Guernsey Employment A-Z Guide

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Introduction

This guide is a high-level overview summary of employment law in Guernsey. It is not intended to cover all aspects of each topic. It has been designed to highlight issues and provide general commentary to employers. It is not intended to be legal advice and should not be relied upon as such.

A

Adoption leave

Any employee who adopts a child under 18, irrespective of their length of service, has a statutory entitlement to 12 weeks' 'basic adoption leave'. The first two weeks after the child being placed with an adopter is compulsory. Permitting an employee to work during this period is a criminal offence, punishable by fine. Adopters who have been continuously employed for 15 months or more at the beginning of the 11th week before the expected placement date, are entitled to 'additional adoption leave', totalling 26 weeks, which includes the 12-week 'basic adoption leave' period.

There is no statutory entitlement to be paid during any period of adoption leave. Adoptive parents can claim parental benefits from the States of Guernsey, including payment of a one-off adoption grant and a payment of parental allowance for up to 26 weeks. That allowance is payable to the parent who takes time off work to care for an adopted child. The parental allowance is transferable between parents if the caring responsibility changes.

Employees have the right to return to their pre-adoption leave job, or a suitable alternative role, on equivalent terms and conditions. If a redundancy situation arises while on adoption leave, unlike in Jersey, they are entitled to be offered any suitable alternative roles ahead of others.

An adopter's partner is entitled to two weeks' 'adoption support leave' starting on the placement day, provided they have been continuously employed for 15 months at the beginning of the 11th week before the expected placement date. There is no statutory entitlement to be paid during any period of 'adoption support leave'.

See also **K** for **Keeping in touch ("KIT") days.**

Age discrimination and retirement

There is currently no legislation in Guernsey that dictates the age at which an employee should retire, nor are there any laws prohibiting age discrimination in Guernsey. As such, it is currently possible to stipulate a retirement age within the employment contract.

Unlike in Jersey, where one of the statutory justifications for dismissal is retirement, whether an employer can lawfully rely on this contractual age as a fair reason for dismissal when terminating the employment of an employee (i.e. as "some other substantial reason") has yet to be determined by Guernsey's Employment and Discrimination Tribunal (the "**Tribunal**").

Age discrimination is due to be introduced as a Protected Ground in 2026, as part of phase two of the implementation of the Prevention of Discrimination (Guernsey) Ordinance, 2022 ("**Discrimination Ordinance**"). Phase one came into force in October 2023. When the provisions come into effect, it will no longer be possible to stipulate a contractual retirement age in a contract of employment, except in exceptional circumstances (the provisions have still to be drafted).

Agency workers

There are no statutory provisions which specifically apply to agency workers, although the definition of 'employee' in the relevant employment laws is wide enough to cover 'workers'.

Annual leave

There is no statutory entitlement to annual leave, with or without pay, nor is there any statutory entitlement to time off in lieu in relation to public or bank holidays. Whether an employee is entitled to annual leave (paid or unpaid), and/or time off in respect of public holidays (paid or unpaid), must be clearly set out within their employment contract. This also applies where there is no such entitlement.

Practically, employers in Guernsey do provide annual leave to their employees and most employers will provide paid annual leave of between 20 and 30 days.

B

Breach of contract

Where a party to an employment contract fails to comply with one or more of its express or implied terms, that party may have a breach of contract claim. Unlike in Jersey, Guernsey's Tribunal does not have jurisdiction to hear and determine breach of contract claims and so any claims must be made in the civil courts, either in the Petty Debts Court if the claim involves monies less than £10,000 or in the Royal Court. There is no cap on damages that may be awarded.

Whilst most breach of contract claims are made by employees against their former employers, such claims can also be initiated by employers against former employees, although this is less common. Such claims are often brought as part of injunction proceedings for breach of post-employment restraints or where an employee has not repaid monies owed to an employer (e.g. in respect of a training contract or company loan).

Practical tip: employers should ensure that their employee handbooks and any employment policies are specifically and clearly marked as non-contractual so as to guard against an express breach of contract claim.

Bullying and harassment

Harassment is defined in the Discrimination Ordinance. A person is deemed to have harassed another if they engage in unwanted conduct that is related to a Protected Ground, or of a sexual nature, and which has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. In relation to sexual harassment, this also includes where a person is treated less favourably because they reject unwanted advances. The key to harassment is that offence is caused and examples could include behaviour which involves remarks designed to embarrass, offend or intimidate an individual, the making of inappropriate jokes or ridicule, unwelcome physical conduct or insinuation, suggestions or demands for sexual favours, racial shunning or segregation or racial abuse. Conduct not related to a Protected Ground can still be harassment and prohibited under a company policy but it won't form the basis of a claim under the Discrimination Ordinance.

Bullying is not specifically defined in legislation, but guidance issued by the Employment and Equal Opportunities Service ("**EEOS**") (formerly, the Employment Relations Service) acknowledges that all employees are to be treated with dignity and respect. Bullying and harassment should not be tolerated. These terms are often used interchangeably. Put simply, bullying may be described as the process whereby an employee is intimidated, mistreated or humiliated and can be characterised by offensive, malicious or insulting behaviour. The key is that the actions or comments are seen as demeaning or humiliating and are unacceptable to the recipient.

Employers have a duty of care to employees to ensure that the workplace is free from bullying and harassment in all its forms. If not, the implied duty of trust and confidence may be broken, and an employer could be faced with a constructive unfair dismissal claim (see **C** for **Constructive unfair dismissal**). If the bullying and/or harassment relates to a Protected Ground, the employer could also be faced with a discrimination claim (see **D** for **Discrimination**). An employee may also look to claim damages through the Royal Court if they have suffered damage to their health as a result.

It is, therefore, imperative that any form of bullying and/or harassment is not tolerated in the workplace at any level, that specific policies are in place to deal with any incidences at the earliest stage and that regular training is provided to all staff on a periodic basis. These steps will help support an employer's defence to any claims under the unfair dismissal and/or discrimination laws.

Harassment is also a criminal offence under the Protection from Harassment (Bailiwick of Guernsey) Law, 2005. That law applies a "reasonable person" test and prohibits any course of conduct which amounts to harassment and which the perpetrator knows, or ought to know, amounts to harassment. However, this Law is rarely applicable in a workplace context.

C

Compromise agreement

Other than a settlement arising directly out of a Tribunal claim, the only lawful way for an employee to waive their right to initiate claims for unfair dismissal and discrimination under the relevant employment law, is for the parties to enter into a compromise agreement. In summary, a compromise agreement is a legally binding written contract between an employee and their employer, or former employer, in which an employee agrees to release the employer and waive their right to pursue any claims against their employer, usually in exchange for a compensatory sum.

To be enforceable, the compromise agreement must comply with certain strict statutory requirements. For example, the agreement must relate to a particular claim, and it must contain a statement that the agreement is intended to comply with the provisions of the relevant laws. The most notable of the requirements is that the employee must seek advice from an independent, appropriately insured lawyer regarding the terms and effect of the agreement. Whilst there is no legal obligation to do so, it is expected that a contribution towards those legal fees will be provided by the employer. This is generally capped at between £500 and £750.

