

Introduction

Terms and conditions of employment

1.1 The contract of employment

1.2 Express terms

1.3 Implied terms

1.7 Universal implied terms

Mutual trust and confidence • Not to act arbitrarily, capriciously or inequitably • Good faith and fidelity • Not to disclose trade secrets/ confidentiality • To obey reasonable and lawful orders • Care of employer's equipment • To employ a competent workforce • To provide a safe working environment • To deal promptly with grievances

1.18 Statutory terms

1.20 Varying the terms of employment

1.24 The right to written particulars of employment

1.29 Wrongful dismissal

1.38 Statutory minimum notice

1.41 Fixed-term employees

1.47 Enforcement

1.50 References

1.56 The Data Protection Act 1998

1.56 The legal framework

1.58 Which data is protected

1.60 The data protection principles

continued

1.61 Workers' rights

Access to the data • Correcting inaccurate data • Rights in relation to automated decision-making • Preventing processing causing damage or distress

1.72 Criminal records

1.73 Enforcement

1.75 Monitoring at work

1.79 Freedom of information

Chapter 1: Key points

All employees have a contract of employment. Verbal contracts have the same status as written contracts, but are harder to prove.

- Contract terms may be express, implied or inserted by statute. Express terms are written or verbally agreed. Where there is no express term, an implied term may fill the gap. Terms may be implied because they are obvious or by looking at what has happened in practice, but not just because they are reasonable.
- Also, general implied terms apply in most employment contracts, eg the obligation not to destroy trust and confidence.
- Under the Employment Rights Act 1996 s1, certain contract terms must be put in writing. A written statement of these particulars does not necessarily constitute the contract in itself, but often amounts to strong evidence of what the contract is. Changes in terms should be confirmed in a section 4 statement.
- Contract terms are often varied during employment, but this can only occur by agreement (express or implied). Where the employer tries to enforce changes to the contract without agreement, this is called 'unilateral variation'.
- An employee must respond quickly where the employer tries to impose contract changes unilaterally, otherwise s/he may be taken to have agreed the change by inaction. There are various options for an employee in this situation, but most of them risk dismissal. If an employee is dismissed for refusing to accept a contract change, the dismissal will not necessarily be unfair.
- There are special regulations protecting employees working on fixed-term contracts from unjustified less favourable treatment.
- In theory, an employer can be sued for defamation, malicious falsehood or negligent misstatement if s/he writes a misleading or inaccurate reference. In practice, these claims are difficult to bring.
- Under the Data Protection Act 1998, workers have access to their own personal data and can seek corrections of inaccurate information held on them.
- Monitoring and privacy at work are covered by various specialist legislation as well as the Human Rights Act 1998 and Part 3 of the Data Protection Code.
- The Freedom of Information Act 2000 provides access to information held by public authorities.

General guide to useful evidence

- The letter of appointment, written contract of employment or statement of particulars under section 1 of the Employment Rights Act 1996, the staff handbook, any collective agreement (if unionised) or other written procedures, pay-slips.
- If there is no written contract: the job advertisement; what was said at interview and immediately on starting; custom and practice at the workplace.
- Having established the original contractual agreement, look for any variations which were applicable at the material time: further documents; verbal agreements; changes in practice.

The contract of employment

- 1.1 Depending on the circumstances, people may work on a variety of arrangements, eg as self-employed, as a 'worker' or as an 'employee'. As will be clarified throughout this book, their status will affect the extent of their employment rights. Whatever the basis for their employment, they are likely to be working under some kind of contract. Paras 1.1–1.40 of this chapter specifically concern the contractual rights of employees. For the definition of an employee in the context of unfair dismissal law, and global contracts, see paras 6.4–6.12. Every employee has a contract of employment, which consists of a number of terms, some of which are express terms, some implied and some statutory. Express terms are those agreed between the employer and employee whether in writing or orally. Implied terms are not expressly agreed but are implied from surrounding circumstances into the contract of employment by the tribunals and courts. Some implied terms are universal (ie they apply to all contracts of employment) and others are implied as a natural consequence of a specific contract of employment, either because the term is so obvious that the employer and employee would have agreed to the term if asked to consider it, or because the contract could not work without the term being incorporated. Statutory terms are inserted into the contract by Acts of Parliament. For example, the Equal Pay Act 1970 inserts an equality clause into contracts.

Express terms

- 1.2 An express term is one which has been the subject of discussion and acceptance by the employer and employee. These terms are usually

put in writing but this is not necessary.¹ The main express terms are usually found in the letter of appointment or in the written contract of employment. Sometimes they are found in other documents such as the staff handbook, the rule book or collective agreement. Also watch for memos, notices on a notice board and e-mails, although these documents may or may not have contractual status. Pay-slips can provide good evidence of contractual pay rates and the name of the employer, although they are unlikely to amount to contractual documents in themselves. The contract of employment often expressly incorporates the provisions of the staff handbook as part of the employment contract. The main express terms are usually:

- the rate of pay, and how often the employee will be paid;
- the hours of work;
- any terms and conditions relating to holidays and holiday pay;
- sick pay;
- notice pay; and
- the disciplinary rules and grievance procedure.

Implied terms

1.3 In the absence of express terms, employment contracts need terms to be implied into them in order to make them workable, meaningful and complete. Implied terms of fact are used to fill a gap where there is no express term on a particular point. The courts will imply a term only if it is absolutely necessary to do so, or if it is clear that the employer and employee would have agreed to the term if it had been discussed.² The courts will not intervene and imply a term just because it is reasonable or convenient.³ The idea is to give effect to the parties' presumed intentions. There are four common ways of trying to work out what an implied term might be:

- the 'business efficacy' test;
- the 'officious bystander' test;
- the behaviour of the parties in practice; and
- custom and practice.

1.4 The 'business efficacy' test is where a term is implied to make the contract workable. For example, it may be an implied contract term that

¹ Though there is a separate right to have certain terms in writing. See para 1.24.

² See *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125, HL.

³ *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119, EAT.

a chauffeur holds a valid driving licence, even though this has never been explicitly discussed. The ‘officious bystander’ test is where a term is so obvious that both parties would instantly have agreed it at the outset, had they been asked. This test works for the driving licence example too. However, these tests do not always give an answer where there is no express term on a point.

1.5 A term can sometimes be implied by looking at what has happened between the particular employee and the employer in practice. For example, if the employer has given seven weeks’ holiday every year to the employee without exception this may indicate an unspoken agreement at the outset for seven weeks’ holiday. This way of implying a contractual term can be confusing, because behaviour and the contractual position can change over time.

1.6 Custom and practice across the workplace or the industry may also give rise to an implied term if the custom and practice is reasonable, notorious and certain. ‘Reasonable’ means that the term is fair, ‘notorious’ requires the term to be well known, and ‘certain’ requires the term to be sufficiently precise so that the term is possible to state.⁴ For example, the employer always closes the factory for a trade holiday and gives all staff paid holidays for that week.⁵ Depending on the facts, a policy which is adopted unilaterally by management, eg to pay travel expenses or to give enhanced redundancy pay, can sometimes become implied into an employee’s contract by custom and practice.⁶

Universal implied terms

Mutual trust and confidence

1.7 As employment contracts involve personal contact between the parties, it is necessary to have certain terms implied into them so that they can operate smoothly, such as the implied term of mutual trust and confidence. This is the most widely applied and influential of all the implied terms. The employer must not, without reasonable and proper cause, conduct him/herself in a manner likely to destroy or seriously damage the relationship of trust and confidence with the employee.⁷ This term applies to the employee as well. The following are

4 *Sagar v Ridehalgh and Sons Ltd* [1931] 1 Ch 310, CA.

