following a worker's complaint to them or if someone blows the whistle to the authorities. If you are found guilty by HMRC, you are liable for any arrears of pay to your worker and a penalty.

### 3.3 Deductions for cash shortages and stock deficits

Under section 18 Employment Rights Act 1996, you may deduct from the wages of your restaurant or bar staff for cash shortages or stock deficiencies provided that this does not exceed 10% of their gross wages on a particular pay day. This provision does not prevent you from deducting the whole amount of any deficiency or shortage over a number of pay days. It simply limits the rate at which deductions may be made on any given day. Neither does the 10% rule apply to your worker's final instalment of wages (e.g. deductions from their notice pay).

You must make the deduction within 12 months of the date when you discovered the shortage or deficiency. You must also notify your worker in writing of their total liability in respect of their shortage or deficiency and make a written demand for payment on one of their pay days.

The rules for deductions are best set out in the employment contract to avoid claims for unlawful deduction of your employee's wages.

### 3.4 Service accommodation

Depending on your operational requirements, you may require staff to live "on site" for the better performance of their duties. If you are offering them service accommodation as part of their employment contract, you should ensure that they are living on your property as a "licensee" rather than as a "tenant" so that you can require them to vacate your property in the event that their employment contract is terminated for whatever reason.

If your employee is a "tenant", you can only secure their removal if you have an Eviction Order from the courts. This can be a long and expensive process involving lawyers. To ensure that your employee is a "licensee", you will need to ensure that you retain control, possession and management of the property and that you are entitled to enter the premises at any time. If they are a "tenant" and, therefore, enjoy exclusive possession, you cannot enter the property at will.

The license arrangements can either be incorporated in a service accommodation clause in the employment contract or you can draw up a separate service accommodation agreement. In these kinds of arrangements, you should be aware of the potential tax implications. Provided that the provision of free accommodation is for the better performance of the employee's duties and the employee can demonstrate that occupation of the particular property is essential to the proper performance of their duties, the value of the accommodation plus council tax, water and sewerage charges relating to the property which are paid for by the employer is exempt from income tax and NIC. Other types of charges could be taxable depending on the employee's annual earnings.

You should also be aware of the restrictions on working time if your "on site" manager is required to be "on call" in the place where he or she lives and works.

### 3.5 Mobility

A mobility clause gives you the flexibility to require your employees to work at different establishments on reasonable notice. This is especially important if your business needs vary from time to time and you need to deploy your staff to where the customer demand is most pressing.

If you exercise the mobility clause and your employee unreasonably refuses to relocate, this can be dealt with as a disciplinary matter as it can constitute insubordination. In this kind of situation, it is not open to your employee to claim a redundancy payment on the basis that their job in their original place of work has ceased to exist.

You should, however, be aware that imposing a requirement on your employees to work in certain locations involving additional commute and longer working hours could constitute indirect discrimination particularly for women who may be disadvantaged by or cannot comply with such a mandatory requirement.

### 3.6 Working Time Regulations 1998 – working hours, rest periods, holidays

The Working Time Regulations 1998 impose restrictions on the hours a worker can legally work. This affects the number of workers you will need to employ to service your customers and also how your roster your staff.

#### 48 hour working week

You cannot require your workers under 16 to work more than 48 hours a week. Workers 18 or over who want to work more than 48 hours a week can, however, choose to opt out of the 48-hour limit.

The weekly working time limits are always based on average working time over six working days regardless of how many days your worker actually works. This is calculated over a 17-week period (102 working days after deducting their weekly rest days).

For example: An employee works three shifts of 10 hours and two shifts of nine hours over five days in a week. The total weekly hours of work are 48. His average night working time is eight hours (not 9.6 hours) using the statutory formula:

48 hours x 17 weeks= 816 hours

816 hours divided by 102 working days in a 17 week period = 8 hours per day.

If you and your workers agree as part of a collective or workforce agreement, the working hours can be averaged over a longer period (e.g. up to 52 weeks). This could be for a certain period or indefinitely but it must be voluntary and in writing.

You cannot dismiss or unfairly treat a worker (e.g. refuse them promotion) for refusing to sign an opt-out. If your workers wish to opt back in, they must give you at least seven days' notice. You can require them to give you longer notice of up to three months provided that this was previously agreed in the written opt-out agreement.

**Daily rest periods**

Night time workers who work between the hours of 11pm and 6am also have special protection. The night time period must be seven hours long and include the period between midnight and 5am. A "night worker" is any person who works for at least three hours during "night time" on the majority of their shifts or does so "as a normal course". Case law suggests that anyone who works nights on one in three shifts or more will be a night worker

You must make sure that your night workers do not work more than an average of eight hours in a 24-hour period. If your worker does not receive the daily rest period due to your shift rostering pattern, you must offer them compensatory rest later on.

Your workers cannot opt out of the limits on night time work. In most cases, even if the limits on night hours do not apply, you must remember to carry out regular health assessments and to monitor working hours.

Although there is no scope for workers to opt out of the night limits, you may make a collective or workforce agreement to modify or exclude these limits. Provided any union agreement is made in accordance with agreed procedures and is incorporated into workers' contracts it will be binding on all workers in relevant grades, even if they are not members of the union.

You must keep records of night workers' working hours to prove they are not exceeding night working limits and do so for at least two years.

**Weekly rest periods**

Every worker is entitled to one day's rest in every seven days or two days' rest in every 14 days.

**Daily rest breaks**

Your worker is entitled to a rest break of 20 minutes after six hours of work. This does not have to be paid. If your worker works for 12 hours, the minimum rest break remains as 20 minutes. You should ensure that rest breaks are allocated to your workers during their shifts. If they do not wish to take it, that is their choice but you would not have broken the law.

Some workers may ask if they can forgo their rest breaks but leave earlier at the end of their shift. Such requests should be resisted.

**Annual leave**

All full-time workers working five days a week are entitled to 28 days of annual leave which can include the eight public and statutory holidays normally observed in the UK.

Holidays for part-timers should be pro-rated accordingly. For example, an employee working three days a week should be entitled to 16.8 days (rounded up to 17) based on 3/5 x28 days. Issues can arise in relation to part-timers who do not work on Mondays where the majority of statutory holidays fall. The easiest approach is to pro-rate their annual entitlement regardless of whether they work on Mondays.

Due to the mandatory daily rest breaks, daily and weekly rest periods, you will need to ensure that your staff are rostered properly. Remember that your workers can claim compensation in the employment tribunal and also notify the local authorities of any statutory breaches of the Working Time Regulations 1998.

### 3.7 Lay off and short time working

If you have insufficient work for your employees and the situation is expected to be temporary (e.g. due to seasonal fluctuations or a temporary closure for refurbishment), you can potentially lay off your employees. A lay off occurs if you require your employees to stay at home for at least one working day. Short-time working, on the other hand, occurs if you reduce their working hours such that they are earning less than half a week's pay.

To lay off your staff or put them on short time working, there must either be an express contractual right in the employment contract or an implied right established over a long period by custom and practice. Otherwise, you will be breaching your employees' contracts.

You can only lay off or put your employees on short time working without pay if there is a specific term in their contract allowing you to do so. If your employee is laid off or put on short time working, they might be entitled to a Statutory Guarantee Payment which is limited to a maximum of five days in any period of three months.

The daily amount is subject to an upper limit which is reviewed by the Government annually. On days when a guarantee payment is not available, it may be possible for your employees to claim Jobseekers Allowance through the local Jobcentre Plus office.

Employees who have been laid-off or put on short-time can claim Statutory Redundancy Pay if the period of their lay off or short time working is four weeks in a row or six weeks in a 13-week period. To avoid such a claim, you must reinstate your employees before they qualify for redundancy compensation.

### 3.8 Notice period for termination

Unless your employment contract provides otherwise, the notice an employee needs to give you if they wish to resign is one week. The notice that you need to give an employee, on the other hand, is one week for every complete year of service up to a maximum of 12 weeks. Therefore, if an employee has 3.5 years of continuous service, you will need to give at least 3 weeks' notice for termination. If your employee has 15 years' continuous service, the maximum notice you have to give is 12 weeks. There is no right to statutory or contractual notice if your employee is guilty of gross misconduct.

If you wish to pay your employee in lieu of their notice (e.g. you want them to leave immediately when notice is given by either party) or you wish to place them on gardening leave to protect your business, you will need to ensure that the employment contract gives you the right to do so.

### 3.9 Health and safety laws

Under the Health and Safety at Work etc Act 1974 (HSWA 1974), all employers, employees and third parties (e.g. your contractors) owe duties to ensure the health, safety and welfare of persons at work. This legal duty includes:

- the provision and maintenance of plant and systems of work that are safe and without risks to health;
- the use, handling, storage and transport of articles and substances;
- the provision of information, instruction, training and supervision as is necessary to ensure health and safety at work; and
- the maintenance of a safe working environment for your employees

The HSE and local authority are the main enforcing authorities. Failure to comply with the duties imposed by the HSWA 1974 can result in prosecution in England and Wales.

The HSWA 1974 makes it a criminal offence to breach the statutory obligations and the numerous supporting regulations. Whilst a fine is a common punishment, if safety breaches within a workplace cause a death, then those responsible may also face prosecution for individual gross negligence manslaughter (in the case of individuals) or for corporate manslaughter (under the Corporate Manslaughter and Corporate Homicide Act 2007) where the defendant is an organisation.

### 3.10 Licensing Act 2003

A premises licence is required for any business premises offering *"licensable activities"* under the Licensing Act. *"Licensable activities"* include the retail sale of alcohol, the provision of late night refreshment, and the provision of regulated entertainment (e.g. live music, playing of recorded music or dance performance).

If your staff are selling alcohol, they will need a *"personal licence"*. This type of licence allows a person to sell alcohol, or authorise the sale of alcohol, under the authority of a *"premises licence"*. Anyone can apply for a *"personal licence"* to the licensing authority for the area in which they live. They need to show they have a licensing qualification and a criminal record clean of relevant offences.

The local authority can only refuse such an application on police advice. The licence lasts for ten years and, on expiry, the licensee will need to reapply to the authority that issued the original licence. Anyone who already had a licence under the previous licensing schemes in their name - typically a pub landlord – is able to get a licence without having to have a qualification; this is known as the grandfather right. If an applicant does not live within a local authority's area, they can apply to any authority of their choice.

A *"premises licence"* that includes sale of alcohol must, in addition, name a *"designated premises supervisor"* (DPS), who must themselves have a personal licence and who must counter-sign the application.

You must therefore ensure that any employee selling alcohol in your business has a *"personal licence"* and that you have a DPS on your premises. If your DPS leaves your business, you will need to appoint a substitute. This can be another employee with a *"personal licence"*. The application can be made online subject to payment of a fee and is valid pending the usual checks.

### 3.11 Private Security Industry Act 2001

One of the main duties of the Security Industry Authority (SIA) is the compulsory licensing of individuals working in specific sectors of the private security industry. It is essential that individuals working in the private security industry undergo a structured training programme that results in a recognised qualification. The SIA has developed a competency (skills) requirement as part of its licensing function. Individuals applying for a front line SIA licence must prove that they are properly qualified to do their job.