There is scope in a compromise agreement to include other terms, typically a full release of all employment-related claims and indemnities in relation to such, clauses relating to confidentiality, non-disparagement and standard form references, warranties and undertakings in relation to the employee's conduct during employment, return of company property and the reinforcement of those terms of the employment contract which survive termination, i.e. restrictive covenants (see **R** for **Restrictive covenants**).

Other than the basic statutory provisions, the actual wording and structure of a compromise agreement is entirely at the discretion of the employer. Most employers will use a law firm to prepare their compromise agreements, particularly where the situation may not be straightforward. For example, when dealing with an existing employee, as opposed to an employee whose employment has already been terminated or where they have made a claim against the business. In these cases, the drafting and structure of the agreement will be directly impacted by whether the employee will work their notice period, be placed on garden leave, be paid in lieu of notice or whether a combination of the three may apply. In any circumstances where there is a gap between the date that the employee signs the agreement and their termination date, to ensure that the warranties and undertakings given by the employee are enforceable, employers should have the employee re-affirm the warranties given in the agreement up to the final termination date.

Constructive unfair dismissal

Constructive unfair dismissal is a form of unfair dismissal and arises in circumstances where an employee resigns from their employment because the actions of the employer have been so serious that they are considered to have fundamentally breached the employment contract, making the continued working relationship untenable. In legal terms, in circumstances where there is a repudiatory breach of contract,

the employee is entitled to terminate the contract without notice (i.e. resign). In effect, they consider themselves to have been dismissed at the initiative of the employer.

The resignation must be a direct result of the employer's conduct. If the employee leaves it too long to react to the breach by resigning, they may be deemed to have affirmed the breach and confirmed the employment relationship by continuing to work. Given the requirement for a fundamental breach and the creation of an untenable working relationship, generally employees who resign and assert constructive unfair dismissal do not work their notice period. However, depending on the circumstances, it may not be fatal to the employee's claim if they actively work their notice period.

Claims of constructive unfair dismissal are initiated by an employee in the Tribunal. With limited exceptions, an employee must have been continuously employed for a period of at least 12 months to be eligible to bring such a claim. Claims for constructive unfair dismissal are generally more difficult for an employee to succeed in, mainly because the burden of proof lies with the employee to establish a repudiatory breach of contract. The employee must prove that the conduct of the employer was such that it was reasonable for them to terminate the contract of employment on the basis that the employer has behaved in a way which repudiated the contract of employment.

Where an employee is successful in a claim of constructive unfair dismissal, the Tribunal will make a compensatory award of six months' pay, which award may be reduced at the discretion of the Tribunal (taking into account factors such as the employee's refusal of an offer of compensation).

D

Data consent and Data Subject Access Requests

Data consent
The effect of the General Data Protection Regulation ("**GDPR**"), in the employment context, is to limit the circumstances in which employers can rely on employee consent to process their personal data. Under GDPR, consent must be freely given. Due to the inherent imbalance of power in the employment relationship, any specific consent provided or deemed consent assumed as part of the employment contract or in data protection policies is not valid. Employees also have the right to withdraw their consent at any time so, from an employer's perspective, it is no longer practical to rely on consent being obtained in this way.

Data Subject Access Requests ("**DSARs**")
DSARs can be problematic and time intensive to deal with, especially given the short timeframe of one month within which to respond and the sheer volume of unstructured personal data that generally exists for employees. It is, therefore, important that employers have procedures and systems in place to appropriately manage the personal data they process, allowing them to efficiently locate and retrieve the data upon request, or indeed to enable an employer to comply with their data retention policies to delete data when it is no longer required.

Employers should have a DSAR policy in place, identifying to whom requests should be made, what the employee can expect by way of response, applicable time limits and when requests can be lawfully refused. Having a DSAR response pack with template response documents can be helpful to give employers a structured response to a DSAR and ensure they are able to meet the strict statutory obligations placed on them when responding to a DSAR.

Training should be provided to all employees about the scope and impact of a DSAR. For example, how information and comments recorded in seemingly private email correspondence could be captured by the request. Specific training should also be given to those employees tasked with the responsibility of dealing with a DSAR, together with an agreed policy on how to respond.

Directors

Directors are officers of a company who are appointed to the board of that company. They are responsible for the management of the business and making the decisions as to its operation on a day-to-day basis, for the benefit of the shareholders.

Broadly speaking, directors are defined as non-executive or executive. A non-executive director is engaged on a self-employed basis, under a 'contract for services', being paid a fee rather than a wage and does not generally acquire employment rights. An executive director is employed under a 'service contract', which is another term for an employment contract. These directors will acquire statutory employment rights and typically hold other roles within the business or are responsible for specific functions (e.g. as a compliance director or marketing director).

It is recommended that all directors are employed or engaged pursuant to written terms. In addition to the usual contractual clauses, a director's service contract should include additional clauses dealing with:

- **conflicts of interest**: appropriate wording should be included to ensure that directors disclose any conflicts or potential conflicts of interest;
- **duties**: directors have additional statutory, fiduciary and common law duties which should be included in the service contract (e.g. the duty to act in good faith, to exercise reasonable care and skill and to exercise powers for a proper purpose);
- **insurances and indemnities**: consideration should be given as to whether indemnities are provided and/or directors and officers insurance is obtained to protect directors from any loss resulting from claims against them in relation to the discharge of their duties; and
- **termination provisions:** in the event an individual ceases to be a director for any reason.

Irrespective of how a director is engaged, their duties and obligations under law are the same, and although not all people with the title of 'Director' are directors at law (i.e. appointed to the board of a company), if they act as a director, they may be liable as such.

Discrimination

Discrimination, in the field of employment, on the grounds of sex, marital status and gender reassignment has been unlawful since the enactment of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, and since 2016, pregnancy and maternity/adoption leave have also been Protected Grounds by virtue of the Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016, both Ordinances together being referred to as "**Existing Legislation**" (see **S** for **Sex Discrimination**).

However, with the introduction of the Discrimination Ordinance, discrimination has been made unlawful on the grounds of disability, race, carer status, sexual orientation and religion or belief (additional Protected Grounds).

Age is not currently a Protected Ground, but will become one in phase two of the implementation of the Discrimination Ordinance. The provisions in relation to sex and gender reassignment which are contained in the Existing Legislation will also be updated to align with the Discrimination Ordinance. Once the Discrimination Ordinance is fully implemented, Guernsey will ultimately have 11 Protected Grounds in respect of which discrimination will be prohibited.

Seven types of discrimination are (or will be) prohibited under the Laws:

- **direct discrimination**: when an individual is treated less favourably than others due to one or more of the Protected Grounds;
- **discrimination by association**: when, by virtue of their association with a person with a Protected Ground, an individual is treated less favourably than others;
- **indirect discrimination**: where an organisational policy, applicable to all, places those with Protected Grounds at a disadvantage;
- **discrimination arising from disability**: where an employee has been treated unfairly and this is connected to a disability;
- **failure to make reasonable adjustments**: where an employer has failed to remove or reduce a disadvantage associated with a disability.
- **victimisation**: when an individual is subjected to a detriment because they have done a protected act under the Laws; and
- **harassment**: unwanted conduct towards an individual relating to a Protected Ground that is intended to offend, humiliate, degrade or intimidate.