5 *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126, EAT.

6 *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126, EAT; *Albion Automotive Ltd v Walker and others* (2002) 718 IDS Brief 5, EAT.

7 *Woods v WM Car Services (Peterborough)* [1982] ICR 693, CA.

examples of breaches of this implied term by the employer:

- physical or verbal abuse;⁸
- sexual harassment⁹ and the failure to support someone who has been the victim of harassment at work;¹⁰
- imposing a disciplinary penalty when unwarranted or where the disciplinary procedure is not followed.¹¹

Breach of the implied term of trust and confidence may cause an employee to resign and claim constructive dismissal.¹²

- 1.8 In very limited circumstances, employers may use an express term in a way which breaches the implied term of trust and confidence. For example, in one case the employers were in breach of this term when they invoked a mobility clause to insist an employee move workplace to a distant town on extremely short notice.¹³ Usually, however, employers are able to rely on express terms, however unreasonable the result.

Not to act arbitrarily, capriciously or inequitably

- 1.9 There is an implied term that an employer will not treat an employee arbitrarily, capriciously or inequitably without good reason. Failing to give an employee a pay increase without good cause when other employees are given an increase has been held to be a breach of this term.¹⁴

Good faith and fidelity

- 1.10 This implied term lasts during employment but not after its termination.¹⁵ Any action by an employee which seriously harms the employer's business will be in breach of this term,¹⁶ (although whistle—blowing authorised by the Public Interest Disclosure Act 1998 would override this).¹⁷ Likewise, an employer who discloses to a third party informa-

8 *Western Excavating (ECC) v Sharp* [1978] ICR 221; [1978] IRLR 27, CA.

9 *Western Excavating (ECC) v Sharp* [1978] ICR 221; [1978] IRLR 27, CA.

10 *Wigan BC v Davies* [1979] ICR 411, EAT.

11 *Post Office v Strange* [1980] IRLR 515, EAT.

12 See paras 6.33–6.42.

13 *United Bank Ltd v Akhtar* [1989] IRLR 507, EAT.

14 *FC Gardiner Ltd v Beresford* [1978] IRLR 63, EAT.

15 *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69, CA.

16 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, CA.

17 See para 6.85.

tion about an employee without good reason or consent will be in breach of this term. Examples are:

- carrying on business in competition with the employer;¹⁸
- the use of the employer's list of customers including his/her business requirements.¹⁹

Employees cannot use confidential information for their own personal benefit during their employment.

- 1.11 The employee may also have agreed express contract terms, eg not to set up in competition after leaving the employment or not to poach staff or customers for a specified period of time. These are known as 'restrictive covenants'. If they are too restrictive in their ambit, they may not be enforceable, because it can be against the public interest to restrain trade more than is reasonably required to protect legitimate business interests. This is a complex area of law.

Not to disclose trade secrets/confidentiality

- 1.12 It is implied that the employee cannot disclose, either during employment or after it has ended, the employer's trade secrets or highly confidential information.²⁰ Most employees will not have access to information which would amount to a trade secret. The true nature of a trade secret is something which the outside world does not or could not ascertain, such as a process or a chemical formula, eg the ingredients of Coca Cola, and not just lower level confidential information which the employer does not want the employee to use after s/he leaves.²¹

To obey reasonable and lawful orders

- 1.13 The employee is obliged to obey reasonable and lawful orders. Lawful means both a requirement of parliament as well as an order given within the ambit of the employment contract. If the employee is asked to perform a function outside the employment contract which is unreasonable, s/he can, in theory, refuse. The employee needs to be careful because a small degree of flexibility is often taken to be within the

18 *Hivac Ltd v Park Royal Scientific Instruments* [1946] 1 All ER 350; [1946] Ch 169, CA.

19 *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69, CA.

20 *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69, CA. This is subject to protected whistleblowing, see para 6.85.

21 *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69, CA.

contract. Also, if the employee is dismissed over the issue, it is still possible that the dismissal will be fair.²²

Care of employer's equipment

- 1.14 The employee owes the employer a duty to look after the employer's equipment and machinery. The failure to exercise due care, leading to loss to the employer, could constitute a disciplinary matter. This will arise if the employee has injured a third party, as any claim by the latter will usually be against the employer.

To employ a competent workforce

- 1.15 The employer owes a duty to employ a competent and safe workforce,²³ safe plant and equipment, to have a safety system at work and to pay attention to employees' complaints in relation to safety matters.²⁴

To provide a safe working environment

- 1.16 The employer owes a contractual duty to provide a safe working environment. (There are also detailed statutory rules about health and safety at work.²⁵)

To deal promptly with grievances

- 1.17 The employer is under a duty to afford employees an opportunity to obtain, reasonably and promptly, redress of any grievance that they may have.²⁶

Statutory terms

- 1.18 Due to the unequal bargaining power between workers and employers, successive governments have found it necessary to incorporate into the employment contract certain terms protecting workers during, and on termination of, employment, for example minimum notice pay, an equality clause under the Equal Pay Act 1970 and the national minimum wage.

²² See paras 7.55-7.60.

²³ *Hudson v Ridge Manufacturing Co* [1957] 2 All ER 229, QBD.

²⁴ *British Aircraft Corporation v Austin* [1978] IRLR 332, EAT.

²⁵ See also para 17.144 onwards.

²⁶ *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516, EAT.

- 1.19 Generally speaking, clauses which exclude an employee's various statutory rights are void, though there are special rules when claims are settled.²⁷

Varying the terms of employment

- 1.20 Any term of the employment contract can be varied by consent of the parties (except for certain statutory minimum terms). If the employer tries to vary a term of the employment contract but does not get the employee's consent, that variation is not recognised as lawful.²⁸ However, the courts and tribunals will treat the employee as having consented to the variation if s/he does not object to the change within a reasonable period of time. This is often referred to as a variation by affirmation. It is therefore important that the employee objects to any proposed variation as soon as possible. It is not necessary for the employee to keep repeating his/her objection; once is sufficient if it is clear and unequivocal. But an objection cannot hold all the options open forever without taking further action.

- 1.21 Where an employer insists on varying terms without the employee's consent, the employee's refusal to agree will rarely be the end of the matter. The employer may impose the changes anyway, such that the employee's normal options are to resist, resign²⁹ or, if relevant, sue for any unlawful deduction from wages or breach of contract. Alternatively, if the change is very radical, an employee may claim that s/he has in reality been dismissed and is now working under an alternative contract.³⁰ The employee can then claim unfair dismissal, while still working in the new employment. There are other options too, eg claiming discrimination, whether or not the employee actually leaves the employment. A checklist of the options is in appendix A.³¹[KA1]

- 1.22 Many of the options may lead to the employee's dismissal. Whether or not an employee will succeed in an unfair dismissal case depends on eligibility to claim and the normal principles of fairness.³² It does not necessarily follow that dismissal for opposing a change of contract

²⁷ See para 20.162.

²⁸ *Rigby v Ferodo Ltd* [1987] IRLR 516; [1988] ICR 29, HL.

²⁹ For constructive dismissal, see paras 6.33–6.42.

³⁰ *Hogg v Dover College* [1990] ICR 39, EAT; *Alcan Extrusions v Yates and others* [1996] IRLR 327, EAT.

³¹ See p000.