A SIA licence is required if your staff undertake the licensable activities of a security guard, door supervision or CCTV for your hotel, pub or night club. There are two types of SIA licence:

- A front line licence is required if a person is undertaking licensable activity. A front line licence is in the form of a credit card-sized plastic card that must be worn, subject to the licence conditions.

- A non-front line licence is required for those who manage, supervise and/or employ individuals who engage in licensable activity, as long as front line activity is not carried out. This includes directors or partners in your business. A non-front line licence is issued in the form of a letter that also covers key holding activities.

Unless you have been given an exemption under section 4(4) of the Private Security Industry Act 2001, it is a criminal offence for your employee to undertake the licensable activities without an SIA licence. An exemption is applicable only where your company has been granted approved contractor status by the SIA and the other conditions of section 4(4) have also been met.

The licence involves a one off fee for a three year licence. You should decide if your employee should bear the cost of applying for the SIA licence as a condition of the job or if you will pay for this. If you are paying for the cost, you should ensure that this is repaid to the business in the event that your employee leaves you before the expiry of the licence.

### 3.12 Bribery, gifts and hospitality

Since July 2011, it is a criminal offence for an employer or employee to offer or receive a bribe; bribe a foreign official; and fail to prevent a bribe being paid or received. Under the Bribery Act, a 'bribe' includes a financial reward or other form of advantage to influence and secure a business advantage from the recipient. If you break the law, you could be liable to an imprisonment term of ten years and an unlimited fine.

If you are an hotelier, the Bribery Act may affect the following:

- Your property development teams and their relationships with officials performing public functions in national, local or municipal government, public agencies architects, surveyors, agents and consultants (e.g. hotel development projects outside the UK);
- If you are involved in joint venture projects with partners in another country where bribery is either customary or prevalent;
- Your procurement/purchasing managers and their relationships with suppliers and any agents, contractors and subcontractors;
- Your marketing and sales teams and their relationships with travel agents, airlines, consortia and the management of corporate accounts;
- Services offered by concierge at your hotel.

To avoid breaking the law, you will need an anti-bribery policy to show that you have taken adequate measures to prevent bribery and that you are doing business with organisations which have adequate safeguards as well.

Such a policy will set out your company's rules on gifts and hospitality, facilitation payments and kickbacks. It should also identify 'red flag' areas your employees need to be aware of to protect your business and the procedures that will apply where there is an allegation of bribery within the organisation.

Your staff should also receive training on your anti-bribery policy as part of your risks management.

To avoid putting yourself at risk of a bribery allegation, be wary of any third party who:

- insists on receiving a fee before committing to sign a contract with your company or carrying out a government function;

- requests payment in cash and/or refuses to sign a formal fee agreement or provide a receipt;
- requests an unexpected additional fee or commission to "facilitate" a service;
- demands lavish entertainment or gifts before commencing or continuing contractual negotiations or provision of services;
- provide a non-standard invoice that looks unusual to you.

### 3.13 Disciplinary and grievance management

By law, you have to provide details of your disciplinary and grievance procedure to your employees.

A disciplinary procedure sets out the rules and standards your employees are required to observe. It provides you an opportunity to deal with conduct or performance issues at work. The procedure should be fair, effective, and consistently applied in the interest of fairness.

You should follow the Acas Code of Practice on disciplinary procedures. The code provides useful guidance on how to:

- Resolve discipline issues informally
- Develop your disciplinary rules and procedures
- Keep written records of disciplinary issues
- Act fairly with formal disciplinary action
- Establish the facts
- Hold a disciplinary meeting
- Take action after the disciplinary meeting
- Provide employees with an opportunity to appeal.

Staff in your organisation may have problems or concerns about their work, working conditions or relationships with colleagues that they wish to discuss with you. They want their grievance to be addressed and resolved. A grievance procedure allows you to resolve problems before they can develop into major difficulties for all concerned. You should follow the Acas Code of Practice on grievance procedures. The Code provides useful guidance on how to:

- Resolve grievances informally
- Develop your rules and procedures
- Deal with formal grievances
- Hold a grievance meeting
- Decide on appropriate action (i.e. resolution)
- Allow the employee to appeal.

Your workers may ask an official from any trade union to accompany them at a disciplinary or grievance hearing, regardless of whether or not they are a member or the union is recognised. There is no legal right to be accompanied by a parent, friend, spouse, relative or lawyer.

Such requests are very rarely accommodated by employers and only in the most exceptional circumstances. If the companion cannot attend on a proposed date, he or she can suggest an

alternative time and date so long as it is reasonable and it is not more than five working days after the original date. Before the hearing takes place, you should ask your worker to tell you who they have chosen as a companion.

The statutory companion should be allowed to address the hearing in order to:

- Put the worker's case
- Sum up the worker's case
- Respond on the worker's behalf to any view expressed at the hearing.

The statutory companion can also confer with the worker during the hearing. However, he or she is not allowed to answer questions on the worker's behalf, or to address the hearing if the worker does not wish it, or if the companion prevents you, the employer from explaining your case. The role of the statutory companion should be explained at the beginning of any disciplinary or grievance meeting.

Employment tribunals are legally required to take the Acas Code of Practice into account and to adjust any compensatory awards made in tribunal claims by up to 25% for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that you have unreasonably failed to follow the guidance set out in the Code they can increase the award they have made by up to 25%.

Conversely, if they feel an employee has unreasonably failed to follow the Code, they can reduce the award by up to 25%. This forces the employer and employee to engage and resolve a dispute before it ends up in the employment tribunal.

### 3.14 Confidential information

Every business has confidential information which it needs to protect against its competitors. For example, your customer data, pricing information, trading information and business plans are sensitive in nature and should be kept away from the public domain. Your employees may have also access to your trade secrets, for example, if you have developed a secret recipe or cocktail concoction. The secret recipes underpinning the success of KFC and Coco-Cola remain closely guarded to this day.

There is an implied duty of confidentiality in every contract of employment. Your employees must not misuse confidential information and trade secrets. However, information which remains in your employee's head and becomes part of their own skill and knowledge in the course of their employment is for them to keep. Put it in another way: "objective knowledge" belongs to you and may be protected, but "subjective knowledge" such as the employee's own abilities, skill, aptitudes, belongs to your employee.

The implied duty not to misuse confidential information survives after your employee leaves your business only if the information amounts to a 'trade secret'. As there is no guarantee that the information concerned will always amount to a "trade secret", it is advisable to ensure that you always have an express confidentiality covenant which continues after the employment contract has ended. What amounts to confidential information should be carefully defined in your employment contract and reviewed regularly to ensure that the information reflects the reality of your evolving business.

### 3.15 Restrictive covenants

Some of your employees, particularly those who hold senior positions may have access to your trade secrets, confidential information, key customers/clients relationships and business strategies. Apart from their contractual duty of confidentiality, you should protect your business further by requiring such employees to enter into non-competition covenants. The key areas that you will need to protect are:

- Trade secrets and confidential information
- Trade connections, customers, clients and suppliers
- Your workforce.

Restrictive covenants are generally unenforceable as they are regarded as a matter of public policy as being in restraint of trade. In order for them to be enforceable, they must not go beyond what is necessary to protect your legitimate business interests. The Courts will therefore examine the nature, scope and duration of the covenants when assessing if they are reasonable or enforceable.

A general restriction preventing an employee from competing with you after the employment relationship has ended is the most draconian type of covenant. Non-compete covenants will generally only be enforced if they seek to protect your trade secrets and other sufficiently highly confidential information when confidentiality clauses would not offer adequate protection.

If you are thinking of having a non-compete restriction, this must be specific in its scope and must not be too wide. You may, for example, want to restrict the geographical radius or limit the restriction to named key competitors to improve its enforceability.

Good employees can be hard to find and you may have invested in their training and career development. The maintenance of a stable workforce is a legitimate and protectable interest. However, such a restriction should be limited to those employees whose departure could damage your business. Typically, the restriction must relate to employees of a certain level of seniority and who report to or worked with the ex-employee.

You can also prevent your employee from actively making contact with your customers, clients and suppliers by using a non-solicitation clause. A non-dealing restriction, on the other hand, is intended to prevent your ex-employee from dealing with your customers, clients and suppliers if or when he or she is approached by them. These types of restraints are enforceable if they are limited to persons who had material dealings with your former employee.

If an employee breaches their restrictive covenants, you can obtain injunctive relief (i.e. a court order to stop them competing with you) or sue for damages in the civil courts.

This is a complex area of employment law and you should always seek professional legal advice to ensure you have adequate measures in place particularly with key hires.

### 3.16 Variation of contract

Employment contracts may need to be changed for a number of reasons. Change may be necessary to respond to difficult market or trading conditions or because your business requirements are no longer the same. Where the change is detrimental (e.g. you are seeking to reduce your employees' existing salary and benefits), your employees are likely to challenge it.

In the absence of a contractual right to change contractual terms, contracts of employment can only be amended if both you and your employee agree to it. If you unilaterally change the contractual terms, your employees can sue for breach of contract.

For this reason, it is advisable to ensure that your contract gives you the flexibility to alter your terms to reflect your operational requirements and changes in the law. Typically, such a clause will provide that your employees will receive notification of what the proposed changes are and when they will take effect (e.g. on 30 days' prior notice). You should however be aware that a general right to change the contractual terms is likely to be interpreted very narrowly by the tribunals especially if the change is detrimental to your employees.

If you do not have an express clause permitting you to amend your employees' contracts, you can still implement change provided that you have sound business reasons to do so and you have consulted with your employees about your proposal. This will usually involve you persuading the employee to accept the change because of valid business reasons. It may involve inducements or incentives to accept change (e.g. the offer of extra benefits to forgo something else in their contract) or a proposal to phase in the changes to mitigate any hardships that may be experienced by your staff.

If your employees refuse to co-operate and leave you no option but to dismiss and re-engage them on the new terms, you have to be sure that you have informed and consulted with them for 30 days (if 20-99 employees are going to be affected) or 90 days (if 100 or more employees are going to be affected) before giving them notice to end their original contracts. If the consultation procedure is not followed, you could be liable for a protective award of up to 90 days per employee. You should be aware that there are Government proposals to reduce the 90-day minimum consultation period to 45 days where 100 or more employees are affected with effect from April 2013.

# 4. Typical problems affecting the hospitality sector

## 4.1 Staff turnover

The hospitality workforce is a transient one as it is largely made up of young workers who are pursuing a course of study in the UK and working part-time. Many employees starting out in life use the industry as a stepping stone and move on to better paid jobs. Low pay, low skilled roles and long unsociable hours are also contributing factors to staff turnover levels.

It therefore comes as no surprise that the hospitality sector is notorious for its staff turnover, reportedly to be as high as 30% to 40% compared to other industries. Save for those who are committed to pursuing a long term career in hospitality, staff turnover levels are unlikely to change. There are however ways to reduce staff turnover in your business. These include:

- Recruiting people with a "hospitality mindset";
- Investing in people and creating career opportunities for the young – this involves training them in different departments and letting them cultivate a range of skills in the early years;
- Developing effective workplace policies to support a positive working culture and environment;
- Empowering your managers to make decisions as part of their career development;
- Carrying out employee engagement surveys to assess the mood of your workforce;
- Empowering managers to support and reward staff and to deal with problems promptly;
- Understanding why employees leave you – a confidential exit interview with an HR manager rather than the line manager is a good way of getting to the root of any problems;
- Benchmarking your business with industry standards and your competitors.