Where an employee is successful in a claim of discrimination, the Tribunal will make a compensatory award of six months' pay (or up to nine months' pay if there is more than one complaint or if the complaint of discrimination is combined with a complaint of unfair dismissal) and may also make an award of up to £10,000 for injury to feelings, which award may be reduced at the discretion of the Tribunal (taking into account factors such as the employee's refusal of an offer of compensation).

Click here to access our Guernsey Discrimination in Employment Guide, where we explore each of the Protected Grounds in detail, with worked examples of the different types of discrimination.

Disciplinary procedure

The EEOS has issued a 'Code of Practice on Disciplinary Practice and Procedures in Employment' (the "**Code**") that sets out best practice when dealing with conduct issues within the workplace. Although a breach of the Code does not automatically render an employer liable to proceedings, it will be taken into account by the Tribunal when considering how an employer dealt with matters prior to a dismissal.

Employers should have their own written disciplinary policy and set of procedures, not only to establish appropriate conduct standards in the workplace, but also to set out a clear and open policy on how they will deal with any breaches of those standards. This should include, amongst other things, how disciplinary investigations and subsequent hearings will be dealt with, the suspension of employees and in what circumstances, how warnings will be implemented and procedures relating to an employee's appeal of any disciplinary sanction. This gives both consistency and transparency to employees but also provides a good basis on which to enable employers to demonstrate the application of a fair and reasonable process, should an employee contest the fairness of their dismissal in the Tribunal. Such policies should not be so minutely drafted so as to remove any flexibility on the part of the employer when dealing with a situation. Importantly, they should also contain appropriate wording to enable an employer to deviate from the procedure when required.

It is also important that any disciplinary policy is stated to be non-contractual to avoid any breach of contract claims if an employee asserts that the policy has not been appropriately applied.

E

Effective Date of Termination ("EDT")

The EDT is a statutory construct that determines an employee's termination date for the purposes of any claim under the Employment Protection (Guernsey) Law, 1998.

Determining the EDT is important. Firstly, it establishes the end of a period of continuous employment. This in turn determines whether an employee has the necessary qualifying period to bring, for example, a claim of unfair dismissal (see **Q** for **Qualifying periods**). Secondly, the time limit for presenting a claim to the Tribunal is calculated by reference to the EDT. If a claim is made outside of time, unless there are very specific circumstances, the Tribunal has no jurisdiction to hear it.

If an employee's employment contract is terminated by notice, whether given by the employer or employee, the EDT will be the date on which that notice expires.

If an employee is dismissed without notice, the EDT will be the date on which the dismissal takes effect.

If employed under a fixed term contract, and the contract is not terminated on notice, the EDT will be the date on which the term expires, unless the same contract is renewed.

If an employee is dismissed without notice, for the purposes of computing a necessary qualifying period, the Tribunal will calculate the EDT by applying the relevant statutory notice period but not the contractual notice period to the termination date.

Employment status

An 'employee' is defined as an individual who has entered into, who works under or, where the employment has ceased, who worked under a contract of employment. Unlike in the UK, Guernsey law does not distinguish between a worker and an employee.

Whether someone is deemed to be an employee or not is important in determining what statutory rights they may have. For example, in relation to statutory maternity leave, minimum notice periods and protection against unfair dismissal.

When an employer is recruiting, for example, on a consultancy basis, it is important for any agreement to be drafted carefully to avoid the unintentional creation of an employment relationship. However, the wording in a contract goes only so far, and even if a contract states that an individual is not an employee and the parties do not intend to create an employment relationship at the outset, the Tribunal will look behind that agreement to determine the exact nature of the parties' relationship. Consideration will be given to things such as the degree of control one party has over another, whether there is a mutual obligation to provide and accept work, exclusivity of service and how integrated a person is within the business.

Employment Tribunal claims

The Tribunal has jurisdiction to hear and determine claims made by employees in relation to unfair dismissal (including constructive unfair dismissal), discrimination, failure to provide written reasons for dismissal and claims under the Minimum Wage (Guernsey) Law, 2009. It does not have jurisdiction to hear breach of contract claims (see **B** for **Breach of Contract**) or any other claim arising out of, or as a result of, the employment relationship. Claims must be made in a prescribed form and there is no fee payable for the lodgement of a claim.

The Tribunal does not have jurisdiction to hear certain claims where there is a minimum period of continuous service required (see **Q** for **Qualifying periods**).

All claims are subject to specific time limits. With limited exceptions, claims must be submitted within three months of the act complained of. For example, within three months of the effective date of termination (see **E** for **Effective Date of Termination ("EDT")**) in unfair dismissal claims and within three months of the last discriminatory act in discrimination claims.

Upon lodgement of an employee's claim with the Tribunal, the employer has the opportunity to formally respond, and a specific form is required to be completed for this purpose.

A conciliation officer is then appointed to see if the parties can reach a settlement. Conciliation is not compulsory and either party can refuse to engage in the process. If no settlement is agreed, the matter is referred to a case management meeting to determine the arrangements for a formal hearing. There is no requirement to be legally represented during this process or at the hearing.
For each hearing, a panel is constituted from a pool of Tribunal members. Each Tribunal panel is made up of three lay members, one of whom who will act as a chairperson. The chairperson must be legally qualified.

During the hearing itself, after giving all parties the opportunity to present their evidence, and after considering any written submissions, the Tribunal panel will either uphold or dismiss the claim. If upheld, a compensatory award will normally be made (see **U** for **Unfair dismissal** and **D Discrimination**), which award may be reduced at the discretion of the Tribunal (taking into account factors such as the employee's refusal of an offer of compensation).

There is a right of appeal to the Royal Court on a question of law only.

F

Failure to provide written reasons for dismissal

If an employee has been continuously employed for at least 12 months as at the effective date of termination, they have a statutory right to request a written statement giving the reasons for their dismissal. This must be provided to the employee within seven days of the request.

Failure to do so, or providing inadequate or false reasons, creates a right for the employee to complain to the Tribunal. If upheld, a compensatory award may be made equating to half a month's pay/two weeks' pay. If an employee is dismissed while pregnant or on maternity leave, they are entitled to be provided with this written statement even if no request is made or she has been employed for less than 12 months.

Fixed term contracts

Fixed term contracts are agreements that are prepared to end on a specific date or to conclude at the expiry of a specified period of time, the completion of a particular task or occurrence/non-occurrence of a particular event. The non-renewal of a fixed term contract will amount to a dismissal. If the contract comes to an end after the completion of a specific task, it may be considered a redundancy.

In the main, fixed term employees are not treated any differently to permanent employees in terms of employment rights. However, unlike in Jersey and the UK, employers may include wording in a fixed term contract which prohibits an employee from claiming unfair dismissal if the reason for the dismissal is the expiry of the fixed term contract. Such a provision is only valid for engagements over 12 months, on the premise that anything less than that does not attract unfair dismissal protection. Obviously, when effecting a termination of any fixed term contract, a reasonable process still needs to be applied to the dismissal, but this clause ensures substantive fairness.

Fixed term employees can be employed under successive contracts and an employee's period of continuous employment for the purposes of computing the qualifying period is not broken if they are employed under two or more fixed term contracts with the same terms. However, if the interval between the contracts is longer than a week, it will break continuity of employment. In such circumstances, where continuity is not broken, where an individual is engaged on a series of fixed term contracts, cumulating beyond 12 months, it is recommended that an additional clause is included in the later contracts which reflects the wording referred to above.