³² In particular, see paras 7.72–7.77.

will be unfair, or even if it is, the employee may not get much by way of compensation. In some circumstances, the dismissal will be automatically unfair, eg if on the facts it is due to the employee having asserted a statutory right such as to have written particulars of the terms and conditions of employment or not to have an unlawful deduction from wages.³³

- 1.23 The employer cannot effect a change in the contract simply by notifying the employee that after a period of time the contract will be treated as having been varied. Employers have been known to terminate the original employment contract and offer a new contract which contains the variation as a means of getting round the employee's lack of consent to the variation. This approach is only lawful under the contract if the full contractual period of notice is given to terminate the employment contract and it is clear that the original contract is being terminated. If this happens, the employee can probably claim unfair dismissal in respect of the first contract and continue to work under the second contract. Where the employer effects mass dismissals in this way, the duty to consult trade union or employee representatives regarding collective redundancies also applies.³⁴

The right to written particulars of employment

- 1.24 Employees are entitled to receive, within two months of the start of their employment,³⁵ a written statement of particulars of their employment. This is often known as a section 1 statement.³⁶ The particulars must include:

- the names of the employer and employee;
- the date on which employment began, including any period of continuous employment with a previous employer;
- rates of pay or methods of calculating pay and frequency of payment;
- hours of work, including normal working hours and compulsory overtime;³⁷

33 See paras 6.67–6.70.

34 See para 2.17.

35 Employment Rights Act (ERA) 1996 s1(2).

36 Temps seeking work through a temp agency who are not employees of that agency, should be given a slightly different statement of terms under the Conduct of Employment Agencies and Employment Businesses Regulations 2003 SI No 3319 reg 15.

37 *Lange v Georg Schünemann GmbH* [2001] IRLR 244, ECJ Case C-350/99.

- terms relating to holidays, including public holidays and holiday pay;
- the employee's job title or a brief description of the work for which s/he is employed;
- place of work, including details of any mobility clause, and the employer's address;
- rules relating to sickness or injury and sick pay;
- pension arrangements;
- the length of notice required by each party;
- if employment is not intended to be permanent, the period for which it is expected to continue, or if a fixed-term contract, its expiry date;
- any collective agreements which directly affect the terms and conditions of employment;
- certain details³⁸ if the employee is required to work outside the UK for a period of more than one month;
- the disciplinary rules and procedure;³⁹
- the name of a person to whom the employee can apply if s/he is dissatisfied with any disciplinary decision or seeking redress of any grievance relating to his/her employment; and
- any other term which, in view of its importance, is an essential part of the contract.⁴⁰

Where there are no particulars on a point, this should be stated. If there is a change in any of the terms, the employer is required to notify the employee in writing within one month of the change.⁴¹ Employers do not always make this written notification of contract variations, but an agreed variation will nevertheless be valid (provided it can be proved).

1.25

At least the first seven items listed above must be contained in a single document (the principal statement). Regarding notice, the statement can refer to the legal position (see para 1.38) or a reasonably accessible collective agreement. The other particulars may be contained in separate documents such as the staff handbook, provided these are reasonably accessible and referred to in the principal statement. Where an employer has supplied a written contract of employment or letter of engagement containing all the required particulars within the relevant time, this will be sufficient.⁴²

38 ERA 1996 s1(4)(k).

39 ERA 1996 s3(1).

40 *Lange v Georg Schünemann GmbH* [2001] IRLR 244, ECJ Case C-350/99.

41 ERA 1996 s4.

42 ERA 1996 s7A.

- 1.26 The statement of terms is not itself the contract. It is strong but not conclusive evidence of what the contractual terms are.⁴³ If no proper statement is supplied within two months, the employee can apply to an employment tribunal (ET) during employment or within three months after termination of employment.⁴⁴ An employee can make an ET claim for a determination of particulars even if s/he left within the first two months of employment, as long as s/he has worked at least one month. The application can ask the ET to decide all the particulars which ought to have been given in a statement, or simply one or two specific particulars which have been omitted. The ET cannot award compensation in itself for failure to supply the particulars, but it can award 2–4 weeks' gross pay (subject to the same cap as for statutory redundancy pay) as extra compensation where the employee has also brought and won certain claims, eg unfair dismissal or discrimination.⁴⁵ Unless there are exceptional circumstances, this award must be made if, at the time such proceedings were started, the employer was in breach of his/her duty to supply a section 1 or section 4 statement.⁴⁶
- 1.27 In practice employees tend not to apply to the ET unless there is a dispute over their entitlement to, eg holidays. There is always a risk that the employee will not be happy with the ET's findings on what the true contractual position is. It is useful to remember that it is automatically unfair to dismiss an employee, regardless of length of service, because s/he has demanded a section 1 statement.⁴⁷
- 1.28 The duty on the ET is to determine what has in fact been agreed by the employer and the employee (including any term which needs to be implied), but not to remake a contract or decide what should have been agreed. The ET may have to make findings as to the terms and conditions of the contract when initially made and then consider whether there have been subsequent variations.

Wrongful dismissal

- 1.29 Unlike unfair dismissal, which is a statutory right, wrongful dismissal is a contractual claim. It arises when an employer terminates the

43 *Robertson and Jackson v British Gas Corporation* [1983] IRLR 302, CA.

44 ERA 1996 s11.

45 This covers claims listed in Schedule 5 of the Employment Act 2002 (see para 22.00) – essentially those covered by the statutory dispute resolution procedures and the new ACAS regime.

46 Employment Act 2002 s38. See also p000.

47 See paras 6.67–6.70.

employment contract contrary to the terms of the contract (eg failure to give proper notice, or breach of another contractual term such as failure to follow the contractual disciplinary procedure).

1.30 The general rule is that either party can end the contract by giving the appropriate notice and without cause or reason. Where an employee has committed an act of gross misconduct, the employer may end the contract without giving notice. What amounts to gross misconduct depends on the facts of each case, but it is an act which completely undermines the employment contract. Some employment contracts define what amounts to gross misconduct; some acts such as theft and physical assault are obvious acts of gross misconduct and do not need stating. Although gross misconduct entitles the employer to dismiss without giving notice, whether the dismissal is fair is a separate question under the general unfair dismissal provisions of the ERA 1996.⁴⁸

1.31 A wrongfully dismissed employee can recover damages for breach of contract. The idea is to put the employee in the position s/he would have been in if the employer had not broken the contract. Where the breach of contract is failure to give proper notice, compensation will usually be the loss of earnings (pay and other benefits, eg use of a company car) for the notice period, subject to mitigation. The employee is expected to take reasonable steps to reduce his/her loss by seeking alternative employment. Any earnings received in the notice period will be set off against the claim.⁴⁹ It is also possible that any Jobseeker's Allowance received will be set off if it amounted to a net gain; similarly if the employee unreasonably failed to claim it.⁵⁰

1.32 The tribunal or court will award compensation net of tax up to £30,000⁵¹ and after that, should award a grossed-up sum to allow for tax on the award. Despite this, it is common practice for employers to pay employees a gross sum in lieu of notice, which in many situations will not be taxable up to £30,000.⁵² However, if the contract explicitly allows for termination on payment of a sum in lieu of notice, there is probably no breach of contract, in which case the sum must be paid net as an emolument from the employment. This can become complicated. Matters of tax are beyond the scope of this book and where there is an issue, advisers should check specialist sources.

48 See also paras 22.10–22.11.

49 *Cerberus Software Ltd v Rowley* [2001] IRLR 160, CA.

50 *Secretary of State for Employment v Stewart* [1996] IRLR 334, EAT; *Westwood v Secretary of State for Employment* [1984] IRLR 209, HL.