## 4.2 Illegal workers

An illegal worker is someone who is aged over 16, subject to immigration control and not allowed to take up employment. You can be prosecuted for employing illegal workers, including:

- People from Romania or Bulgaria (who can only take up self-employment in the absence of any other right to work);
- Students with expired visas, or students working more hours than they are allowed to; and
- People on a visitor's visa.

You could be liable for a fine ('civil penalty') of up to £10,000 for each illegal worker that you hire. If you knowingly employ an illegal worker, you can also go to jail for up to two years and receive an unlimited fine.

By carrying out document checks prescribed by UK Border Agency, you will ensure that you only employ people who are legally allowed to work for you, and you will also have a statutory excuse against payment of a fine if a person turns out to be an illegal worker.

To rely on the statutory excuse:

- You must correctly carry out checks on prescribed documents before a person starts working for you.
- If a person has a time limit on their right to work, you must repeat document checks at least once every 12 months.
- If a person has a restriction on the type of work they can do and, or, the amount of hours they can work, then you should make sure that you do not employ them in breach of these work conditions.
- You must not knowingly employ an illegal migrant worker.

You should carry out checks on all people before they start working for you to ensure you avoid discrimination on grounds of nationality or race. For example, you should not make presumptions about a person's right to work in the UK on the basis of their background, appearance or accent.

### 4.3 Tips, service charges and troncs

It is common practice for employees working in the hospitality sector to receive tips, gratuities or service charges from customers in addition to their basic pay. Her Majesty's Revenue & Customs (HMRC) defines a tronc as a *"special pay arrangement used to distribute tips, gratuities and service charges"*. The deduction of income tax and national insurance contributions (NICs) in relation to such payments depends on the arrangements that exist between the employer, "troncmaster" (typically a head waiter), customer and the employees.

"Gratuities" are subject to class 1 NICs if they are directly or indirectly paid by the employer from sums previously paid to it by customers. To minimise exposure to NIC liability, tips are therefore normally administered and independently controlled by "troncmasters".

There are a number of scenarios to consider from a tax perspective:

1. Discretionary cash tips from customers to employees or left on tables for employees to retain without any involvement from the employer are exempt from PAYE and NIC. The employee must notify HMRC of such receipts and tax will usually be recovered by an adjustment to their PAYE tax code.
2. Discretionary cash tips that are pooled and distributed via a tronc collection scheme are exempt from NIC, but income tax is payable by the troncmaster.
3. Discretionary tips by way of card or cheque payments to the employer, which are then paid into a dedicated troncmaster's bank account for subsequent distribution by the troncmaster in accordance with a tronc scheme agreed between the troncmaster and employees, are exempt from NIC but income tax is payable by the troncmaster.
4. Discretionary tips (whether cash, card or cheque) paid by the employer to the employees via the employer's payroll and shown on payslips issued by the employer are subject to income tax and NIC.
5. A mandatory service charge that is automatically added onto a customer's bill and which is paid out to employees - are subject to income tax and NICs regardless of the arrangements in place for sharing out the money.

If you wish to retain the NICs exemption in relation to tips, you should:

- Review your current arrangements and ensure the tronc system is independently operated by the troncmaster;

- Ensure that your employees do not have the contractual right to tips - the contract should simply allow employees to participate in the scheme;
- Notify HMRC when a new troncmaster has been appointed so that HMRC can set up a PAYE scheme for the tronc in the troncmaster's name.

From 1 October 2009, the National Minimum Wage 1999 (Amendment) Regulations 2009 provide that tips, service charges, gratuities and cover charges cannot be used to make up the national minimum wage.

### 4.4 Absence Without Authorised Leave (AWOL)

An employee typically goes on "AWOL" when he or she has exhausted their annual leave or does not feel like working and feigns illness. This tends to happen either before or after a booked annual leave, before or after a public holiday or when their prior request for annual leave has not been approved.

Employees have also been known to lie about the loss of a loved one in order to claim bereavement leave. If an employee is lying about the reason for their absence, this can constitute malingering or an abuse of your absence policy. Operationally, unplanned staff absenteeism can be a tricky situation particularly if you are unable to find alternative cover for the employee.

AWOL is an act of gross misconduct as it amounts to a dereliction of the employee's duties. The advent of social media has meant that it is now easier to investigate what your employees are doing outside of work as social activities are often posted on Facebook, Tweeter and the like. If you suspect an employee has taken AWOL, you should engage your disciplinary procedure when the employee returns to work.

### 4.5 Theft of inventory, cash and guest property

Employee theft is rife in the hospitality sector and this can cost your business if it is undetected or ignored. This can include loss of inventory, cash or property belonging to your guests or customers.

Employees steal for different reasons. They may be in financial straits, driven by greed or do it simply because they believe that they can get away with theft.

You can reduce corporate theft in a number of ways:

- Recognise the threat of internal theft;
- Ensure that inventory checks are carried out regularly;
- Ensure that there is a clear protocol for "Lost and Found" items;
- Be clear to your hotel guests about where they should leave tips for your room attendants;
- Provide safes in your hotel rooms;
- Carry out a pre-recruitment background check on employees who handle cash in your business;
- Carry out random checks on employee tips, cash tills and transactions;
- Ensure that employees are aware that giving away free food or drinks for more tips is regarded as gross misconduct;
- Ensure that employees are held responsible for stock deficits and missing cash;

- Be alert to suspicious behaviour;
- Use CCTV to police theft;
- Carry out routine search of employees' lockers;
- Consider the use of covert surveillance;
- Engage your disciplinary policy;
- Encourage employees to report theft using your whistleblowing policy;
- Consider criminal prosecution of thieves in your business.

### 4.6 Sabotage

Disgruntled employees may sabotage your business and cause irreparable damage to your reputation. This can take the form of food poisoning, leaking trade secrets and confidential information to your competitors, offering or accepting bribes, working with undercover journalists and selling information and photos to the media relating to your guests and customers.

It is important to implement a Code of Ethics so that your employees are fully aware of the need to act at all times with honesty, integrity and loyalty towards their employer. These values are particularly vital in the hotel industry where trust is paramount in the employment relationship. If your employee breaches the policy, their behaviour should be dealt with under your disciplinary policy as it may amount to gross misconduct justifying summary dismissal.

### 4.7 Discrimination at work

The hospitality industry is multi-national and multi-cultural. In this melting pot, your staff are required to observe and respect the cultural sensitivities of their fellow colleagues. All job applicants and employees are protected against direct discrimination, indirect discrimination, harassment and victimisation in relation to their "protected characteristics". This applies to the whole employment relationship starting from recruitment through to the termination of their employment.

As an employer, you can be vicariously liable for the actions of your staff so the best way to protect your business is to adopt a zero tolerance policy to discrimination at work. This involves ensuring that you have a clear policy in place and that you have trained your staff on diversity issues and awareness.

Harassment is particularly difficult to police as it is not possible to control or be fully aware of what your employees get up to everyday. Also, this kind of discrimination can take various forms as it is any unwanted conduct which is intimidating, hostile, offensive, humiliating and degrading which has the purpose or effect of violating the dignity of men and women at work. It must be related to the complainant's "protected characteristics" for example, sex, race, disability, age sexuality or religion.

This kind of discrimination can include bullying, homophobic banter, taunting, jokes, pregnancy gossip, name calling, "outing" colleagues, ridiculing, mimicking, exclusion, making unwelcome sexual advances and xenophobic behaviour. The conduct in question can be obvious or insidious.

Whether something amounts to harassment will depend on whether the complainant is too sensitive. If the act in question is not offensive to other people, then it may not constitute harassment.

Employees are also protected against third party harassment, for example by guests, customers, suppliers or contractors providing that there have been at least three occasions of harassment (though not necessarily by the same person). However, there are Government proposals to repeal this type of discrimination under the Equality Act 2010.

### 4.8 Drugs and alcohol abuse

There is anecdotal evidence both in the UK and the US that alcohol and drug misuse is a serious problem in the hospitality industry. Misuse of alcohol and drugs can lead to reduced levels of attendance, reduced efficiency and performance, impaired judgement and decision making and increased health and safety risks, not only for the individual but also for others. Irresponsible behaviour or the commission of offences resulting from the misuse of alcohol or drugs may also damage your reputation and business.

The problem can be managed by having a clear policy on managing drug and alcohol abuse. Within such a policy, you can promote a culture which understands and is sympathetic to the problems associated with alcohol and drug misuse in which staff with dependency problems are encouraged to seek help and are supported.

Alternatively, you can be more robust by having a zero tolerance policy where you will not accept staff at work under the influence of alcohol or drugs, and/or whose ability to work is impaired in any way by alcohol or drugs consumption. In either case, your policy should address the following:

- Your policy statement
- Personnel responsible for implementation of the policy
- Alcohol and drugs at work
- Random searches
- Random Drug screening
- Management of suspected substance misuse
- Support available
- Confidentiality
- Performance and disciplinary issues.

You can also obtain help from The Ark Foundation, part of Hospitality Action, set up to educate the hospitality industry's students, employees and management as to the dangers of alcohol dependency and other drug misuse.

### 4.9 Violence at work

As an employer, you have a legal duty to protect the health, safety and welfare of your employees, under the Health and Safety at Work Act 1974. The HSE defines work-related violence as: *'Any incident in which a person is abused, threatened or assaulted in circumstances relating to their work'*. This includes physical violence, verbal abuse and threats and intimidation. Door supervisors, security staff and customer facing staff are all at risks of encountering violence and assault from angry or drunken guests. Kitchen staff working in a pressurized environment may also be at risk of danger with the presence of knives.

Measures that you can take to manage violence at work include:

- Modifications to your work environment - including CCTV, premises design and layout, visibility and lighting, physical security devices, security personnel, and crowd control;
- Reviewing your working practices - including cash handling/cash transit procedures, staffing levels, dealing with customers and opening hours;
- Adopting a zero tolerance policy on violence towards your staff and communicating this to your customers/guests;
- Training staff on dealing with angry, violent or drunken customers or guests;
- Using legal options e.g. use of bans, such as exclusion orders, restraining orders, trespass notices and Anti-social Behaviour Orders (ASBOs) and fines. Fixed penalty notices (FPNs) can be issued by the police for anti-social behaviour and criminal activity.
- Partnership working and special schemes - you should also contact your local authority environmental health department or police crime prevention officer to find out if they are aware of any schemes you could access.
- Ensuring that employees are aware that violence at work will not be tolerated and will be treated as a disciplinary matter.