Practical tip: although there is no requirement to do so, it is advisable to include a notice period in a fixed term contract which can be triggered if the arrangement does not work out. If the fixed term contract, or two or more fixed term contracts, continue beyond three months, the statutory minimum notice periods will apply (see **N** for **Notice periods**).

Flexible, hybrid and agile working

Employees do not have the statutory right in Guernsey to request flexible working.

The hybrid and agile working arrangements of the pandemic have led to a rise in requests by employees for flexible working on a more permanent basis. Employees now expect flexibility in their work and employers should have a flexible, hybrid and/or agile working policy in place. Such a policy can take many forms and should be tailored to the specific employer's business and the roles performed within it. Flexibility is key and should be maintained by employers, both in respect of the policies operated and the arrangements agreed with employees.

It is not enough just to have a policy in place and allow employees to work flexibly. Where remote and agile working is possible, employers should facilitate such working arrangements by ensuring appropriate equipment is provided and systems are in place to ensure sufficient protection of both virtual and hardcopy company data and confidential information. Appropriate workstation assessments should be carried out to ensure the health and safety of employees when working from home and, if necessary, appropriate training given. Employers must also ensure that they deal with employees equally when considering any requests.

If hybrid arrangements are still ongoing from the pandemic but are not intended to be permanent, care must be taken by employers to ensure that this temporary/informal arrangement does not become an implied term of the employment contract. This could potentially lead to a breach of contract claim when employees are required to return to the office permanently.

G

Garden leave

When an employee is specifically directed not to work or attend the workplace during their notice period, they are said to be on 'garden leave'. Generally, the main underlying purpose of placing an employee on garden leave is to protect the business interests of the employer and act as a form of restrictive covenant.

During this period, employees remain entitled to continue to receive their salary and contractual benefits in the usual way and remain employed by the business until their notice period expires. Generally, employees on garden leave are prevented from having access to company systems, which protects an employer's confidential information and ensures that employees cannot cause any malicious harm to the business systems. During a garden leave period, an employer can also prevent an employee from contacting and/or maintaining working relationships with clients and/or employees.

The right to place an employee on garden leave is not statutory, nor is it an implied term. There must be an express contractual right to place an employee on garden leave. To place an employee on garden leave

in the absence of a specific contractual right to do so is likely to be regarded as a breach of contract. It is, therefore, advisable to not only include a garden leave clause in the employment contract, but also to have a policy to deal with other matters that can arise during the garden leave period. For example, the policy could include a provision that annual leave will cease to accrue and/or that all remaining annual leave will be deemed to be taken during the garden leave period. It should also make clear that any director will be required to immediately resign, without compensation, from any office that they hold.

If an employee has less than 12 months' continuous service, care must be taken. When an employee is on garden leave, they remain employed. Any period of garden leave will, therefore, continue an employee's period of continuous employment and, if that extends beyond 12 months, they will acquire the qualifying right to bring, for example, a claim of unfair dismissal.

Grievances

There is no statutory procedure to deal with grievances, nor is there a requirement to refer to any grievance policy in an employment contract. However, all grievances should be dealt with in a fair, objective and consistent manner to avoid any subsequent claims being brought against the employer (i.e. for constructive unfair dismissal) (see **C** for **Constructive unfair dismissal**).

It is, therefore, advisable to have a formal grievance policy detailing the procedure for submitting a grievance, holding a grievance meeting, the right of appeal and time limits for each stage of the process. It is important that the policy is non-contractual, both to enable changes to be made easily to it and, importantly, to avoid creating a separate breach of contract claim should the policy not be applied properly. In that respect, employers should be aware that, whilst a separate claim can be avoided by having a non-contractual policy, an employee can still resign and assert, for example, a breach of the implied duty of trust and confidence, because their employer failed to follow the grievance policy.

Gross misconduct

Under the Employment Protection (Guernsey) Law, 1998 there are five potentially fair reasons that an employer can rely on to dismiss an employee fairly (see **U** for **Unfair Dismissal**). 'Misconduct' is one of them. In this context, misconduct usually refers to two types of improper or unacceptable behaviour: ordinary misconduct and gross misconduct.

So, how does ordinary misconduct differ from gross misconduct? The difference lies in the severity of the act and its effect on the business. Ordinary misconduct may include acts such as taking sick leave when you're not sick, or not keeping your time sheets up to date. While this type of misconduct is clearly unacceptable and can result in disciplinary action, depending on the circumstances, it is unlikely to be regarded as sufficiently serious to justify instant dismissal. Gross misconduct requires a higher degree of misbehaviour, which is of a more serious nature or has more serious consequences for the business than ordinary misconduct. It must involve an act that destroys the implied relationship of trust and confidence between the employer and employee, making the working relationship untenable to continue.

Examples of 'gross misconduct' can include:
- theft;
- fraud;
- violence;

- serious negligence;
- serious insubordination;
- damaging company property;
- serious breach of health and safety;
- incapability at work due to alcohol or substance misuse;
- serious breach of confidence;
- falsifying documents;
- setting up a competing business;
- fraudulently claiming expenses or misappropriating company money;
- misuse of confidential information;
- bringing the employer into disrepute; or
- failure to obey an employer's reasonable and lawful instructions.

Employers should ensure that their employment contracts and/or employee handbooks detail lists (without limitation) of examples of conduct that would constitute 'gross misconduct'. It is important for an employer to properly classify conduct as 'gross misconduct' because getting the classification wrong could result in a finding of unfair dismissal.

Practical tip: summary dismissal (i.e. without notice) is not the same as 'instant' dismissal (i.e. where an employee is dismissed 'on the spot' without any process). Even if an employee had a previously exemplary record, an employer must still conduct a full investigation and follow a fair disciplinary procedure before dismissing the employee. Failing to do so could render the dismissal procedurally unfair.

H

Handbooks

Most employers will have an employee handbook. Employers use handbooks to provide a consistent set of rules, policies and procedures for their employees. They also use handbooks to define working conditions, to outline the contributions they expect from employees and to set behavioural expectations for the business. Handbooks do not need to cover all eventualities and should be tailored to the employer's specific business. Handbooks should provide clear guidance so that employees fully understand their rights and responsibilities. Handbooks should be non-contractual and specifically stated to be subject to amendment at the employer's discretion.

It is permissible for the mandatory statutory terms and conditions of employment to be contained in an employee handbook as long as reference is made to the handbook in the employment contract, and the handbook is readily accessible to all employees. Best practice suggests that a copy of the handbook is made available to the employee before commencement of employment.

It is recommended that the handbook should contain all relevant policies and procedures, in particular those relating to disciplinary matters, harassment and grievances, so there can be no ambiguity as to how matters will be managed. Unless required by law (see **T** for **Terms and conditions of employment**) or where a specific right or obligation is created (e.g. suspension, deductions from wages, repayment of monies owed), all terms and policies in the handbook should be described as non-contractual to allow

the employer to amend the policies if necessary and to ensure that a contractual claim is not created in circumstances where an employer does not adhere to a particular policy in full. Employers should be mindful that even though an employee may not be able to assert a breach of contract claim for not applying a particular policy contained in a handbook, they may still refer to the policy as evidence in any unfair dismissal or discrimination claim.