51 Though a tribunal claim is subject to a £25,000 ceiling, see para 1.37 below.

52 Income Tax (Earnings and Pensions) Act (ITEPA) 2003 s401.

- 1.33 It is not possible to recover compensation for mental distress or injury to feelings caused by the wrongful dismissal,⁵³ although it might be possible to get stigma damages, but this will only arise in very limited circumstances.⁵⁴ It may, however, be possible to claim damages for breach of the implied term of trust and confidence if this takes place before and is unconnected with the dismissal.⁵⁵ It may be difficult to know on the facts whether the breach was part of the process of dismissal. For example, distress caused by a lengthy suspension which is followed by a disciplinary process ending with dismissal, may or may not be connected with the dismissal.⁵⁶
- 1.34 Where the wrongful dismissal is because the employer fails to follow a contractual disciplinary procedure prior to dismissal, compensation should include wages for the length of time it would have taken to go through the compulsory disciplinary procedure.⁵⁷
- 1.35 Surprisingly, if failure to give contractual notice or follow a contractual disciplinary procedure means the employee falls short of the necessary service for a statutory right (eg falls short of one year's service to claim unfair dismissal), the value of the employee's claim does not include compensation for the lost opportunity of bringing an unfair dismissal claim.⁵⁸
- 1.36 Claims for breach of contract based on failure to follow disciplinary procedures are hard to prove and should be approached with caution. Most disciplinary procedures are not contractual but offer guidance rather than impose mandatory obligations, and failure to hold a disciplinary hearing or give a warning prior to dismissal will not necessarily be a breach of contract.
- 1.37 An employee who has been wrongfully dismissed can claim in the ET, county court or High Court, subject to the value of the claim. The court rules are complex and should be checked.⁵⁹ As a rough guide, most claims can only be started in the High Court if worth more than £25,000 (£50,000 if there is also a personal injury claim). Otherwise they

53 *Addis v Gramophone* [1909] AC 488; *Johnson v Unisys Ltd* [2001] IRLR 279, HL.

54 *Bank of Credit and Commerce International SA v Ali* [1999] IRLR 508, HL. See also para 17.154.

55 *McCabe v Cornwall CC* [2003] IRLR 87, CA.

56 *McCabe v Cornwall CC* [2003] IRLR 87, CA.

57 *Gunton v Richmond LBC* [1980] IRLR 321, CA.

58 *Harper v Virgin Net Ltd* [2004] IRLR 390, EAT; May 2004 *Legal Action*, CA; *The Wise Group v Mitchell* UKEAT/0693/04.

59 See the Practice Direction on How to Start Proceedings supplementary to the Civil Procedure Rules 1998 SI No 3132 Part 7, available on www.justice.gov.uk/civil/procrules_fin/index.htm

must be started in the county court. There are different allocation tracks for both county court and High Court claims according to the type, value and complexity of the claim. One of these is the small claims track (previously known as ‘the small claims court’) which covers most claims for damages up to £5,000 (other than certain housing and personal injury claims). Unlike the usual position in the civil courts, there is only a limited costs risk on the small claims track if the employee loses.⁶⁰ Alternatively, certain contract claims arising or outstanding on the termination of an employee’s employment may be brought in an ET, currently for up to £25,000.⁶¹

Statutory minimum notice

1.38 ERA 1996 s86 sets out minimum notice periods though the contract may require more. An employer must give at least:

- one week’s notice to an employee who has been continuously employed for one month or more but less than two years;
- one week’s notice for each whole year of continuous employment for an employee employed for two years or more, but less than 12 years. For example, an employee employed for 5 years 11 months, would be entitled to at least five weeks’ notice of dismissal;
- 12 weeks’ notice for continuous service of 12 years or more. For example, an employee employed for 16 years would be entitled to at least 12 weeks’ notice.

An employee employed for one month or more need give only one week’s notice when resigning. In some situations, neither contractual nor statutory notice needs to be given,⁶² eg an instant or summary dismissal for gross misconduct or a resignation due to the employer’s fundamental breach of contract (constructive dismissal).

1.39 An employee must be paid for the statutory notice period even if s/he is off sick and has exhausted his/her normal entitlement to sick pay, or if s/he is absent due to pregnancy, childbirth, adoption leave, parental leave or paternity leave.⁶³ Oddly, if the employee has a contractual entitlement to notice which is at least one week longer than the

60 See Civil Procedure Rules (CPR) 27.14 (website, n61).

61 Employment Tribunals Act 1996 s3; Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI No 1623 article 10.

62 ERA 1996 s86(6).

63 ERA 1996 ss87–88.

statutory minimum, s/he entirely loses the right to statutory notice pay in these circumstances.⁶⁴

- 1.40 An employee can claim for wrongful dismissal including the failure to give notice in the ET within three months of the effective date of termination.

Fixed-term employees

- 1.41 The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (FTE Regs) 2002⁶⁵ implement the EC Fixed-term Work Directive⁶⁶ and grant additional rights concerning pay and pensions. The government has produced guidance on the FTE Regs 2002 which can be downloaded via links to Directgov and Business Link on the website for the Department for Business Innovation & Skills (BIS) (previously BERR).⁶⁷ This guidance has no legal status, but it is a useful reference point. In a related area, the government has been consulting on the implementation of the EC Temporary Agency Workers Directive⁶⁸ which must be introduced by 5 December 2011.

- 1.42 The FTE Regs 2002 only cover employees, but it is arguable that the Fixed-Term Work Directive also protects other workers.⁶⁹ A fixed-term employee is someone who is employed under a contract of employment that will terminate on a specific date, or on completion of a particular task, or when a specific event does or does not happen.⁷⁰ This can include employees on short contracts to do seasonal work (eg agricultural workers or working in children's summer camps or shop assistants taken on purely for Christmas), and employees employed as maternity or sickness locums.⁷¹ It is still a fixed-term contract, even if it contains a clause allowing the employer or employee to terminate it on notice during its course.⁷² A permanent employee is one who is

64 ERA 1996 s87(4); *Scott Company (UK) Ltd v Budd* [2003] IRLR 145, EAT.

65 SI No 2034.

66 No 99/70.

67 www.berr.gov.uk/employment/employment-legislation/employment-guidance/page18475.html

68 No. 2008/104.

69 See scope defined by ECJ in *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] IRLR 911, ECJ.

70 FTE Regs 2002 reg 1(2).

71 See Directgov guidance (n00).

72 *Allen v National Australia Group Europe Ltd* [2004] IRLR 847, EAT.

not employed on a fixed-term contract.⁷³ The FTE Regs 2002 do not apply where the employee is an agency worker.⁷⁴ Apprentices and employees on certain government training or work experience schemes are also excluded.⁷⁵

1.43 A fixed-term employee has the right not to be treated less favourably than a comparable permanent employee just because s/he is a fixed-term employee as regards contract terms or by being subjected to any other detriment.⁷⁶ A comparable permanent employee is someone who, at the time of the less favourable treatment, is employed by the same employer on broadly similar work (having regard to similar levels of qualification and skills), and who is based at the same establishment or if there is no one comparable at the same establishment, then based at a different establishment.⁷⁷ Subject to the defence of justification (below) an employer must not give a fixed-term employee less favourable access than a permanent employee to benefits such as Christmas bonuses, free gym membership, travel loans, training courses or occupational pension schemes, or deny him/her promotion opportunities or select him/her first for redundancy, purely because s/he works fixed-term. However, it is not contrary to the FTE Regs 2002 to dismiss full-time employees just short of the one year qualifying period for unfair dismissal protection, even though no similar action is taken against permanent employees.⁷⁸ Where the fixed-term employee does the same work as several permanent employees whose contract terms are different, s/he may choose who to compare him/herself with.