### 4.10 Stress at work

Restaurants can be physically demanding places to work in and hotels are no exception when there is continuous emphasis on the need to deliver your brand standards and experience and exceed guests' expectations. Contributing factors of work-related stress in the hospitality industry include:

- Increasing pressure and overwhelming job demands;
- Long hours resulting in a lack of sleep or rest;
- A requirement on staff to constantly please their customers or guests;
- Lack of communication with colleagues, supervisors and management;
- Employees being assigned job responsibilities without receiving the proper support and guidance;
- Not having a job description;
- Absence of  work and home life balance;
- Being overworked and underpaid compared to other industries;
- Stressful interactions with customers;
- Pressure in the kitchens to deliver food at the right standards and on time.

As an employer, you owe a duty of care to your staff. If you breach this duty, you may be sued for negligence. You also owe statutory duties under the Working Time Regulations 1998 (e.g. in relation to rest breaks, rest periods and annual leave). Under contract law, you also need to ensure that you do not do anything which may breach the implied term of trust and confidence.

It is therefore important to review your employment practices to ensure that your staff are not "burnt out" through over-working and that there are adequate measures in place to deal with work-related stress before it results in personal injury.

To manage work-related stress, your policy should include:

- Your policy statement
- Who is covered by your policy
- Personnel responsible for implementation of the policy
- Sources of support from your business
- Resolving cases of stress at work
- How absence due to stress will be dealt with
- Confidentiality
- Protection for those reporting stress or assisting with an investigation.

### 4.11 Health and safety at work

Staff working in commercial kitchens, hotels, restaurants, cafes, fast food outlets, pubs and clubs and contract caterers are all at risk of harm in the workplace. According to accident statistics, the main risk areas in the hospitality sector are injuries caused by slips and trips (by kitchen assistants, chefs and waiting staff due to poor floor conditions, spillages, trip hazards and carrying of hot oil), knives, contact dermatitis and manual handling accidents (e.g. repetitive work or heaving lifting).

The HSE has produced guidelines on how to manage these types of risks. You should incorporate these guidelines within your workplace practices.

To protect your business and staff, you should have a clear health and safety policy in place. Such a policy should address the following:

- Your policy statement
- Who is covered by your policy
- What is covered by your policy
- Personnel responsible for implementation of your policy
- Standards of workplace behaviour
- Handling equipment
- Accidents and first aid
- National health alerts
- Emergency evacuation and fire precautions
- Risk assessments, DSE and manual handling.

### 4.12 Personal hygiene and grooming standards

In any service-related industry, staff are required to be suitably attired and to look presentable to their customers and guests at all times. Poor personal hygiene can be off- putting to your customers and this can hurt your business.

Hygiene and grooming standards are usually set out in a grooming standards policy and the rules should reflect your company's brand standards, service excellence and guests' expectations. The policy should contain rules on hair, facial hair, nails, make-up, uniform, footwear, jewellery (including visible body piercings and tattoos) and personal hygiene.

You should, however, ensure that your grooming policy which applies to all employees does not indirectly discriminate against employees with certain "protected characteristics". For example, an outright ban on wearing crucifixes could be discriminatory towards employees of the Christian faith and a "no beard" policy could affect the Muslim faith. Banning the wearing of a Kara (a bangle) or turban may be discriminatory towards Sikhs.

If your policy negatively affects some of your employees, you will need to ensure that it can be objectively justified (e.g. you may be able to justify the banning of certain types of jewellery if this is hazardous because of contact with machinery in the kitchen).

Where in doubt, try to accommodate your employee's request if this works for your business. For example, you may ban employees growing a beard whilst at work because the process is unkempt but allow them to have a fully grown beard following their return from annual leave. If you cannot agree to their request, be prepared to justify your business decision.

### 4.13 Pandemics

A pandemic such as bird flu or swine flu can damage your business at a number of levels. It can cripple your workforce, affect delivery of supplies and result in reduced custom due to heightened fear of contagion. It is therefore important to have a business continuity plan in place to:

- Cope with significant levels of employee absence;
- Reduce the risks of the disease coming into and spreading within your workplace itself;
- Keep employees informed about the health risks in respect of possible outbreaks of disease taking into account current government guidance;
- Review your hygiene practices and improve these, where necessary;
- Have contingency plans for staff absence;
- Review relevant policies such as sickness, absence or dependant leave policies and consider how these might need to be modified;
- Deal with disruption in supplies and logistics.

### 4.14 Terrorism

Terrorist attacks and threats against the hospitality industry, whether large international chains or individual properties, have grown alarmingly since 9/11. This can take various forms from threats and hoaxes intended to intimidate, interference with vital operations and communications to threat to human life.

Luxury hotels have been a target of choice particularly if your organisation is associated with high profile individuals or businesses which are targets of terrorists; your location is attractive to terrorists; or if there is an "insider" in your business with special access or knowledge. In the light of recent attacks on hotels, there is increased recognition of the need to invest in security by being more pro-active rather than reactive to a crisis.

To protect the health and safety of your employees, guests and contractors you should:

- Develop a business continuity plan by analysing the potential risks to your business (and their likely effects), and formulate a strategy to combat them. Always plan for worst-case scenarios;

- Implement a policy setting out how you will deal with terrorism and publicise the policy internally;
- Identify the threats to your business;
- Decide what you need to do to protect your employees, guests, contractors, physical assets, information (e.g. paper and electronic data) and processes (e.g. supply chains and critical procedures);
- Implement security measures such as intense checks for guests and staff, background checks on employees and use of photo IDs to control access to your property, luggage checks and use of sniffer dogs, x-rays and metal detectors to screen for explosives;
- Review your security measures bearing in mind changes to your property, planned building works, personnel and procedures;
- If the workplace cannot be run safely, consider closing it and sending employees home.

### 4.15 Whistleblowing

Whistleblowing legislation in the UK is aimed at protecting employees from dismissal and detrimental treatment if they have made a "protected disclosure". For a complaint to qualify as a "protected disclosure", it must relate to a breach of your legal obligation. The employee must report the concern internally before alerting external agencies and the complaint must be made by your employee in good faith.

For example, if an employee reasonably believes that there are breaches of hygiene laws in your restaurant kitchen which is endangering the public or that you are selling alcohol in breach of licensing laws, he cannot be dismissed as a result of "blowing the whistle" so to speak.

Furthermore, you cannot victimise an employee who has reported suspicions of illegal workers working in your organisation. It does not matter if the employee's belief turns out to be wrong so long as he or she has acted in good faith (i.e. not acted for personal gain or maliciously). In such a situation, the employee must, in normal circumstances, report the matter internally first before informing enforcement officers from the local authority. If the employee's rights are breached, you could be liable for unlimited compensation for loss of earnings and injury to feelings.

### 4.16 TUPE issues

If you are selling your business or outsourcing or insourcing parts of your operations (e.g. the running of your staff canteen, security staff or cleaning staff), the employees who are assigned to the business or activity are protected under TUPE laws. Their employment automatically transfers to the new employer on the same terms and conditions and they can only be dismissed in very limited circumstances (see 6.9 below).

# 5. Managing breach of contract claims

## 5.1 What is wrongful termination?

All employees are entitled to the statutory minimum notice for termination under the Employment Rights Act 1996 unless you have agreed to more generous notice periods for termination. In the hospitality sector, the statutory minimum notice will apply in most cases except for senior management staff.

If you dismiss an employee without any notice and in the absence of gross misconduct, you may be liable to a claim of wrongful dismissal. Such a claim may arise if you:

(a) mistakenly believed that there were grounds to dismiss your employee summarily;

(b) do not wish your employee to work their notice period and pay them notice pay in lieu when your contract does not allow this;

(c) deliberately dismiss the employee summarily and without any notice pay even though there was no gross misconduct.

If your employee works under a fixed-term contract without a "break clause" (i.e. giving you the right to terminate the fixed term on giving notice) and the contract is prematurely terminated, you may be liable for damages for wrongful dismissal. Compensation is confined to the loss of earnings and benefits which your employee would have received had he or she worked out the balance of their fixed term.

As the maximum compensation the employment tribunal can award for wrongful dismissal claims is £25,000 and such claims can only be made when the contract has actually terminated, higher value claims particularly involving long notice periods or bonus are usually brought in the county court or high court. The procedure for civil court claims is however more formal and requires the payment of a court fee. The amount of fees depends on the value of the claim or counterclaim. There is the risk of a costs order against the losing party.

If your employee's notice period is long, disputes will often centre on whether there were sufficient grounds for summary dismissal, if not whether the employee has done enough to mitigate their losses during the notice period.

## 5.2 Breach of contract claims

This type of claim arises from a breach of any other term of the employment contract apart from the employee's notice provisions. If the employee is still employed at the time of the breach, such claims can only be brought in the civil courts, not the employment tribunal.

A breach of contract claim by an employee can, for example, include:

(a) loss of earnings as a result of your failure to go through a contractual disciplinary procedure;

(b) loss of earnings (e.g. for sick pay) and damages for personal injury due to wrongful suspension from work;

(c) loss of prospective earnings because your business was corrupt and this damaged the employee's employment prospects;

(d) loss of an enhanced redundancy payment due to the employee;

(e) loss of permanent health insurance benefits under the policy or failure to make payments equivalent to benefits payable under that policy;

(f) loss of a bonus payment;

(g) loss of share options.

In wrongful dismissal and breach of contract claims, the employee must take reasonable steps to mitigate their losses. If the employee has found alternative employment but it is not as well paid as the previous job, then his financial loss would be the difference between the two jobs.

The Court may reduce the employee's damages by taking into account a number of things:

(a) Actual earnings from their new employment or hypothetical earnings by way of mitigation;

(b) Receipt of social security benefits (e.g. jobseeker's allowance including any failure to apply for it);

(c) Redundancy payment;

(d) Compensation for unfair dismissal if damages for wrongful dismissal have been allocated in the unfair dismissal compensation;

(e) Rebates of income tax;

(f) Liability for damages counterclaimed by the employer which is independent of the repudiated contract;

(g) Compensation from the employee's private insurance policy (e.g. insurance against loss of employment to meet mortgage payments).

If the employee has received money under a disability pension and pension scheme, such payments are not deductible because they are considered to be fruits of money set aside in the past in respect of past work. The Court may however make a deduction to reflect the employee's accelerated receipt of a lump sum payment covering the damages period. This could be between 2% and 7%.

# 6. Managing unfair dismissal claims

## 6.1 Who can claim unfair dismissal?

Employees who have accrued two years of continuous service have the statutory right not to be unfairly dismissed under the Employment Rights Act 1996. Prior to the 6th April 2012, the qualifying period for unfair dismissal rights was one year and this remains the case for employees who began employment with you prior to this date.

To avoid a claim for unfair dismissal in the employment tribunal, you must have a fair reason to dismiss your employee and also act fairly prior to their dismissal. There are potentially five fair reasons you can rely on under section 98 Employment Rights Act 1996. These include:

1) Conduct

2) Capability

3) Redundancy

4) Illegality (contravention of a duty or restriction imposed by law); and

5) 'some other substantial reason' (SOSR).