Hours of work and rest breaks

There are no statutory limits regarding the number of hours an employee can work per day or week. However, weekly shop workers cannot be forced to work on a Sunday.

There is also no statutory requirement for employees to be given daily or weekly rest breaks or even lunch breaks. Contracts of employment do, however, need to state what an employee's hours of work are, which includes any rest and meal breaks.

Employers have a duty of care to their employees to ensure their health and safety at work, and statutory obligations exist under the health and safety laws to provide a safe working environment. Any failure to ensure an employee's health and safety at work can create a situation where an employee could assert a fundamental breach of contract (most commonly seen in cases involving stress and excessive overtime being worked) and claim constructive unfair dismissal (see **C** for **Constructive unfair dismissal**).

I

Immigration and employment permits

British and Irish citizens can enter the Bailiwick of Guernsey without a visa and remain indefinitely to take up employment. Since Brexit, and with effect from 1 January 2021, all EU nationals and nationals of the EEA (Norway, Iceland and Liechtenstein) and Switzerland are required to obtain a visa and an immigration work permit prior to coming to Guernsey. Any individual already in Guernsey on 1 January 2021, is permitted to continue to live and work here but they must apply for settled/pre-settled status. Nationals from other countries also require permission to enter and stay in the Bailiwick and they must also have a visa and immigration work permit.

In addition to immigration clearance (i.e. a visa and an immigration work permit), every person working in Guernsey must hold either a Resident Certificate or Permit or an Employment Permit. A Resident Certificate or Permit is based on personal circumstances, usually having a strong family connection to the Island, and allows someone to undertake any employment in Guernsey. Employment Permits must be applied for by an employer and are issued in eligible sectors.

There are three types of Employment Permits: Seasonal Permits ("**SEP**"), Short Term Permits ("**STEP**"), and Long-term Permits ("**LTEP**") and all are only valid for a named, full-time role with a named employer:

- EPs are issued for seasonal work and are valid for up to 9 months, with a minimum 3-month break following the 9-month period and can be renewed indefinitely. SEP holders are not permitted to accommodate family members and must reside in open market housing.
- STEPs are issued for jobs where there are manpower shortages in Guernsey, are valid for a maximum of one year, renewable for up to five years and do not allow the holder's family to reside with them.

– LTEPs are issued for jobs where there are skill gaps in Guernsey and those skills are in short supply internationally. They allow the holder's immediate family to reside with them and are valid for a period of eight years, after which time the holder will become an Established Resident and will no longer be tied to a certain job. If they do not move away from the Island, they will then be eligible to apply for a Permanent Resident Certificate, allowing them to leave and return at any time.

Applying for Employment Permits has been streamlined in recent years and, once an employer is registered online, the application process (also online) is relatively straightforward.

Industrial relations

There has been very limited industrial action in Guernsey, and there is no statutory protection for employees looking to strike. Employees are, however, protected against unfair dismissal on the basis of their involvement with a trade union.

Trade unions are not legally recognised in Guernsey. However, there are various protections for trade union members and a statutory complaints procedure to resolve any industrial dispute. An 'industrial dispute' is defined in the Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993 as any dispute between an employer and an employee connected with employment, non-employment or conditions of employment, other than a dispute under the unfair dismissal, sex discrimination, discrimination or minimum wage regimes.

The process of lodging an industrial dispute is similar to that of the Tribunal. On receipt of the notification of the dispute, it is referred to an industrial disputes officer and the parties will be offered conciliation in an attempt to settle the dispute. If a settlement cannot be reached, the dispute is then referred to arbitration, if the parties agree, or to the Industrial Disputes Tribunal if they cannot agree. The Industrial Disputes Tribunal's decision is legally binding on the parties.

J

Just out of jail

It is recommended that employers, particularly in regulated industries, should have a criminal records policy which provides guidance for the business during recruitment and where existing employees obtain a criminal record during employment.

When recruiting, employers are entitled to ask prospective employees if they have any previous convictions. Indeed, in regulated industries, employers are required to make such an enquiry. However, each case should be examined on an individual basis. Conducting a criminal record check risk assessment is a useful way to make consistent, justifiable and informed decisions. Areas relevant to that risk assessment will include:

– whether the conviction is relevant to the position being applied for;
– the seriousness of the offence;
– the age of the individual at the time of the offence;
– whether they have a pattern of offending behaviour; and
– whether they have made sustained efforts to rehabilitate.

With some exceptions, there is no obligation on an employee to disclose spent convictions and an employer must not dismiss or prejudice an employee for having, or failing to disclose, one. Exceptions include, for example, when applying to work with children, within the police force or in certain positions within the finance and banking industry, where having a spent conviction or failing to disclose it can be regarded as a lawful ground for dismissal.

The policy should also deal with procedures if an existing employee obtains a criminal record. For example, the requirement for employees to report any criminal convictions, warnings or investigations to their employer; or the requirement to undertake a DBS recheck for a new role or if the employer believes that an employee's circumstances have changed since their last check was provided. The criminal record check risk assessment should be used to assess any information obtained and provides a useful audit trail for the employer to refer back to if their decision-making process is questioned.

Employers should note that any data collected concerning an employee's criminal record history is considered special category personal data and should be treated with the utmost of confidentiality and retained only for so long as it is absolutely necessary.

K

Keeping in touch ("KIT") days

During a period of maternity or adoption leave, except during any 'compulsory period', an employee can request to work for up to 10 days without impacting their remaining period of leave. These 10 KIT days can be continuous or kept separate and the employee is entitled to receive the same pay rate and benefits for those days as applied prior to their period of leave. Appropriately worded policies will ensure that the pay provided is limited to the time actually spent working and that any amount of time working on a particular day will be counted as one KIT day.

It should be noted that working any KIT days is solely at the employee's discretion. An employer cannot force an employee to work during any period of statutory leave and an employee should not be treated less favourably for refusing to work a KIT day.

L

Long-term sickness absence

Dealing with an employee who is absent on a long-term basis due to illness is notoriously difficult, particularly when the illness involves mental health. Having a non-contractual policy dealing with these types of absences can assist both the employer and the employee in knowing what is expected of them and gives an accountable process to follow when managing and responding to long-term absences.

Applying a consistent policy to long-term absences is key. Throughout any period of long-term absence, it is important to maintain open communication with the employee to monitor their progress and provide support, as required. It may also be necessary to obtain medical advice from the employee's doctor or, if agreed, a doctor appointed by the employer, or engage the involvement of an occupational health

adviser to assist with the prognosis and opine whether reasonable adjustments can be made to assist the employee in returning to work.

If an imminent return is not possible, the employer will need to determine the employee's capability to perform their role. This should be regularly assessed on a periodic basis if the absence is continuing. Relevant considerations may also be whether the employee is entitled to permanent health insurance, if applicable, or eligible for ill-health retirement.

When progressing through a capability process, the employee must be consulted with at every stage. Dismissing an employee without following appropriate steps and a reasonable process may lead to unfair dismissal, breach of contract and/or personal injury claims.

See also **O** for **Occupational health**.

M

Maternity and maternity support leave

Irrespective of their length of service, expectant mothers are entitled to take time off during working hours to attend ante-natal appointments. They also have a statutory entitlement to 12 weeks' 'basic maternity leave', the first two weeks after the child being born being considered compulsory. Permitting an employee to work during this period is a criminal offence, punishable by fine.