1.44 Employers have a defence if the less favourable treatment can be justified on objective grounds.⁷⁹ An employer should balance the rights of individual employees against business objectives and consider justification on a case-by-case basis. The Directgov guidance says the treatment will be justified if it is to achieve a legitimate objective, if it is necessary to achieve that objective and if it is an appropriate way to achieve that objective. This is similar to the test used for justifying indirect race or sex discrimination, although arguably a higher thresh-

73 FTE Regs 2002 reg 1(2).

74 FTE Regs 2002 reg 19. Note that reg 19(1) repeals the exclusion of agency workers on contracts shorter than 3 months from SSP entitlement from 27th October 2008.

75 FTE Regs 2002 regs 20 and 18.

76 FTE Regs 2002 reg 3.

77 FTE Regs 2002 reg 2.

78 *DWP v Webley* [2005] IRLR 288, CA.

79 FTE Regs 2002 reg 3(3)(b).

old. Another way an employer can justify less favourable treatment is if the terms of the fixed-term employee's contract, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract.⁸⁰ This 'package approach' may not be lawful under the directive.⁸¹ It will also not necessarily amount to less favourable treatment where the pro rata principle applies,⁸² eg where an employer pays for annual health insurance and an employee on a six-month fixed-term contract is offered half the subscription cost.

1.45 A fixed-term employee has the right to be informed of any available permanent vacancies. It is sufficient if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his/her employment.⁸³ Also, once an employee has been continuously employed on two or more fixed-term contracts for four years (excluding any employment before 10 July 2002), the contract becomes permanent unless keeping the employee on a fixed-term contract is objectively justified.⁸⁴ Unfortunately the wording of the FTE Regs 2002 is clumsy as to the date on which this takes effect. The FTE Regs 2002 may simply mean that the employee becomes permanent as soon as s/he has been employed for four years (on at least two contracts). But some commentators believe that the employee only becomes permanent on the next occasion (after four years) when a new contract is offered or the previous fixed-term contract is renewed. A collective or workforce agreement can modify the rule.⁸⁵ Continuous employment for this purpose is calculated in the same way as it is to qualify for unfair dismissal protection.⁸⁶ so that certain breaks between fixed-term contracts may be counted in. For example, teachers employed on nine-month or term-time only contracts may be able to claim permanent status after four years if they can show their service is continuous by reason of custom and arrangement or temporary cessation, and the employer cannot justify keeping them on fixed-term contracts.

1.46 An employee can request a written statement confirming his/her new status as permanent employee or, if this is disputed, explaining the

80 FTE Regs 2002 reg 4.

81 The ECJ in *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] IRLR 911, ECJ seems to require a more precise defence.

82 FTE Regs 2002 regs 2(1) and 3(5).

83 FTE Regs 2002 reg 3(6) and (7).

84 FTE Regs 2002 reg 8.

85 FTE Regs 2002 reg 8(5).

86 FTE Regs 2002 reg 8(4); see para 6.18–6.21.

justification for the contract remaining fixed term.⁸⁷ Employees place great value on being given ‘permanent’ status, but it is not always as important as they think. Employees qualify for unfair dismissal protection as soon as they build up one year’s service, whether they are employed on a permanent or fixed-term contract.⁸⁸ Admittedly, having permanent status as opposed to working on a short-term contract may make the employee less vulnerable to dismissal in practice.

Enforcement

- 1.47 An employee who thinks s/he may have been less favourably treated, may make a written request to the employer to supply written reasons for the treatment within 21 days.⁸⁹ If the employer fails to answer or is evasive, the ET may draw an adverse inference in any subsequent tribunal proceedings. If the treatment concerned is dismissal, the employee cannot make a request under the FTE Regs 2002, but can make an equivalent request for written reasons for dismissal under ERA 1996 s92.⁹⁰
- 1.48 If a fixed-term employee believes s/he has been less favourably treated than a comparable permanent employee, or that his/her rights have been infringed under the FTE Regs 2002 in any other way, s/he can bring an ET claim within three months.⁹¹ Late claims may be allowed if it is just and equitable to do so. The ET has power to make a declaration as to the employee’s rights, to order compensation and to make recommendations that the employer take certain action.⁹² The amount of compensation will be what the ET thinks is just and equitable having regard to the infringement and any loss attributable to it. No award may be made for injury to feelings.
- 1.49 It is automatic unfair dismissal to dismiss an employee because s/he has done anything under the FTE Regs 2002 including alleging, eg in a grievance, that the employer has infringed the regulations (except where the allegation is false and not made in good faith), bringing ET proceedings, giving evidence or requesting a written statement, or because the employer believes or suspects the employee has done or

87 FTE Regs 2002 reg 9.

88 See para 6.24.

89 FTE Regs 2002 reg 5.

90 See para 20.11.

91 FTE Regs 2002 reg 7.

92 FTE Regs 2002 reg 7.

intends to do any of these things.⁹³ It is also unlawful to submit an employee to a detriment for these reasons.⁹⁴

References

- 1.50 There is usually no obligation on an employer to provide a worker with a reference on termination of the employment contract. An exception is where a reference is required by a regulatory body such as the Financial Service Authority (FSA) to ensure that financial services are only handled by authorised and competent persons.
- 1.51 If an employer does provide a reference to a third party, that employer owes a duty of care to the person to whom the reference is provided. Furthermore, a corresponding duty is owed to the worker who is the subject matter of the reference. It is necessary for the reference to be true, accurate and fair. Also the reference must not give an unfair or misleading impression overall, even if the discrete components are factually correct.⁹⁵
- 1.52 A worker can sue an employer if s/he has suffered loss due to a negligent reference, either for breach of an implied term of the contract or in negligence.⁹⁶ The duty imposed on the employer is to ensure that the reference is fair, just and reasonable and the author of the reference should take all reasonable care to ensure that there is no misstatement. Negligent misstatement is where the employer, honestly but carelessly, makes a false statement of fact or opinion in the reference. Employers should confine unfavourable statements about the employee to those matters into which they had made reasonable investigation and had reasonable grounds for believing to be true.⁹⁷ It is also possible to sue an employer for defamation or malicious falsehood in the provision of a reference.
- 1.53 In practical terms, it can be hard for a worker to do anything if s/he suspects a bad reference has been given. It may be hard to obtain a copy of the reference, even from the proposed new employer. The Data Protection Act 1998 is rather a mixed blessing in this respect. However, the worker could make a subject access request⁹⁸ of the

93 FTE Regs 2002 reg 6.

94 FTE Regs 2002 reg 6.

95 *Bartholomew v Hackney LBC* [1999] IRLR 246.

96 *Spring v Guardian Assurance plc* [1994] IRLR 460.

97 *Cox v Sun Alliance Life Ltd* [2001] IRLR 448, CA.

98 See paras 1.61–1.63.

prospective/new employer (but not of his/her ex-employer)⁹⁹ and enlist the Information Commissioner's assistance if disclosure is refused. The Commissioner has issued a short Good Practice Note: 'Subject access and employment references', which encourages disclosure.¹⁰⁰ Although the reference will doubtless disclose the identity of the author, this can sometimes be concealed. Any claim for a negligent or false reference would usually only be enforceable in the county court or High Court. If s/he has been unable to get the reference any other way and has sufficient grounds, the worker may be able to get pre-action disclosure. Realistically, the worker will not want to bring a case in the civil courts unless public funding (legal aid) is available. This depends on the nature of the claim and whether the worker is eligible. It may be available for negligent misstatement, but not for defamation or malicious falsehood. Sometimes the best and simplest thing to do is to send a solicitor's letter to the former employer warning him/her of the consequences of unjustified references. This may prevent the employer doing it again.