Remember that no minimum qualifying period applies where the employee's dismissal is 'automatically' unfair. A dismissal is "automatically unfair" if, for example, you dismissed your employee because:

(a) they took leave for a family reason (i.e. pregnancy, childbirth, maternity, maternity leave, adoption leave, parental leave, paternity leave or time off for dependants);

(b) of a health and safety reason;

(c) of a working time reason under the Working Time Regulations 1998;

(d) they performed the functions of a trustee of a pension scheme or employee representative;

(e) they blew the whistle about malpractices in the company;

(f) they asserted certain statutory rights (e.g. the right to receive an itemised payslip and a section 1 statement, not to suffer unlawful deduction of wages or unfair dismissal, to be given statutory minimum notice, and working time rights);

(g) they applied for flexible working;

(h) they exercised the right to accompany another employee or be accompanied to a disciplinary or grievance hearing;

(i) they asserted rights as a part time worker or as a fixed term employee.

An employee must still meet the qualifying period to sue for unfair dismissal in the following special cases:

(a) a dismissal in connection with a transfer of undertaking (e.g. a sale of the business);

(b) a dismissal due to failure to disclose or because of a spent conviction.

### 6.2 What can employees claim?

If your employee is unfairly dismissed, he may ask the employment tribunal for one of three things:

(a) reinstatement (i.e. to return to his old job);

(b) re-engagement (i.e. to be given another job within the company);

(c) financial compensation.

If you fail to comply with an order of re-instatement or re-engagement, you may be ordered to pay an additional compensation of between 26 and 52 weeks' pay. The employee can also ask the employment tribunal for "interim relief" in certain circumstances. This involves reinstating or re-engaging the employee pending determination of the dismissal by the Tribunal.

Orders for reinstatement and re-engagement are rare and are subject to whether it is practical for you to have the employee back and whether the employee has contributed to the dismissal. Where the relationship of trust and confidence has broken down, such orders may not be possible.

The usual remedy for unfair dismissal is financial compensation which consists of a "basic award" and a "compensatory award".

The "basic award" takes into account the employee's age and length of service, from which a multiplier is derived. This is then multiplied by the statutory value of a week's pay. The Basic Award is equivalent to the employee's statutory redundancy pay.

The basic award may be reduced by the tribunal if the employee has:

(a) contributed towards his own dismissal;

(b) received statutory redundancy pay;

(c) unreasonably refused reinstatement;

(d) received any ex-gratia redundancy payment from the employer.

The maximum "compensatory award" for unfair dismissal is announced by the government on 1 February each year. However, there is no limit to the "compensatory award" where the reason for the employee's dismissal is due to:

(a) a health and safety reason;

(b) whistleblowing;

(c) their selection for redundancy because of health and safety activities or activities as an employee representative.

The amount of the "compensatory award" is based on such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by your employee as a result of their unfair dismissal. This will include financial losses, which flow from the date of dismissal to the date of hearing (actual losses) and beyond the date of hearing (i.e. future losses).

The tribunal will consider if the loss is: open ended (i.e. employment would have continued); limited or non-existent (i.e. employment would have ceased anyway); or speculative (i.e. that a dismissal might have occurred at some later stage), so that damages should be reduced to reflect that contingency.

In practice, it is unusual for employees to be awarded more than 12 months loss of earnings due to their obligation to mitigate their loss unless there are exceptional reasons why it should take them more than 12 months to secure new employment. This may apply if, for example, your employee is unable to work due to illness, the labour market is stagnant or the age of the employee makes it more difficult for them to secure a new job.

If your employee obtains new and permanent employment but loses it quickly, you may still be liable if the loss in question was caused by the originally unfair dismissal.

| Overview of the employee's schedule of loss | |
|---|---|
| Net Loss of salary (date of dismissal to date of hearing) | This includes any anticipated increases at the time of hearing, not at the date of dismissal |
| Net future loss of earning | A discount is usually applied for accelerated receipt of capital which is between 2.5 to 4.5% |
| Loss of pension rights | A Tribunal must consider if an employee has sustained any pension loss on dismissal. An employee's loss of pension rights can exceed their claim for loss of earnings e.g. 10 years and 2.5 years respectively. Pension money which an employee received on dismissal, whether the scheme was contributory or non-contributory or occupational or private, is not deducted from compensation for unfair dismissal. |
| Expenses | This includes expenses incurred looking for new employment and removal costs |
| Loss of benefits | This can include contractual and non-contractual benefits such as private use of Company car, free or subsidised accommodation. The loss is calculated by assessing the cost of replacing the benefits. |
| Loss of statutory rights | This relates to the loss of continuity of employment that would be required to claim unfair dismissal, enhanced redundancy payments and longer notice periods. It is usually assessed at about £250 |
| Failure to provide written particulars of employment | The Tribunal may make an order of two to four weeks' pay (capped) where an employee has successfully brought a claim |

The "compensatory award" may be reduced by the Tribunal by taking into account the following:

(a) Sums received for wrongful dismissal;

(b) Enhanced redundancy compensation;

(c) Failure to mitigate losses or earnings from mitigation – if your employee has obtained an equivalent or better paid job, there is no loss to claim (save for a basic award) even if the dismissal is unfair. If his new employment is less well paid, damages will be assessed on the difference in earnings;

(d) Social Security Benefits - Income support and jobseeker's allowance received will be deducted against the compensatory award. The approach with invalidity benefit is to deduct the entire sum or 50 per cent of it. Housing benefit is not deductible;

(e) Contributory fault - if your employee was blameworthy and this caused or contributed to his dismissal, compensation may be reduced. Contributory fault can result in a 100 per cent reduction in the compensatory award although it is rare. Where contributory fault is established, a percentage reduction in the basic and compensatory award should be the same in a majority of cases but an employment tribunal can apply a different reduction where appropriate.

No deductions are made in relation to pension payments received by your employee nor an educational grant received during employment for a course to commence after the employee's dismissal.

If your employee is in receipt of unemployment benefit or income support after their dismissal, the Department for Work and Pensions may recover social security benefits paid out to the employee by way of deduction from their compensation. It is therefore often more advantageous for employees to settle their employment dispute, as in these circumstances no deduction will be made from their employment tribunal awards.

### 6.3 Do you have a fair reason to dismiss?

You can only rely on facts known to you at the time of the employee's dismissal. In other words, the fairness of any dismissal is judged at the time of the dismissal, not due to facts that have arisen afterwards. Where there are multiple reasons for the employee's dismissal, you must show what was the principal reason for the employee's dismissal.

It is for the Tribunal to investigate what is the real reason for the dismissal. Where there is a dispute over the reason for the dismissal, the burden of proving the principal reason for dismissal lies on the employer.

Different practical considerations apply in respect of each of the five fair reasons mentioned above. As an employer, you must therefore act fairly depending on the reason for the termination. Let's look at each of these reasons in greater detail.

### 6.4 How should you handle capability cases?

It can sometimes be difficult to distinguish cases of conduct and capability, which often overlap as reasons for dismissal. 'Capability' involves an inherent cause so underperformance, inflexiblility or inadaptability are generally 'incapability' issues.

Where an employee fails to perform up to an acceptable standard due to his own carelessness, negligence or idleness, such behaviour constitutes 'misconduct'. Malingerers and those who go on unauthorised absence from work should be dealt with as 'misconduct' rather than 'incapability' issues.

In capability situations, it is important to draw a distinction between incapability of performing the contract by reason of sickness absence and incapability due to lack of competence, qualification or skill.

The procedure that you need to follow in each case is different. In either case, it is sufficient if you honestly believe on reasonable grounds that the employee is incapable or incompetent. It is not necessary for you to prove that your employee is in fact incapable or incompetent. A single act of incompetence may justify dismissal where the safety of the public or other workers is compromised (e.g. if your chef breaches health and safety rules in the preparation of food resulting in food poisoning).

If your employee is unable to work due to illness, you should deal with the situation differently depending on whether the absenteeism is intermittent or long term. The issue in this kind of situation is how long an employer can be expected to wait for the employee to return to work. This will depend on the length of service of your employee, the nature of their illness and the medical prognosis, amongst other considerations.

**CHECKLIST**

In non-medical related cases, you should:

- carry out a careful appraisal of the employee's performance;
- discuss any concerns with your employee;
- consider if support should be provided;
- consider if a disciplinary warning is appropriate;
- give the employee a chance to improve by setting out "corrective actions" and "review periods".

In illness-related cases, you should:

- draw a distinction between long-term absences caused by an underlying medical condition and repeated or intermittent absences caused by transient complaints. In long-term sickness cases, disciplinary warnings may not be appropriate;
- consult with your employee and carry out a medical investigation;
- use the Access to Medical Reports Act 1988 and the Access to Health Records Act 1990 to obtain a medical report. Where there is doubt on the GP's findings, you should request that your employee undergoes a separate examination by your company doctor. If your employee refuses to undertake a medical examination, he should be warned that a decision will be taken on the basis of the information available and that it could result in a dismissal;
- explore if you can offer your employee alternative employment depending on their medical diagnosis and prognosis;
- give proper consideration to ill-health retirement (if you have a scheme in place) before dismissing your employee;
- ensure that any decision to dismiss is consistent with the treatment of other members of staff in similar situations;
- ensure that if your employee is suffering from chronic illnesses or injury that you are aware of the risks of disability discrimination under the Equality Act 2010. You may be required to make reasonable adjustments as part of the capability management process;
- be aware that if your employee's illness is caused by the company, this may be a relevant factor when considering the fairness of any dismissal, particularly at the compensation stage;

- be aware that if your employee is entitled to contractual sickness benefits or permanent health insurance (PHI), you cannot terminate his employment if the sole purpose of the dismissal is to deprive him of the benefit of the sickness benefits or PHI scheme. By law, you must not do anything that is primarily aimed at defeating the employee's entitlement to a contractual benefit. Nothing however prevents you from summarily dismissing the employee where there is 'good cause' (e.g. gross misconduct or repudiatory breach by the employee) or for redundancy even where this has the indirect effect of depriving the employee from his entitlement to PHI benefits.

### 6.5 How should you handle misconduct cases?

As an employer, your disciplinary policy should contain a non-exhaustive list of what types of behaviour will be deemed as misconduct and gross misconduct in your business.

**Examples of gross misconduct for employees in the restaurant sector would include:**

- Pilferage or theft of property or money belonging to the company, colleagues or customers;
- Swearing in the restaurant;
- Physical attack or assault, offensive/indecent behaviour towards customers or colleagues;
- Misuse of the Company's IT and communication systems;
- Dishonesty and theft;
- Being under the influence of drugs or alcohol;
- Gross insubordination;
- Serious acts of harassment or discrimination;
- Wilful damage or sabotage of the company's property or equipment;
- Serious breaches of or flagrant disregard for Health and Safety Rules;
- Damage or abuse of company property or customer's property;
- Misappropriation of the company's stock, cash or cheques;
- Knowingly serving a customer under the legal age with an alcoholic drink;
- Behaviour likely to bring the company name into disrepute whether the incident occurs inside or outside of the working hours;
- Breach of the Trade Descriptions Act.