Employees who have been continuously employed for 15 months or more at the beginning of the 11th week before the due date, are entitled to 'additional maternity leave', totalling 26 weeks, which includes the 12-week 'basic maternity leave' period.

There is no statutory entitlement to be paid during any period of maternity leave. Eligible employees can, however, claim parental benefits from the States of Guernsey. These benefits can include a one-off maternity grant, a maternal health allowance for the two-week period following the birth of a child and a newborn care allowance payable for up to a total of 26 weeks, including the two-week period where a maternal health allowance is paid. The latter is payable to the parent who takes time off work to care for their child and is transferable between parents if the caring responsibility changes.

Employees have the right to return to their pre-maternity leave job, or a suitable alternative role, on equivalent terms and conditions. If a redundancy situation arises while on maternity leave, unlike in Jersey, they are entitled to be offered any suitable alternative roles ahead of others.

The mother's spouse or cohabiting partner is entitled to two weeks' 'maternity support leave' provided they have been continuously employed for 15 months at the beginning of the 11th week before the expected due date. This can start on the day of the birth or when the mother and/or baby are discharged from hospital. There is no statutory entitlement to be paid during any period of 'maternity support leave'.

See also **K** for **Keeping in touch ("KIT") days**.

Minimum wage

With very limited exceptions, all employees have a statutory right to be paid a minimum hourly rate.

The current rates, from 1 October 2025, are £12.60 for employees over the age of 18 and £11.35 for those aged 16 and 17. Minimum wage rates are reviewed and updated annually. The minimum wage rates also include maximum food and accommodation off-sets, which can be deducted from the minimum wage payable to employees where food and accommodation are provided by an employer.

As yet, Guernsey does not have a national living wage.

N

Notice periods

There are statutory minimum periods of notice that must be given by either party when terminating the employment relationship. These are dependent on the employee's length of continuous service. In particular, a minimum of one week's notice must be given if the employee has been continuously employed for a period of one month or more but less than two years, two weeks' notice if the employee's period of continuous employment is two years or more but less than five years and a minimum of four weeks' notice where the employee has been continuously employed for five years or more.

If the employment contract specifies a longer notice period, the contractual notice period will prevail.

The minimum notice provisions do not apply to employees employed under a fixed term contract of three months or less.

Practical tip: employers should be aware that the minimum statutory notice period may be added to an employee's period of statutory service in order to determine the effective date of termination.

See also **P** for **PILON** - **Pay in lieu of notice**.

Novation

For various reasons, an employer may look to transfer an employee's employment to a new employer. An employment contract can only be novated if all of the parties to the original contract agree. Novation agreements are generally tri-partite (i.e. between the old employer, the new employer and the employee) and operate to effectively extinguish the old employment contract and replace it with a contract with the new employer with all the rights and obligations of the parties being transferred. The parties can agree to transfer the existing contract in verbatim or they can agree to transfer some but not all of the terms. Whatever is agreed, the new employment contract and the novation agreement need to accurately reflect the parties' intentions, particularly in relation to pre-novation liabilities and obligations and must unambiguously reflect any changes to terms and conditions that the parties agree.

O

Occupational health

If an employee is absent from work due to illness or injury, it may be helpful to obtain advice from an occupational health ("**OH**") adviser. Indeed, such an obligation may be written into a capability or long-term absence policy. An OH assessment generally focuses on the employee's role at work and how that may impact their physical and/or mental health. Having assessed the employee, the OH adviser will report back to the employer with any advice and recommendations that may assist a return to work and/or minimise any further absences in the future. These recommendations commonly include:

- a phased return in terms of time and/or duties;
- proposed adjustments to workspaces or equipment;
- opinions on future capacity for full service to be resumed; and
- whether any follow up is required, such as any support meetings with the employee.

If medical advice is also required, the employee's doctor or a doctor appointed by the employer may also be asked to provide recommendations. Where an OH adviser has also been engaged, an employer should consider both reports. Ultimately, it is the employer's responsibility to consider what is possible in the workplace and then consult with the employee about the best course of action to assist a return to work.

If a return to work is not possible, the employer will need to consider whether the employee is capable of performing the role for which they were employed. Capability is one of the five lawful reasons for dismissing an employee. At this point, depending on the circumstances, an employer may need to consider eligibility for ill-health retirement. Employers should rely on up-to-date medical evidence before making any final decisions about an employee's employment. Failure to do so will likely render any dismissal unfair.

An OH adviser is also able to provide their opinion as to what reasonable adjustments could be made to facilitate the employee's return to work. Under the Prevention of Discrimination (Guernsey) Ordinance, 2022, an employer is obliged to make reasonable adjustments for disabled persons and the failure to do so may amount to unfair discrimination, which may expose the employer to legal liability.

Practical tip: an OH policy can be very useful, setting out when an OH referral can be made, the relevant procedures for the assessment, including who will carry it out, and what the employee can expect in terms of next steps.

See also **L** for **Long-term sickness absence**.

P

Part-time working

Whilst there is no specific statutory protection for part-time employees, part-time employees have the same statutory rights as full-time employees in respect of conditions of employment, unfair dismissal rights and maternity/adoption rights, even if some are applied on a pro-rated basis.

Part-time employees should not be treated less favourably than full-time employees (e.g. in relation to benefits provided or opportunities for promotion or development), with such action potentially giving rise to a direct or, more likely, an indirect discrimination claim (see **D** for **Discrimination**).

Pensions

The States of Guernsey has introduced the Secondary Pensions (Guernsey and Alderney Law) which requires employers to set up a pension for all eligible employees and make minimum contributions. This is a significant change in the pension landscape in Guernsey.

Employees can opt out of the scheme and, if they elect to do so, there will be no obligation on the employer to contribute during any period where the employee has opted out. However, an employer is required to re-enrol their employees periodically.

The minimum pension contributions an employer and employee are required to make will increase gradually from a combined minimum contribution starting from 2% in 2024 up to 10% by 2032 (as at 1 January 2026, the combined minimum contribution is 2.5%).

PILON - Pay in lieu of notice

A PILON clause enables an employer to remove an employee from the business with immediate effect. If an employer does not wish an employee to work their notice period, they may elect to terminate the employment relationship with immediate effect and make a payment (typically a lump sum) in lieu of the salary that the employee would have earned if they had worked their notice period. Depending on the wording in the employment contract, an employee may be entitled to payment of contractual benefits as well. When making a PILON, it is important that employers communicate in writing that the payment represents a PILON, when the payment will be made (e.g. in the next pay run) and confirm the employee's final day of employment / termination date. This will help avoid any argument about when the termination actually takes effect.

Employers do not have a right to make a PILON unless the contract of employment specifically permits it. By terminating an employee's employment with immediate effect and making a PILON in the absence of a contractual clause permitting that action, an employee could assert that there had been a fundamental breach of contract (see also **R** for **Restrictive covenants** for the effect of such a claim).

Practical tip: a PILON clause is a useful tool for employers wanting to dismiss an employee who, for example, has accrued 10 months' continuous service. Working their contractual notice, of say three months, would mean the employee would accrue 13 months' service, making them eligible to bring a claim of unfair dismissal. By relying on a PILON clause and terminating the employment immediately at the 10 months' point, this can be avoided, unless of course the dismissal is for one of the automatically unfair reasons to dismiss (see **U** for **Unfair dismissal**).