1.54 An employer may give a discriminatory reference or victimise a worker by giving an adverse reference or no reference because the worker alleged discrimination during his/her employment or brought a case after leaving.¹⁰¹ The advantage of a discrimination claim, if it can be brought, is that it is run in an ET and the questionnaire procedure can be used to obtain details and possibly a copy of the reference before starting any case.

1.55 These days, many employers give a purely factual reference confirming dates of employment and job title, to avoid any possibility of action being taken against them. Unfortunately such a reference can be of limited value to the worker. Because of the above difficulties, it is usually important to obtain an agreed reference as part of any settlement negotiated on an unfair dismissal or discrimination case.

⁹⁹ Data Protection Act (DPA) 1998 Sch 7 para 1.

¹⁰⁰ Available at

www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/subject_access_and_employment_references.pdf

¹⁰¹ See para 13.82 for a definition of victimisation under the discrimination legislation.

The Data Protection Act 1998

The legal framework

1.56 The Data Protection Act (DPA) 1998 implements the EC Data Protection Directive.¹⁰² Various statutory instruments have also added requirements. There is an Information Commissioner with powers to enforce the DPA 1998 and issue Codes and Guidance. The Commissioner has issued an Employment Practices Data Code of Practice. He has also issued 'Supplementary Guidance' and a 'Quick Guide to the Employment Practices Code: Ideal for Small Businesses'.¹⁰³ The Code has four parts. Part 1 concerns recruitment and selection; Part 2 concerns employment records; Part 3 concerns monitoring at work; and Part 4 concerns medical information. The Code does not constitute the law but it provides useful guidelines on how the Commissioner will interpret the law. The DPA 1998 also needs to be interpreted in the context of the Human Rights Act 1998, especially the potentially conflicting provisions of article 8, the right to private life, and article 10, freedom of expression.¹⁰⁴ The rules under the DPA 1998 are detailed and complex. The following is only a summary of the main rules applicable in an employment context. A guide to the DPA 1998 and the Freedom of Information legislation (below) in the context of discrimination cases is available on the EHRC website.¹⁰⁵

1.57 The DPA 1998 provides data protection controls in all fields of life. It contains a lot of jargon which cannot be avoided. In the employment context, the 'data controller', ie the person who collects and processes the data, is usually the employer. The 'data subject', whose rights are protected, may be a job applicant, trainee, existing employee or other worker. 'Processing' data or information means obtaining, recording or holding data or carrying out any operation on the data, including use, disclosure or destruction of the data.¹⁰⁶

Which data is protected

1.58 'Data' is information which is stored on automated systems, eg com-

puters, CCTV or telephone logging systems, or manual information which forms part of an ‘accessible record’ including health records¹⁰⁷ or a relevant filing system.¹⁰⁸ A relevant filing system is defined as a set of non-automated information structured in such a way that specific information related to a particular individual is readily accessible.¹⁰⁹ This would cover, for example, manual personnel files stored in alphabetical order with the contents of each file in indexed categories. It only covers manual filing systems which are broadly equivalent to computerised systems in ready accessibility to relevant information.¹¹⁰ It would not cover a disorganised filing system where the contents of individual files are thrown together in a completely random order. Workers’ rights to see their files may therefore depend on how tidy and organised their employers are. The test is whether the file is so well organised that a new temp would be able to extract specific information without leafing through the whole file.¹¹¹ Employees of a public authority have an additional right to see unstructured manual personal data about themselves, provided it is not too expensive to search out.¹¹² This may cover information held on an unstructured personnel file, someone else’s file, or generally elsewhere. Some workers may also have a right in their contracts to see their files.

1.59 ‘Personal data’ means data related to a worker who can be identified from the data alone or taken together with other information which the employer has. It includes an expression of opinion about the worker or indication of anyone’s intentions towards him/her, eg a manager’s view on a worker’s promotion prospects.¹¹³ CCTV footage from which

102 No 95/46/EC.

103 All available from the Information Commissioner’s website via www.ico.gov.uk/what_we_cover/data_protection/guidance/codes_of_practice.aspx

104 See paras 3.13–3.25.

105 Tamara Lewis, *Using the Data Protection Act and Freedom of Information Act in Employment Discrimination Cases* at www.equalityhumanrights.com

106 DPA 1998 s1(1).

107 DPA 1998 s68.

108 DPA 1998 s1(1).

109 DPA 1998 s1(1).

110 *Durant v Financial Services Authority* [2003] EWCA Civ 1746, CA.

111 This is the Information Commissioner’s interpretation of *Durant* [2003] EWCA Civ 1746, CA.

112 DPA 1998 ss7(1) and 9A.

113 DPA 1998 s1(1). *Common Services Agency v Scottish Information Commissioner* 2008 UKHL 47 could be problematic in that it extends the scope of identifiable personal data.

the worker could be identified would also be personal data. However, it is not enough that the data simply refers to the worker. The information must significantly focus on the worker with content which would affect his/her personal or professional privacy.¹¹⁴ ‘Sensitive personal data’ means personal data containing information on a worker’s race or ethnic origin, religious belief, political opinions, trade union membership, health, sexual life or the commission of any offence.¹¹⁵

The data protection principles

1.60 At the heart of the DPA 1998 are eight data protection principles, with which employers must comply.¹¹⁶ In summary, these are:

- 1) To process personal data fairly and lawfully and to meet at least one of the conditions set out in DPA 1998 Schedule 2. The Schedule 2 conditions are that the worker’s specific, unpressurised and informed consent has been obtained, or if not, the processing is necessary:
 - for the performance of the worker’s contract; or
 - to meet any non-contractual obligations of the employer (eg record keeping for the minimum wage); or
 - to protect the vital interests of the worker; or
 - for the administration of justice, etc; or
 - to protect the legitimate interests of the employer or parties to whom the data is disclosed, unless this prejudices the worker’s legitimate interests.

For sensitive personal data, at least one of the conditions set out in Schedule 3 must also be met. These include explicit consent and exemptions in connection with legal rights and proceedings.¹¹⁷

- 2) To obtain and process data only for specified and lawful purposes.
- 3) To hold data only where it is relevant and not excessive to the purpose.
- 4) Data should be accurate and up to date. It is sufficient if the employer took reasonable steps to ensure the accuracy of the data and if the worker has notified the employer that the data is inaccurate, that a note of this is made.

114 *Durant v Financial Services Authority* [2003] EWCA Civ 1746, CA.

115 DPA 1998 s2.

116 DPA 1998 s4(4) and Schedule 1.

117 See para 1.68 below.

- 5) Not to keep data for longer than necessary.
- 6) To process data in accordance with the rights of data subjects. (See below for workers' rights.)
- 7) To take measures to prevent unauthorised processing of data and against accidental loss. This means taking appropriate security measures and also ensuring that other employees or even external companies such as those set up to pay wages who have access to data are reliable.
- 8) Not to transfer data outside the European Economic Area unless to a country which has adequate data protection and controls.