**Examples of gross misconduct for employees in the hotel sector would include:**

- Falsification or careless completion of records (e.g. application forms, work schedules, time sheets and computer records);
- Engaging in intrusive behaviour with any hotel guest such as soliciting autographs, photos, tickets or any other requests not ordinarily associated with the functional requirements of the job;
- Uttering, publishing and/or distributing false, vicious, malicious or confidential statements concerning the hotel's guests, employees or managers, or concerning any other service establishment;

- Malicious or wilful removal from the hotel premises of property that belongs to or is in the possession of the company, another employee, a customer, or a visitor;
- Removal of or providing access to any records or proprietary information to unauthorized persons;
- Unauthorized personal use of the hotel's rooms or telephones;
- Bringing or possessing firearms, weapons, or any other hazardous or dangerous devices on hotel property or on hotel time;
- Dereliction of duty;
- Failure to maintain a satisfactory and accurate accounting and control of cash banks, and/or making personal use of funds from cash banks for any reasons. Careless handling or loss of hotel pagers, keys or cash;
- Causing injury to another employee or guest or any act of excessive carelessness or negligence, which results in a potential or real loss or damage to you, another employee, the Hotel, or a guest;
- Altering or forging a guest check, credit voucher or adding an un-authorized tip to a guest check;
- Commenting or displaying negative body language on gratuities given or withheld, or soliciting gratuities;
- Immoral, indecent or illegal conduct, whether on or off the premises of the Hotel, soliciting persons for such purposes or aiding and/or abetting in such acts;
- Unauthorized presence on hotel property or in guest areas;
- Fraternization with a guest;
- Gambling in any form on hotel premises;
- Insubordination, including refusal to do assigned work or refusal to perform work in the manner described by a supervisor;
- Possession, use or being under the influence of narcotics, contraband or unlawful drugs while on duty or while on hotel premises, or reporting to work under the influence of narcotics, contraband or any unlawful drugs;
- Possession, use or being under the influence of alcohol, except when involved in legitimate entertaining on behalf of the Hotel or attending employee functions at which authorized alcohol is served;
- Behaviour which creates an intimidating, hostile, or offensive work environment. Making unwelcome advances, requests for sexual favours and other verbal or physical expressions of a sexual nature to guests and/or other employees;
- Discrimination against a guest or fellow employee because of race, colour, age, religion, sex, national origin, disability, pregnancy, sexual preference or other protected characteristics;
- Wilful damage or destruction of the Hotel, guest or a fellow employee's property;
- Fighting, use of threatening, obscene or abusive language or harassment of guests or other employees through verbal or physical conduct;

- Misuse or loss of the Hotel master keys and/or guest room keys;
- Sleeping while on duty;
- Engaging in conduct detrimental to the business interests or reputation of the hotel whether on or off the premises of the hotel;
- Receiving commission and or tips from unauthorized limousines, taxis or other vendors;
- Failure to observe hotel fire and safety rules and procedures or failure to report work related injuries or illnesses;
- Frequent or excessive tardiness or absence from work or an employees' work area or abuse of the sick pay policy;
- Leaving hotel premises or designated work area during working hours without the approval of the manager/supervisor;
- Interfering with the work efficiency of other employees;
- Smoking in restricted areas, or where No Smoking signs are posted;
- Failure to abide by set standards for break periods, and working unauthorized overtime;
- Failure to maintain a high degree of personal cleanliness when reporting to work and during work hours;
- Unsatisfactory job performance including switching work schedules, failing to work on a scheduled shift or arranging your own replacement without the permission of your manager/supervisor;
- Serious insubordination, refusal to obey reasonable instructions and abusive, objectionable or threatening behaviour towards guests, managers or other employees;
- Theft of any kind, including misappropriation of Hotel monies or property; attempts to defraud the Hotel, the public or other employees;
- Giving false information as to qualifications or entitlement to work (including immigration status) in order to gain employment or other benefits;
- Making a disclosure of false or misleading information under your Whistleblowing Policy maliciously, for personal gain, or otherwise in bad faith;
- Disregard of health and safety, fire, licensing or hygiene laws, precautions, practices or procedures. This includes smoking in prohibited areas;
- Disorderly, inappropriate or indecent conduct towards or with another employee, a guest or any other member of the public;
- Harassment of, or discrimination against, employees, contractors, clients or members of the public, related to gender, marital or civil partner status, gender reassignment, race, colour, nationality, ethnic or national origin, disability, religion or belief or age;
- Serious misuse of the hotel's information technology systems (including misuse of developed or licensed software, use of unauthorised software and misuse of e-mail and the internet);
- Undertaking unauthorised paid or unpaid employment during your working hours;
- Use of abusive language to fellow employees, supervisors or guests;

- Unauthorized disclosure or use of confidential, information from the Hotel or the guest;
- Any act of communication with the press or media and failure to report any approach from the press or media to the General Manager's office;
- Deliberate damage to or loss of Hotel property or property belonging to guests or other employees;
- Acceptance of bribes or other secret payments;
- Accepting a gift from a customer, supplier, contractor or other third party in connection with your employment without prior consent from your line manager;
- Serious breach of the policies in the Staff Handbook;
- Conspiracy or assisting in any of the above examples of gross misconduct.

You should only take into account conduct outside the workplace (for example, activities posted on social media, drug taking, alcoholism, violent behaviour and criminal offences) if they bear some relation to the employee's position in the company or where it is damaging to the reputation of your business. Your employee should be told what standard of behaviour is expected of them in the employment contract.

To avoid an unfair dismissal claim, you must hold an honest belief that your employee is guilty of misconduct, possess reasonable grounds for that belief and must have carried out reasonable investigations to hold that belief.

This is known as the "Burchell test" named after the famous case of **British Homes Stores Ltd v. Burchell [1978] IRLR 379**. The legal test is not whether further investigation should have been carried out but whether the investigation that you had carried out could be regarded by a reasonable employer as adequate.

Further, it does not matter if your honest belief subsequently turns out to be wrong. The employment tribunal must decide whether a reasonable employer would have done what you have done to the employee. This is known as the 'the band of reasonable responses' test. Therefore, if a reasonable employer would have dismissed the employee in the same circumstances, it is not open to the employment tribunal to substitute your decision with its own decision simply because the tribunal would not have dismissed your employee.

In the absence of gross misconduct, you must not "leap frog" to dismissal. The obligation to act fairly means that you have to give the employee a series of warnings in relation to their failures. Only if they continue not to improve in their behaviour can you escalate the situation to a dismissal. You can only dismiss without notice if your employee is guilty of gross misconduct.

**CHECKLIST**

In misconduct cases, you should:

- carry out a thorough and fair investigation;
- give your employee advance notice of the disciplinary hearing, outline the allegations against him or her and supply evidence you are going to rely upon;
- allow your employee to be accompanied by a statutory companion – this is either a fellow employee or trade union official (whether or not you recognise any or the specific trade union);
- allow your employee to state his case;

- consider if an adjournment is necessary to carry further investigation when your employee has responded;
- reach a decision to dismiss only after you have carefully considered all the issues raised at the disciplinary hearing;
- only rely on the evidence of anonymous employees with caution. You should bear in mind:
  a) the date, time and place of each observation or incident;
  b) the witness's opportunity and ability to observe clearly and with accuracy;
  c) circumstantial evidence such as knowledge of a system, or the reason for the presence of the informer and why certain small details are memorable;
  d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle;
- ensure that previous warnings which have been excised from the employee's HR record should not be taken into account in your disciplinary outcome;
- ensure that there is consistency of treatment of employees;
- allow the employee the right of an appeal. As this is your final stage before the complaint ends up in the employment tribunal, you should ensure that the appeal is heard fairly and that the appeal officer is empowered to overturn the original decision if he believes it to be unfair.
- comply with the Acas Code on disciplinary procedures at all times.

### 6.6 How should you handle redundancy cases?

Redundancy is a legal concept and has a special legal meaning under section 139 Employment Rights Act 1996. A redundancy situation arises if:

- the company has ceased or intends to cease to carry out work for which your employee was employed (e.g. a business closure); or
- if the company has ceased or intends to cease to carry on that business where your employee was employed (i.e. a "place of work" redundancy); or
- the requirements of that business for employees to carry out work of a particular kind have ceased or are expected to cease or diminish (e.g. the job has ceased to exist, whether through reorganisation or otherwise).

A redundancy situation might, for example, arise where you are closing down a hotel or restaurant as a whole, or if one of your outlets where the employee ordinarily worked is to close temporarily for a major refurbishment (i.e. a place of work redundancy).

It can also arise where there is a reduction in the size of the workforce for work of a particular kind to be carried out due to a seasonal downturn in business or reduced hotel occupancy. The legal test can be complex but whether a job is redundant is ultimately a question of fact, not law.

If your employee has a mobility clause in their contract, the question is whether you can exercise that clause to avoid a redundancy situation upon a workplace closure. Unfortunately, the Courts have held that where there is a mobility clause but the employer has never exercised it before, then it is not open to you to deliberately exercise the mobility clause in order to avoid redundancy liability.

Furthermore, if your employee is a mobile worker (having regard to the nature of his job and any previous relocations), there is unlikely to be a legal redundancy even though there is a workplace closure. In this kind of situation, your employee's refusal to relocate to another restaurant, outlet or hotel could be treated as a disciplinary matter.

A redundancy situation usually arises due to reduced business needs or due to a business restructuring which results in employees becoming surplus to requirements. If a new post encompassing more job responsibilities is created following a business reorganization, the fact that it is different from an old post does not necessarily mean that there is a redundancy situation. The focus is whether work of a particular kind done by your employee has ceased or diminished.

This means that not all restructurings will lead to redundancies particularly where there was no diminution in the need for employees to carry out work of a particular kind.

**CHECKLIST**

In redundancy cases, you should:

a) put the employee "at risk" of redundancy - the letter should set out the reasons for their proposed redundancy, when redundancy consultation will take place and the terms of any redundancy payment if termination takes place;

b) identify if you need to set up a redundancy selection pool by looking at whether people are doing the same or similar job and if their skill sets are interchangeable;

c) carry out a fair and objective method of redundancy selection;

d) agree on ways in which dismissals may be avoided (e.g. providing alternative employment, withdrawing contracted out work, introducing early retirement, relocating production, stopping recruitment and overtime);

e) explore if it is possible to reduce the number of employees to be dismissed;

f) explore ways of mitigating the effects of dismissal (e.g. offering training or outplacement assistance);

g) offer alternative employment to the employee if this is available;

h) pay a statutory redundancy payment (SRP) to the employee if he qualifies for such a payment;

i) consider giving the employee the right of an appeal (this is recommended by Acas although it is not a strict legal requirement).

It is normal practice for employers to carry out a preliminary selection of candidates rather than to put all employees at risk and then select. This has the advantage of ring fencing the process and avoiding unrest amongst the wider workforce. If there are other employees holding similar positions to the employees or who carry out work which involves similar skills to him, a redundancy selection pool should be created.

You should use a fair method of selection. If there is an agreed criteria with trade unions or employee representatives, this should be adopted. Factors to be taken into account in the selection matrix include productivity, punctuality, disciplinary record, adaptability and the company's future needs.

The scoring system should provide clear guidelines as to how a point is ascribed. Employment tribunals rarely interfere with the employer's selection process provided that what you did was within the 'band of reasonable responses' test.

It is important to ensure that any criterion you use is not indirectly discriminatory on grounds of sex, for example, where it is related to pregnancy or part-time working or the employee's age (e.g. using Last In First Out (LIFO) as a method of selection).