Q

Qualifying periods

In order to qualify for certain statutory rights, an employee must have been continuously employed by the same employer or related employer for a specified period of time. For example, with certain exceptions applying to automatically unfair dismissals, to be eligible to make a claim of unfair dismissal (see **U** for **Unfair dismissal**) or to have written reasons for dismissal, an employee must have been continuously employed by the same employer for 12 months or more (see **F** for **Failure to provide written reasons for dismissal**). It is worth noting that, whilst an employee's period of continuous service will not be broken where their employment is transferred from one undertaking to another, it will be broken where there is a period of more than one week where a contract of employment does not apply to the employee.

A qualifying period does not apply for all claims. For example, all employees are statutorily entitled to various rights from the start of their employment, including the right to a statement of terms and conditions of employment (see **T** for **Terms and conditions of employment**), minimum notice periods (see **N** for **Notice periods**), maternity leave (see **M** for **Maternity and maternity support leave**) and the right to make a claim of discrimination (see **D** for **discrimination**).

R

Redundancies and reorganisations

There is no statutory redundancy regime in Guernsey, nor is there any statutory entitlement to redundancy pay. There is, however, a Code of Practice on Handling Redundancy (the "**Redundancy Code**") issued by the EEOS, and, whilst a failure to apply the Redundancy Code will not automatically render the employer liable to proceedings or make a dismissal unfair, it will be taken into account when considering the overall fairness of the redundancy process.

Redundancy is one of the five statutory fair reasons for dismissal. Therefore, it is lawful to dismiss an employee on the grounds of redundancy.

In order for a dismissal to be fair, however, an employer must also show that they have acted fairly in selecting an employee for redundancy and applied a reasonable process in effecting any dismissal arising. A failure to do so could create a right for an employee to assert that they have been unfairly dismissed.

An employer must show, amongst other things:
- that there was a genuine redundancy situation (although the Tribunal will not look too far behind an employer's business decision);
- that all measures were taken to avoid the redundancy;
- that sufficient consideration was given to those likely to be affected;
- that fair and objective criteria were used to select those made redundant;
- that the employee was consulted with at every stage; and
- that they had a right of appeal.

Practical tip: whilst a failure to apply the Redundancy Code will not automatically render the employer liable to proceedings or make a dismissal unfair, it will be taken into account when considering the overall

fairness of the redundancy process. Applying the Redundancy Code in any redundancy situation will assist an employer in ensuring a reasonable process.

Restrictive covenants

The starting point is that any restrictive covenant in an employment context is not enforceable unless an employer can show that it has a legitimate proprietary interest to protect.

It is accepted that employers do have legitimate proprietary interests to protect, but that the restraints must be reasonable in all the circumstances having regard to the business itself, the specific role and the individual's position within the company. They must go no further than is necessary for the protection of the employer's legitimate business interests. It is, therefore, helpful to define in the employment contract what legitimate business interests the employer has in relation to particular roles.

The most common post-employment restrictions involve restrictions prohibiting an employee from:
- competing against their former employer;
- dealing with their former employer's clients and intermediaries; or
- soliciting clients and/or employees from their former employer.

Typically, these restrictive covenants seek to prevent an employee using the knowledge they have gained with their former employer to compete with them, solicit or deal with their clients or poach their employees. They must, however, be reasonable in terms of the geographical area that they cover and the length of time that they apply for after termination of employment. It is critical to have carefully drafted restraint clauses (including ensuring that they apply during and after employment), ensuring that only connections made or developed by the employee in their recent employment history are protected. The courts will interpret the validity of a restraint clause as at the time that it was entered into, and so it is important to ensure that each time an employee is promoted or changes roles, their restraints are reconsidered and, if necessary, amended or re-affirmed.

If an employer believes that a restrictive covenant has been breached, injunction proceedings can be instigated against an employee. However, often a strongly worded 'cease and desist' letter has the desired outcome without the expense of court proceedings.

If an employee is successful in proving that there has been a fundamental breach of contract by the employer (e.g. by being successful in a constructive unfair dismissal claim), the restrictive covenants fall away, and an employer cannot seek to rely on them. This is a common tactic in team moves where employees will resign en masse, assert constructive dismissal and regard their covenants as not being enforceable as a result.

S

Sex discrimination

It is unlawful to discriminate against an employee on the grounds of sex, gender reassignment, marital status, pregnancy, maternity or adoption leave at any stage of the employment relationship and beyond. For example, in recruitment, terms of employment and benefits (including the payment of money) (see also **Y** for **Why should equal pay be considered?**), opportunities for promotion and training, dismissal or

selection for redundancy and providing references.

The Protected Grounds referred to in the Existing Legislation are due to be incorporated into the Discrimination Ordinance as part of phase two. It is expected that the Discrimination Ordinance will replace the Existing Legislation in its entirety, and all discrimination law in Guernsey will then be contained in the Discrimination Ordinance.

Click here to access our Guernsey Discrimination in Employment Guide, where we explore this in more detail.

See also **V** for **Victimisation**.

Sick leave and pay

There is no statutory entitlement to paid sick leave. Any entitlement, above any rate of sickness benefit provided from the States of Guernsey Social Security Department, and paid direct to eligible employees who have made a claim for the benefit, is entirely a matter for the employment contract.

Whether sick pay is provided or not must be clearly set out in the employment contract. It is recommended that the full terms of any sickness policy, including sickness procedures, should be set out in a non-contractual sick leave policy.

Practical tip: When preparing any sick leave policy, employers should have regard to (without limitation):
- the amount of sick pay to be paid;
- whether it reduces after a certain amount of time and whether it should be subject to a cap;
- whether there should be a qualifying period before any sick pay is paid and whether sick leave is paid during probationary periods and/or notice periods;
- the need to provide medical certificates and when;
- whether the employee is in receipt of sickness benefit from Social Security and how that should be accounted for;
- the relationship between sickness absence and annual leave; and
- the requirement to consent to see a doctor for the purposes of preparing and sharing a medical report with the employer.

Suspension

Suspension occurs when an employee is instructed not to attend the workplace and not to engage in any work, usually because an employer is investigating the employee's alleged misconduct.

Suspension is a neutral act and should never constitute disciplinary action. Practically though, it should be reserved only for the most serious of situations where the employee's presence in the workplace might impede or influence an investigation or if there is a risk to the business or another employee by allowing them to remain in the workplace. It should be for as short a period as possible, generally to allow the employer to complete an investigation and/or formal process, whether that be disciplinary or grievance.

Suspending an employee should never be an impulsive reaction. Whilst it may well be the case that suspension is regarded as a neutral act, the reality is that it can be difficult for an employee to return to the workplace after a period of suspension, particularly if that period has extended beyond a week or two.

Employers should, therefore, consider carefully whether to suspend an employee pending the outcome of a disciplinary or grievance investigation or process.

Employers do not have a right to suspend employees unless the contract of employment specifically permits it. To suspend an employee in the absence of a contractual right could enable an employee to assert that there has been a fundamental breach of contract (see also R for Restrictive covenants for the effect of such a claim). Employers should consider having a suspension policy and ensure that it is applied consistently.