Workers' rights

Access to the data

- 1.61 Workers have a right of access to their own personal data, eg their computerised personnel information, if they make a written request and pay a fee up to £10.¹¹⁸ This is called a 'subject access request'. Employers must comply promptly and within 40 days at the latest. Repeated requests for access can only be made at reasonable intervals.¹¹⁹ If the employer refuses to give access, the worker can apply to the High Court or county court for an order¹²⁰ or to the Information Commissioner for an assessment.¹²¹ The employer must not tamper with the information before disclosure, except to conceal identity where required.¹²²
- 1.62 The worker is entitled to a description of any personal data held on him/her, its purposes and the recipients to whom the data may be disclosed. The employer must show the data to the worker in an intelligible form and, provided it is possible, give the worker a hard copy to keep.¹²³ The employer must provide information on the source of the data except where it identifies an individual.
- 1.63 Where the data reveals information about any other individual including an individual who is the source of the information (eg the author of an appraisal or reference), the employer can conceal his/her

118 DPA 1998 s7.

119 DPA 1998 s8.

120 DPA 1998 s7(9).

121 See para 1.73 below.

122 See para 1.63.

123 DPA 1998 ss7(1)(c) and 8.

identity or, if that is impossible, withhold the data. This is the position unless the individual consents or it is reasonable for the employer to dispense with his/her consent.¹²⁴ It may be unreasonable of the employer to refuse to dispense with consent where s/he has not even tried to get it.¹²⁵ In addition, workers are not entitled to see employment and certain other references given by their own employers.¹²⁶ They can ask their current or prospective employer to show them a reference written by someone else, eg their former employer. Although this will probably fall within the rules about concealing an individual's identity, the Information Commissioner encourages employers to reveal as much information as possible.¹²⁷

1.64 There are other exceptions to the right of access including documents which are legally privileged (ie confidential documents between the employer and legal advisers), and information revealing the employer's intentions in any situation where s/he is negotiating with the worker.¹²⁸ There is no right to data processed for management planning if it would prejudice the conduct of the business, eg confidential plans regarding future staff reorganisations. There is also no right of access to data processed for assessing suitability for a Crown or ministerial appointment.¹²⁹

1.65 There are special rules regarding whether data relating to the worker's health needs to be disclosed if it would be likely to cause serious harm to his/her health or anyone else's.¹³⁰

1.66 It is permitted for employers to disclose information to others in connection with actual or prospective legal proceedings or for establishing legal rights. This can be important, for example, in the context of the questionnaire procedure under the discrimination legislation where employers often use the DPA 1998 as an excuse not to answer.¹³¹

1.67 Section 35(2) says:

Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –

(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

124 DPA 1998 s7(4)(5).

125 DPA 1998 s7(6)

126 DPA 1998 Sch 7.

127 See '*Data Protection Good Practice Note: Subject access and employment references*' on www.ico.gov.uk

128 DPA 1998 Sch 7.

129 Data Protection (Crown Appointments) Order 2000 SI No 416.

130 Data Protection (Subject Access Modification) (Health) Order 2000 SI No 413.

131 See para 21.10 on this.

- (b) for the purpose of obtaining legal advice, or is otherwise necessary for the purpose of establishing, exercising or defending legal rights.

1.68 With regard to disclosure of sensitive information, this exception is repeated at paragraph 6 of Schedule 3. Paragraph 9(1) may also be useful in obtaining access to monitoring results. It says:

The processing –

- (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
- (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
- (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

Correcting inaccurate data

1.69 It is contrary to the fourth Data Protection Principle to hold inaccurate data. If the worker finds that inaccurate data is held on him/herself, s/he can complain to the Information Commissioner. The Commissioner can serve an enforcement notice requiring the data to be rectified or erased, or that the data be supplemented with a statement of the true facts.¹³² Alternatively, if the worker has suffered resulting damage and there is a substantial risk of a further breach of the DPA 1998, s/he can apply to the High Court or county court for an order to rectify or erase the inaccurate information.¹³³ The court can also order the employer to correct the information with any third party to whom the employer has disclosed it. If the employer was relying on inaccurate records given to him/herself, the court may simply order that the data be supplemented by a court approved statement of the true facts. Compensation can be awarded for any damage suffered by the worker as a result of a breach of the fourth Data Protection Principle.¹³⁴

Rights in relation to automated decision-making

1.70 If data is automatically processed for evaluating matters such as the worker's performance, reliability or conduct and solely relied on as a basis for any decision significantly affecting him/her, the worker is

¹³² DPA 1998 s40. See also paras 1.73–1.74 below.

¹³³ DPA 1998 s14.

¹³⁴ DPA 1998 s13.

entitled to be told of the logic involved in the decision-taking.¹³⁵ In many situations, where an adverse decision is made on this basis, the DPA 1998 gives workers a right to have the decision reconsidered and make representations.¹³⁶

Preventing processing causing damage or distress

- 1.71 Where a worker believes the employer is processing personal data in a way likely to cause substantial unwarranted damage or distress (not merely irritation or annoyance), s/he can send a 'data subject notice' asking the employer to stop.¹³⁷ If that fails, s/he can go to the Information Commissioner or to court.¹³⁸ There are a number of exceptions to this right and it will rarely apply.

Criminal records

- 1.72 As a general rule, employers must not require existing employees or job applicants to supply records of criminal convictions, unless it is in the public interest or required or authorised by law.¹³⁹ Where it is proper for employers to know if the worker has a criminal record, they can do so with the worker's consent through the Criminal Records Bureau. For details as to when disclosure is appropriate and how to apply to the Criminal Records Bureau, see Part 1 of the Employment Practices Data Protection Code and the Bureau's website.¹⁴⁰

Enforcement

- 1.73 If any of the Data Protection Principles are not complied with, the worker can either go directly to court or approach the Information Commissioner. To ask the Commissioner to investigate, the worker must request an 'assessment' under DPA 1998 s42 as to whether the employer is complying with the DPA 1998. The Commissioner must notify the worker of how he is going about the assessment and the outcome. The Commissioner has power to serve an information notice on the employer requiring information for the investigation and an

135 DPA 1998 s7(1)(d).

136 See the exact wording of the complicated DPA 1998 s12.

137 DPA 1998 s10.

138 See enforcement at para 1.73 below.

139 DPA 1998 s56.

140 www.crb.gov.uk

enforcement notice if he finds the employer has contravened the DPA 1998. The enforcement notice can require the employer to take or stop taking specified steps or to refrain from processing certain data. However, the Commissioner is not obliged to take action on each occasion he believes there has been a breach of the DPA 1998, and he says he will only do so if he considers it is a serious contravention or if it affects a large number of people and is an ongoing breach. The Commissioner has no power to order compensation. The worker can also go to the High Court or a county court if any of his/her rights under the DPA 1998 are breached and claim compensation if, as a result, s/he has suffered any damage, or damage plus distress.¹⁴¹

- 1.74 There is a notification scheme and register under the DPA 1998 on which employers should have registered. With a few exceptions, it is generally an offence to process data if the employer is not registered. For a small fee, members of the public can get a copy of the data entries, which should include details of what sort of data the employer holds, its purposes and to whom it may be disclosed.¹⁴²

Monitoring at work

- 1.75 Some employers may monitor their workers, eg by CCTV, by opening e-mails, examining logs of internet websites visited, checking telephone logs for calls to premium lines, and even arranging video evidence outside the workplace to check whether a worker is genuinely sick. It is potentially a breach of the first data principle in the DPA 1998¹⁴³ to carry out this monitoring. In theory it could also breach the Human Rights Act 1998 (see below). However, there does not seem to be an absolute right not to be monitored, especially if the worker has been informed in advance that monitoring will take place. Part 3 of the Data Protection Code concerns monitoring at work and provides useful guidelines, although it does not amount to the law in itself. The Code seeks to balance the rights of workers with the needs of employers. Part 3 of the Code and supplementary guidance are available on the Information Commissioner's website.¹⁴⁴
- 1.76 The Code stresses that workers have a legitimate expectation to a degree of privacy in the workplace. Monitoring of private information