Remember that it is "automatically unfair" to select an employee for redundancy because:

- of membership of or involvement in an independent trade union;
- of refusal to become or remain a member of a trade union;
- of maternity leave, paternity leave, adoption leave or dependant's leave grounds;
- of flexible working requests or arrangements;
- he asserted a statutory employment protection right;
- of health and safety grounds;
- he was a shop worker or a betting worker or gave, or proposed to give, a notice 'opting out' of Sunday working;
- of duties as an employee representative, or acting as a candidate or a participant in the election of an employee representative;
- of duties as an employee occupational pension scheme trustee;
- of reasons relating to the national minimum wage;
- of reasons relating to the Working Time Regulations 1998;
- he blew the whistle within the meaning of the Public Interest Disclosure Act 1998;
- of reasons relating to the Tax Credits Act 2002;
- of lawfully organised official industrial action lasting eight weeks or less (or more than eight weeks, in certain circumstances);
- of rights relating to trade union recognition procedures;
- he exercised or was seeking to exercise the right to be accompanied at a disciplinary or grievance hearing, or to accompany a fellow worker;
- of duties as a workforce representative or as a candidate to be such a representative for the purposes of the Transnational Information and Consultation of Employees Regulations 1999;
- of grounds related to the Part-time Workers or Fixed-term Employees status.

If you are planning fewer than 20 redundancies, a consultation period of between one to two weeks is recommended, with at least two meetings with the employee. Consultation is required in all cases unless exceptional circumstances apply or where you can establish that consultation would have made no difference to the decision to terminate the employment (known as the 'Polkey principle' after the case of **Polkey v. AE Dayton Services Ltd [1988] ICR 142, HL**). A redundancy dismissal is normally unfair where there has been no consultation at all.

If there are to be collective redundancies (20 or more redundancies), there is a statutory duty to consult in good time under EU and UK laws. It is obligatory to consult recognised Trade Unions.

If there is more than one recognised Trade Union, all of them have the right to be consulted.

If there is no recognised Trade Union, consultation should take place with employee representatives and you will need to allow adequate time for employee representatives to be appointed through a nomination and balloting process. If there are no employee representatives, you can consult with affected employees directly.

If you are 'proposing' to make 20–99 employees redundant within 90 days, you must consult with the employees 30 days before the proposed date of the first dismissal. In the case of 100 or more employees being made redundant within 90 days, the consultation period increases to 90 days although there are Government proposals to reduce this period to 45 days.

The purpose of consultation is for the company to disclose to the employee or employee representative the reason for dismissal, the number of employees affected and the proposed method of selection for redundancy.

You are required to consult on the business reasons behind the redundancies where the closure and redundancies are inextricably linked unless redundancies could be avoided notwithstanding the closure. This means that any Board decisions to close any business should be expressed as provisional only and subject to redundancy consultation with the workforce.

It is not possible to carry out statutory consultation and serve notices for termination at the same time, in order to save time and running costs. Once notice of termination of employment is given, you are effectively stating that the consultation process has finished. The danger in issuing notices of termination *during* the collective consultation period is that meaningful collective consultation may be deemed to be lacking. Therefore, you should only serve redundancy notices when the consultation has been completed (i.e. the consultation has either resulted in agreement with employee representatives, or has otherwise reached its conclusion). If consultation has been completed *within* the 30 or 90 day period, you may issue the notices at that point. If you fail to carry out collective redundancy consultation, the company is liable to pay out a protective award of up to 90 days pay per employee. This can be costly.

To avoid a claim of unfair redundancy or unfair dismissal, all that an employer needs to do is to offer, where possible, *reasonable* alternative employment to the employee in the company or in any of its associated companies. 'Reasonable' means any employment available during the consultation period, even if it means a demotion or a pay cut.

If you are able to offer the employee *suitable* alternative employment (i.e. a different job but which carries the same status and same pay), an unreasonable refusal of your job offer may result in the forfeiture of the employee's Statutory Redundancy Payment (SRP).

If your employee unreasonably refuses to accept reinstatement or re-engagement or unreasonably leaves during the trial period, he may also lose the right to claim SRP. Further, unreasonable refusal of reinstatement (not re-engagement) can lead to a reduction of any basic award provided that this is not less than two weeks' pay (capped).

Whether a job is 'suitable' alternative employment is a question of fact. What constitutes 'reasonable' alternative employment is something you should put to the employee in any event. You should not automatically assume that a lower position would be of no interest to your employee in a redundancy situation.

If the employee accepts 'reasonable' alternative employment, he has the right to a statutory trial period of four weeks (although this trial period is extendable for retraining purposes). Your employee is still entitled to SRP if the re-engagement is terminated "for whatever reason" by

him or her *within* the trial period but not afterwards. You can also terminate the trial period but only if it relates to differences between the old job and new job (e.g. if you consider that the employee is not suitable for the alternative role). Should the trial period be terminated by you or the employee, the reason for termination will remain as redundancy and the termination date will be when the original contract was lawfully ended (i.e. with notice or pay in lieu of notice).

If you have given notice for termination to the employee, he may leave his employment before your notice of dismissal expires in order to start a new job. Your employee will not lose his right to a redundancy payment if he complies with the statutory counter notice requirements or if you agree to his early departure.

### 6.7 How should you handle illegality cases?

To dismiss an employee on this ground, you have to show that their continued employment *actually* breaches the law. The burden of proof is on the employer to establish illegality, not on the employee to establish he is entitled to bring a claim. This means that you have to be very sure that you have sufficient evidence to show that continuing to employ the employee would be illegal, not that it might be.

An employee who works under an illegal contract cannot generally claim unfair dismissal when the contract is terminated. The employment tribunal makes a distinction between a contract that is unlawful from the outset (e.g. to perform an illegal act or to carry out an immoral purpose), so that it is unenforceable by the parties, and a contract that is tainted by illegality as a result of the employer's conduct but this is unknown to the employee (e.g. where the employer fails to deduct tax from the employee's remuneration). So, if an employee knowingly defrauds HMRC by purporting to be self-employed or works without a work permit, he cannot enforce the contract or pursue his employment protection rights.

However, recent cases demonstrate that the courts will consider to what extent the contract is "tainted" by any alleged illegality (if at all) before deciding if the employee's complaint should be dismissed. A contract, which was lawful when it was made, would not necessarily become unlawful by any incidental act of illegality in the performance of it if the employee seeking to enforce the contract did not have to rely on any conduct of illegality.

So, if for example, the employee has no knowledge of and participation in the illegality, he may still sue for unfair dismissal. If the employee is not entitled to be in employment and his contract could and should have been terminated during every day that it operated, then all the ordinary events of the contract are likely to be inextricably linked up with the employee's illegal conduct. Which way the pendulum swings will depend on the facts of a particular case.

**CHECKLIST**

In cases of illegality, you should:

- suspend the employee and investigate the situation;
- assess the likely duration of any statutory prohibition (e.g. a driving ban, loss of SIA licence, personal licence or Designated Premises Supervisor status under the Licensing Act);
- assess if the ban affects the whole or part of the employee's work;
- assess if the employee can be redeployed taking into account the employee's views;

- make enquiries with UK Border Agency if a work permit has expired and ascertain whether it is lawful to continue to employ the employee whilst any applications to remain in and work in the UK are pending with the authorities. You can use the Employer Checking service offered by UKBA. If you are not completely certain that the continued employment of the employee would **in fact** contravene the law, you should consider terminating the employment for "some other substantial reason" instead. Most employers in these types of situation would suspend the employee to investigate the situation further before dismissing.

### 6.8 What are SOSR dismissals?

A dismissal for 'some other substantial reason' is often relied upon by employers as an alternative reason for dismissal or where all other statutory reasons as discussed above do not apply. As with all unfair dismissal claims, the Tribunal will consider if the employee was consulted and whether your dismissal was within the band of reasonable responses.

An SOSR dismissal may, for example, apply where:

- You are carrying out a business reorganisation to improve business efficiency which leads to a change in your employees' terms and conditions of employment and your employee unreasonably refuses to co-operate with changes that are beneficial to your business. In this case, you will also have to show that you have consulted with employees and given them a chance to adapt to any proposed changes;
- You wish to introduce restrictive covenants to protect your business against other competitors but your employees refuse to agree to the restrictive covenants when other employees have accepted the obligations;
- There is a personality clash with other employees and it is not possible for you to segregate the employee or transfer him to another establishment;
- You dismiss an employee for an economic technical or organisational (ETO) reason following a business sale or "service provision change" under TUPE laws;
- A fixed-term contract to cover another employee on maternity leave or adoption leave has expired;
- You are under pressure from third parties to dismiss the employee (e.g. from a client or customer). In this case, you must consider any injustice to the employee in dismissing him and may have to consider redeploying the employee to a different site;
- An employee has brought your business into disrepute;
- There is a risk of disclosure of confidential information. Factors that will be relevant when assessing this could include:
    - the position held by the employee; the employee's past conduct;
    - whether the employee has access to confidential information;
    - the importance of that confidential information;
    - the position held by the other employee involved (both at the employer and at the competitor);
    - the possibility of moving the employee or changing their job in order to remove the access to confidential information;

- and whether the employee had given (or was prepared to give) undertakings not to disclose confidential information.

### 6.9 Can you dismiss employees following a business transfer?

If your company is acquired by or sold to another entity, your employees' employment will automatically transfer to the buyer (or to the incoming contractor in the case of service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006).

TUPE also applies where there is a "service provision change" and there are employees who are wholly or principally dedicated to the provision of those services. For example, if you have outsourced your housekeeping services or staff canteen and decide to appoint another contractor to provide those services, the employees of the outgoing contractor will automatically transfer to the incoming contractor under TUPE.

Unless the employee objects to the transfer, their existing terms and conditions of employment will automatically transfer to the new employer by law. There are very limited grounds for the employer to validly change the employee's existing contractual terms. To do this, the variation must be for a reason connected with the transfer that is an economic, technical or organisational ("ETO") reason entailing changes in the workforce; or a reason unconnected with the transfer (e.g. the changes are driven by market forces).

You will therefore need to be wary of the risks of constructive dismissal claims if there is a proposal to vary the employee's existing contractual terms outside the legally permitted grounds.

It is automatically unfair to terminate the employee's employment if the sole or principal reason for the dismissal was a transfer or a reason connected with the transfer. Redundancies in connection with the transfer may fall within the ETO reason although this is generally invoked by the buyer after the transfer.

Furthermore, a buyer is only able to rely on an ETO reason which relates to its own future conduct of the business. It is therefore not open to the buyer to require the seller to dismiss certain employees before the transfer to enhance the sale price without which the purchase will not go ahead.

If a TUPE transfer is taking place, the seller must inform and consult with its employees before the TUPE transfer. It must provide union officials or employee representatives with certain information long enough before the transfer takes place in order to leave adequate time for genuine consultations. The information includes:

- details of approximately when and why the transfer is going to happen;
- the legal, economic and social implications of the transfer for the affected employees;
- whether the seller envisages taking any "measures" in connection with the transfer which will affect the employees, and if so, what measures are envisaged;
- and whether the buyer envisages carrying out any "measures" which will affect the employees, and if so, what these measures are (e.g. post transfer redundancies, changes to contractual terms etc).