141 DPA 1998 ss15 and 13.

142 DPA 1998 s19.

143 See para 1.60 above.

144 www.ico.gov.uk

is intrusive and should be avoided if possible. Even a ban on private e-mail and internet use does not in itself allow the employer to access messages that are clearly private. Any monitoring which is carried out should be for a clear purpose and, ideally, justified by an impact assessment. This means the employer should have, formally or informally, weighed up his/her business needs against the adverse impact of monitoring and alternative ways of meeting the needs. Workers should be made aware of the nature, extent and reasons for any monitoring, except in exceptional circumstances where covert monitoring is justified, eg where there are grounds for suspecting criminal activity. The Code notes that continuous video and audio monitoring is particularly intrusive and only justifiable in rare situations, eg where security is a particular issue. Employers should also avoid opening workers' personal e-mails as this is especially intrusive. Workers should be told if their e-mails are to be opened and checked in their absence. If workers are to be monitored on their use of telephones, e-mails and internet, there should be a clear policy as to the permitted use of such systems (eg how much personal use is allowed; what kind of use is prohibited) and the penalties for breaching the policy. For a worker's rights if the DPA 1998 is broken, see para 1.73. Most employers will not like the prospect of the Information Commissioner investigating their data arrangements. A threat by workers to request a Commissioner assessment may be a useful way to persuade an employer to reduce or abandon the idea of monitoring.

- 1.77 Where employers intercept electronic communications (eg telephone, e-mail, fax, internet), the most relevant additional legislation is the Regulation of Investigatory Powers Act (RIPA) 2000¹⁴⁵ and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000.¹⁴⁶ Section E of the Information Commissioner's 'Supplementary Guidance' (above) contains a useful explanation of these Regulations, which cover interceptions such as listening in on telephone calls or opening e-mails before they reach the intended recipient. Interception without consent is generally unlawful. The Regulations set out a number of exceptions, such as monitoring (though not recording) communications to see if they are business-related, eg opening an absent workers' e-mails to check if they need dealing with. Employers may also intercept in connection with the

145 For limits to RIPA 2000's usefulness in challenging covert surveillance, see *C v (1) The Police (2) Secretary of State for the Home Department* (2007) 823 IDS Brief 11, Investigatory Powers Tribunal 14.11.06.

146 SI No 2699.

operation of a telecommunications service, including their own network, so an IT department could open e-mails to prevent blockages to the system. There have been few claims directly under this legislation because it is so easy for employers to fit into one of the exceptions.

- 1.78 Article 8 of the European Convention on Human Rights (respect for private and family life) and possibly article 10 (freedom of expression) may provide protection in some circumstances. Interception of calls made on a worker's office telephone without his/her prior knowledge is a breach of the right to privacy.¹⁴⁷ All the legislation mentioned above would need to be interpreted in line with the Convention as far as possible.¹⁴⁸ These principles will also be relevant in an unfair dismissal case where an employee is dismissed for improper use of telephone, e-mail or internet.¹⁴⁹ For the use in ET cases of evidence obtained from covert surveillance, see para 3.20 below. The law on privacy is a developing area and the above is just a brief introduction.

Freedom of information

- 1.79 The Freedom of Information Act (FIA) 2000 and the Freedom of Information (Scotland) Act (FI(S)A) 2002 came into effect on 1 January 2005. The FIA 2000 applies to public authorities in England, Wales and Northern Ireland, UK government departments, Parliament and the Welsh and Northern Ireland assemblies. The FI(S)A 2002 applies to Scottish public authorities, the Scottish Executive and Scottish Parliament. It is similar to the FIA 2000, but gives slightly better rights.
- 1.80 Schedule 1 to the FIA 2000 lists the public authorities to which it applies and this list is updated every October. Some authorities are listed by category and others are precisely described. The list includes central and local government, the health sector, the education sector, the Employment Tribunals Service (ETS) and the police. The UK Information Commissioner has produced very useful guidance notes on his website [FN at www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx] and the Scottish Information Commissioner also has a helpful site [FN www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp] There is also interesting information on the website of the Campaign for Freedom of Information.¹⁵⁰

147 *Halford v United Kingdom* [1997] IRLR 471, ECHR.

148 See para 3.13.

149 See para 7.67.

150 www.cfoi.org.uk

- 1.81 Under FIA 2000 s19, all public authorities must produce a publication scheme, which sets out what kinds of information the public authority will proactively make available, how it can be accessed and the cost. Very often these schemes are published on the authorities' websites. The scheme must be approved by the Information Commissioner.
- 1.82 A member of the public can request any information held by the public authority,¹⁵¹ whether or not it appears on the published scheme. 'Information' is wider than 'data' covered by the DPA 1998. It covers information which is recorded in any form, including paper records, handwritten notes, computer information and information on audio cassettes and videos. Information which is purely in the knowledge of the authority but unrecorded is not covered.
- 1.83 A request should be in writing, state clearly what information is required, and state the name of the applicant and an address for correspondence.¹⁵² The request should be sent to someone appropriate, eg the authority's Freedom of Information Officer, if it has one, or the chief executive. The authority must respond as soon as possible and no later than 20 working days after receiving the request.¹⁵³ The response must either provide the information or explain why it has not been provided, quoting an exemption under the FIA 2000.
- 1.84 There are two categories of exempt information: information which is absolutely exempt and information which is exempt if the authority can prove the public interest in keeping it exempt is greater than the public interest in its disclosure. Absolute exemptions include information contained only in court documents, personal data about the applicant (because there is a right of access under the DPA 1998) or about another individual, if disclosure would breach the DPA 1998, and information whose disclosure would be a breach of confidence at common law. Public interest exemptions include information covered by legal professional privilege and information whose disclosure is likely to prejudice commercial interests. It is advisable to look at the full list of exemptions before making a request.¹⁵⁴
- 1.85 The authority may charge a fee of £25 per hour, but it cannot charge (except for photocopying and post) for requests costing less than £450 to answer (£600 for requests to central government). If it costs more than these figures to search out the information, the authority can

151 FIA 2000 s1 gives the general right of access.

152 FIA 2000 s8.

153 FIA 2000 s10.

154 FIA 2000 Pt II.

either charge or refuse to supply the information altogether.¹⁵⁵ In Scotland, the maximum fee is £15/hour with no charge at all for the first £100 and thereafter only 10 per cent of charges over £100 and up to £600.

1.86 If a request is refused, it is possible to apply for an internal review of the decision (reviews are compulsory only in Scotland). If the review also fails, the Information Commissioner can be asked to review the decision.

1.87 Workers or trade unions may be able to use Freedom of Information requests to get information from public authorities which they cannot get in any other way. There is a guide to making Freedom of Information requests in the context of employment discrimination cases on the Equality and Human Rights Website.¹⁵⁶ The FIA 2000 does not place restrictions on how the information supplied under it may be used, although certain types of confidential information may be exempt from disclosure. However, if the information sought by the worker concerns him/herself, s/he must apply under the DPA 1998, which involves a different procedure.¹⁵⁷

155 FIA 2000 s12.

156 Tamara Lewis, *Using the Data Protection Act and Freedom of Information Act in Employment Discrimination Cases*, bibliography Appendix F, at www.equalityhumanrights.com

157 See para 1.61.