The Seller is only under an obligation to "inform" employees in relation to points 1 and 2. The duty to "consult" only arises where "measures" are being envisaged by the seller or buyer (e.g. there are changes to the place of work or proposed redundancies). Where there is a failure to carry out TUPE consultation in the absence of any "special circumstances", the seller and buyer are jointly and severally liable for a protective award in a sum not exceeding 13 weeks pay per employee. Such awards are punitive in nature and not compensatory.

It is therefore important to comply with what TUPE laws require but if this is not possible due to strict timelines and commercial sensitivity, warranties and indemnities should be negotiated between the parties in order to assign these risks accordingly.

# 7. Managing discrimination claims

## 7.1 Types of discrimination claims under The Equality Act 2010

The hospitality industry has one of the most diverse and transient workforces. It is a microcosm of people from a range of age, gender, cultural and ethnic backgrounds. The multi-cultural working environment in a hotel or restaurant requires legal risks management as different people have different attitudes, cultural values and sensitivities. A commitment towards diversity in the workplace therefore requires businesses and the workforce to embrace inclusiveness as part of its business model.

The Equality Act 2010 was introduced by Parliament in October 2010 to consolidate discrimination law which had developed in a piecemeal fashion since 1976. Under the Equality Act, all job applicants and employees are protected against discrimination on grounds of sex, marital status, race, disability, sexual orientation, religion or belief and age ("protected characteristics").

The types of discrimination prohibited include direct discrimination, indirect discrimination, harassment and victimization. It is unlawful to discriminate against a person in relation to their recruitment, the terms of their employment (including training, transfers and promotion) and in relation to the termination of their employment.

For example, if you refuse to employ male waiters because you believe that female staff sell more cocktails, this may constitute "direct discrimination" because of gender.

If you have a neutral practice or policy which you apply to all your staff but this disadvantages certain employees with certain protected characteristics, this may amount to indirect discrimination. For example, a requirement that all reception staff must work full-time could amount to indirect sex discrimination because most women who are working are primary child carers and cannot comply with your requirement.

You may not be liable for indirect discrimination if your practice can be objectively justified. This means that you must have a legitimate business aim and demonstrate that your requirement is a proportionate means of achieving that aim.

Harassment involves unwanted conduct that has the purpose or effect of violating a person's dignity or creating an offensive, intimidating or hostile environment. It is discriminatory if it is related to any of the "protected characteristics". This can take the form of bullying, undermining, exclusion, jokes and banter in the workplace (see 4.7 above).

Victimisation (a form of retaliation) involves treating a person less favourably because they have complained (or intend to complain) about discrimination, or because they have given evidence in relation to another person's complaint.

An employee must not be disciplined or dismissed, or suffer reprisals from colleagues, for complaining about discrimination or harassment at work. For example, you cannot refuse to offer someone a pay rise because they complained about harassment by a line manager. Equally, you cannot deliberately allocate unsocial shifts to an employee who gave evidence against you at the tribunal in a discrimination case.

### 7.2 Remedies for discrimination at work

A job applicant or employee who has been subjected to unlawful discrimination can ask the tribunal for a declaration that they have been discriminated and also claim for damages. The tribunal can also ask the employer to change its practices or make reasonable adjustments for disabled persons, as the case may be.

The Equality and Human Rights Commission have statutory enforcement powers under the Equality Act 2010 to promote equality. These include conducting inquiries into equality and diversity issues and intervening in legal proceedings in cases where it can use its expertise to challenge or clarify an important aspect of the law.

The outcome of a case where the EHRC has intervened often has a wide impact for employers as it sets a precedent to be followed by other employment tribunals. The ECHR can also enter into a formal agreement with employers where discrimination has taken place whereby an action plan is put in place as an alternative to legal proceedings.

### 7.3 Avoiding and managing discrimination claims

To eliminate the risks of discrimination claims, all employers should have an equal opportunities policy in place. Such a policy will usually pledge the employer's commitment to diversity in the workplace, explain the types of discrimination that are prohibited in the workplace and provide employees with redress if they have suffered unlawful treatment.

By having a policy in place, this demonstrates that the company has taken steps to prevent discrimination at work which is a helpful defence in discrimination claims. If you have taken reasonable steps to stop discrimination at work, you cannot be vicariously liable for the action of your employees.

Your policy should state that as an employer, you are committed to providing equal opportunities for all applicants and employees - to recruit, hire, transfer, promote, train and administer all personnel policies without regard to age, disability, gender reassignment, marital or civil partner status, pregnancy or maternity, race, colour, nationality, ethnic or national origin, religion or belief, sex or sexual orientation.

It should also state that the principles of non-discrimination and equality of opportunity also apply to the way in which staff treat visitors, clients, customers, suppliers and former staff members and that all staff have a duty to act in accordance with this policy and treat colleagues with dignity at all times, and not to discriminate against or harass other members of staff, regardless of their status.

**CHECKLIST**

When dealing with a discrimination complaint, you should:

1) Deal with an employee's grievance promptly and sensitively;

2) Carry out an impartial investigation into the allegations by interviewing relevant witnesses;

3) Suspend or re-assign employees if necessary pending the outcome of the investigation;

4) Discuss the matter with any third party if the complaint is about a contractor, customer, service user, supplier or visitor;

5) Meet with the alleged harasser or discriminator and ensure that they are told the details of the allegations so that they can respond;

6) Prepare an investigatory report;

7) Take disciplinary action against an employee who is guilty of discrimination, harassment or bullying;

8) In the case of discrimination by third parties, put up signs setting out acceptable and unacceptable behaviour; speak or write to the person and/or their superior about their behaviour; or, in very serious cases, ban them from the premises or terminate your contract with them;

9) Consider if some form of mediation and/or counselling, or change of duties, working location or reporting lines of one or both parties is necessary;

10) Provide the complainant with the right of an appeal.

### 7.4 Personal and vicarious liability

A person who has unlawfully discriminated against another could be personally liable for their behaviour. In the majority of cases, the victim will also sue the employer because the Equality Act 2010 provides that the employer is liable for the acts of its staff regardless of whether it knew about it unless it has taken reasonable steps to prevent or stop the discriminatory conduct. In practice, the employer is usually joined as a co-respondent because it has deeper pockets than the employee.

It is important in these situations for the employer to investigate if the employee has behaved unlawfully. If the employee has breached your policies, then it would be advisable to ask the employee to seek independent legal advice about his own position. Disciplinary action against the culprit may also be required to protect you from vicarious liability. If the employee in question is innocent, then you may wish to defend the employee as well by preparing a joint defence to the legal claim.

Liability for any discriminatory behaviour is "joint and several". This means that the victim can choose to sue the employee (respondent 1) as well as the employer (respondent 2). If liability is established, it is for the two respondents to claim a contribution from the other party under the Civil Liability (Contribution) Act 1978.

Employment tribunals have tended to apportion liability between the two respondents depending on who has the ability to pay but this approach has been questioned. In cases where the loss is divisible, the victim should be able to sue each wrongdoer for that part of the loss caused by the fellow employee and the employer respectively. By contrast, where the loss is caused by both the employer and a fellow employee, liability is joint and several so the victim has a choice as to who damages should lie against. In this case, if the employer has deeper pockets, then the reality is that it is likely for the victim to pursue the employer for compensation.

### 7.5 Financial risk management

Compensation for discrimination is unlimited both in relation to loss of earnings, injury to feelings, personal injury and aggravated damages.

The assessment of damages in discrimination cases in relation to injury to feelings can be divided into three bands:

**Top band** (between £18,000 and £30,000) - sums in this range are only awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment.

**Middle band** (between £6,000 and £18,000) – sums in this range are only relevant for serious cases which do not merit an award in the highest band.

**Low band** (£500 and £6,000) – sums in this range are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

Where the discriminatory treatment has resulted in personal injury, this is also recoverable. The employment tribunals are required to ensure that there is no overlap in damages for injury to feelings and mental injury.

Aggravated damages are awarded in cases where the employer has behaved in a high handed, malicious, insulting or oppressive manner towards the victim. For example, the victim's injury to feelings can be compounded if the employer refuses to acknowledge it has done wrong or if it chooses to defend legal proceedings rigorously even though it has breached the law.

In very serious cases, exemplary damages can be awarded against the employer to make an example of their unlawful behaviour.

### 7.6 Reputational risk management

Discrimination cases attract media headlines because they are often newsworthy and interesting, at times salacious and shocking! It is particularly damaging to the reputation of your business if an employment tribunal finds that your company has unlawfully discriminated against its own employees. Apart from the negative impact on recruitment and your ethos and corporate values, a finding in favour of an employee can also affect internal morale, staff retention, expose you to claims by other employees and affect whether customers want to patronise your establishment.

Potential reputational damage in discrimination proceedings can be avoided or mitigated against in a number of ways.

#### Deal with grievances promptly

The Acas Code on disciplinary and grievance procedures requires employees to raise a grievance and allow the employer the opportunity to resolve the grievance before issuing employment tribunal proceedings. Otherwise, any compensation awarded by the employment tribunal may be reduced by up to 25%.

You should use the grievance process to deal with complaints and to try to resolve them before it escalates to the employment tribunal. Even though the Acas Code does not apply to grievances raised after an employee has left your business, you should deal with a complaint promptly otherwise it is likely to lead to formal legal action.

#### Apologise if wrongdoing has occurred

If discriminatory conduct has taken place, be prepared to issue an apology to the victim.

#### Take appropriate action against the culprit

If an employee has breached your policy, you should take decisive and appropriate disciplinary action to demonstrate that you operate a zero tolerance policy on discrimination at work. This can include a requirement on the culprit to apologise to the victim for his unlawful behaviour.

**Be prepared to improve your practices**

A commitment to change your work practices can go a long way towards minimising damage to your reputation. Working with the EHRC as an alternative to legal proceedings can help to contain a situation.

**Get your PR right**

If a sensitive issue leaks into the public domain, you should ensure that you are in a position to put forward your side of the story to minimise damage to your reputation. Remember that "No comment" responses to the media can be more damaging than making a statement.

You should always take time to plan what you want to say and ensure that when communicating with the media, information flows through one appointed spokesperson and that the message is consistent. Keeping calm and responding politely to the press can help influence the media in your favour.

Whether you win or lose a case, releasing a carefully constructed press statement can help to protect your business and instil confidence in your brand. In cases where liability remains disputed, you may wish to let the press know that you intend to appeal against the employment tribunal's judgment. If you are not contesting the tribunal decision, you can express disappointment with the ruling but stress that remedial steps have been taken to ensure that the situation never happens again.

Remember to take a mid or long-range view. Depending on the nature of the litigation, it may take time for your company to recover.

Discrimination cases can be avoided if you actively promote a culture of respect, tolerance, dignity and inclusiveness of all employees through effective implementation of diversity awareness, policies and procedures. It is important to ensure a fair, transparent and consistent recruitment process and that business decisions are made based on merit. If you and your employees abide by these principles, you cannot go wrong.

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