Proper consideration should be given to any alternatives to suspension. For example, moving the employee to another department or directing them to go on paid leave. Suspending an employee without having due regard to reasonable alternatives may lead to a breach of the implied duty of trust and confidence and the risk of a constructive unfair dismissal claim (See C for Constructive unfair dismissal). Employers could also be faced with a discrimination claim if, for example, two employees are treated differently and the reason(s) for the different treatment relates to a Protected Ground.
If, after due consideration, suspension is considered appropriate in all the circumstances, the suspended employee must continue to receive their full salary and benefits, unless the contract expressly says otherwise.

T

Terms and conditions of employment

Within four weeks of starting employment there is a statutory obligation on the employer to provide all employees, irrespective of the number of hours to be worked, with a statement of employment outlining their terms and conditions of employment (the "**employment contract**"). Failure to do so is a criminal offence, punishable by fine.

The employment contract should contain, at a minimum, the following information, even where such an entitlement does not exist:

- the names of the employer and the employee;
- the date upon which the employment commenced;
- the rate of pay or method of calculating pay, including overtime rates and other pecuniary benefits, and the intervals at which they are paid;
- hours of work, including provisions in relation to rest breaks;
- holiday entitlement, including public holidays and holiday pay, with sufficient details to calculate any entitlement to accrued holiday pay on the termination of employment;
- sick pay and any terms and conditions relating to sickness or injury;
- pension entitlement;
- notice periods to be given and received on the termination of the employment;
- job title; and
- any terms and conditions relating to maternity pay, maternity leave and the employee's right to return to work.

Other than notice periods (see **N** for **Notice periods**), minimum wage (see **M** for **Minimum wage**), maternity leave (see **M** for **Maternity and maternity support leave**) and adoption leave (see **A** for **Adoption leave**), there are no minimum terms which must be provided by the employer.

In addition to these statutory requirements, it is advisable to have other express terms clearly set out in the employment contract dealing with issues like:

- benefits;
- duties;
- deductions from wages;
- confidentiality;
- restrictive covenants;
- suspension, with or without pay;
- termination of employment, including PILON and garden leave; and
- intellectual property, company property, etc.

As well as the express contractual terms referred to above, there are also various implied contractual terms which exist between an employer and employee which are implied as a matter of law. For example, the employer's duty to protect the health and safety of its employees and the mutual duty of trust and confidence between the parties. Breaches of these implied terms can give rise to constructive unfair dismissal claims (see **C** for **Constructive unfair dismissal**), personal injury claims and/or breach of contract claims (see **B** for **Breach of contract**).

See also **V** for **Variations to an employment contract**.

Transfer of employment

Unlike in the UK, and with the exception of States of Guernsey employees where a specific ordinance is enacted, there is no statutory protection against dismissal or changes to terms and conditions when a business transfers ownership (i.e. there is no TUPE). Limited protection is provided for employees under Guernsey's employment law in relation to continuity of service with the law providing that an employee's period of continuous employment will not be broken by the transfer of a business to a new employer.

When a business is sold in Guernsey, how the sale is structured will have a direct impact on the employees. Broadly speaking, you generally have a sale by way of the shares in the company (share sale) or a sale of the assets of the company (asset sale).

Where the ownership of a company changes by way of a share sale, whether or not it is the employing entity that is being sold or the employer is part of a larger group of companies, there is no change to the employing entity, and thus there is no effect on the employees' employment contracts.

In an asset sale, the purchaser is not obliged to take on the employees, nor is it obliged to offer the same terms and conditions as was previously offered by the seller to those staff that it wishes to acquire. There are many ways that a deal can be structured involving employees in an asset sale, which may involve redundancies, novation of employment contracts (see **N** for **Novation**), retention bonuses, grandfathering certain employment conditions and/or guaranteeing continuity of employment to name just a few. These all become a matter of negotiation between the vendor and the purchaser.

U

Unfair dismissal

In order for a dismissal to be fair, it must be both substantively and procedurally fair.

A dismissal must be for one of five statutory lawful reasons (substantive fairness). These lawful reasons for dismissal include:

- conduct;
- capability or qualifications;
- redundancy;
- contravention of a legal duty; or
- some other substantial reason.

However, having a lawful reason does not necessarily make a dismissal fair. An employer must also show that it followed a reasonable procedure in effecting that dismissal (procedural fairness). It is possible for a dismissal to be substantively fair, but procedurally unfair and, in such circumstances, an employee would be successful in their claim of unfair dismissal.

If an employee is dismissed on the grounds on pregnancy, maternity, adoption, health and safety, trade union membership, assertion of a statutory right, refusal to work on a Sunday or an act of discrimination it will automatically be unfair regardless of the procedure followed.

Claims of unfair dismissal, together with constructive unfair dismissal claims (see **C** for **Constructive unfair dismissal**), must be made to the Tribunal within three months of the effective date of termination (see **E** for **Effective Date of Termination ("EDT")**). Unless the dismissal is for one of the automatically unfair reasons set out above, an employee must have been continuously employed for a period of more than 12 months to be eligible to bring a claim. If the Tribunal finds in the employee's favour, a compensatory award of six months' pay will be made, which the Tribunal has the discretion to reduce in certain circumstances. Note that the entitlement to compensation is six months' pay and not up to six months' pay.

Unlawful deductions from wages

Deductions from wages are unlawful unless they are specifically authorised in the employment contract, expressly permitted by the employee or they are authorised by a relevant statutory authority (e.g. the Social Security Department) or by a judgment or order of the court. If deductions are made by employers outside of these, an employee will likely have a claim for breach of contract (see **B** for **Breach of contract**). It is, therefore, important to ensure that appropriate deduction clauses are contained in the employment contract or the contractual part of an employee handbook. This can be particularly helpful when an employer wishes to recoup overpaid sick leave or deduct the value of damage sustained to company property or the cost of company property lost or misappropriated by an employee.

V

Variations to an employment contract

Employment contract terms can only be varied if both parties agree. The changes must then be confirmed in writing within four weeks of the change taking effect.

If there is no agreement, changes can still be made unilaterally if it is expressly authorised in the employment contract by way of a flexibility clause. For example, "We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change". Clauses such as this, however, will only allow reasonable and relatively minor changes to be made. Reasonable changes can also be made if there has been adequate consultation with the employee before effecting the change. Failure to do so, or seeking to make unilateral changes to fundamental contractual terms, could lead to breach of contract (see **B** for **Breach of contract**) and/or constructive unfair dismissal claims (see **C** for **Constructive unfair dismissal**) on the basis that it would breach the employer's implied duty of trust and confidence.

Where an employee's consent to a change in terms is not forthcoming, after an appropriate period of consultation, employers can terminate the existing employment contract in accordance with its terms and offer employment under new terms incorporating the change(s). In these circumstances, there will be no breach of contract but there will be a dismissal. Depending on the employee's length of continuous service, the employer may be at risk of an unfair dismissal claim even if the new employment is accepted. Continuity of service will be preserved if the new employment is accepted.

Vicarious liability

Vicarious liability is a legal concept that assigns liability to a party who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm.

Employers can be held to be vicariously liable for the acts or omissions of their employees. For example, harassment or discriminatory acts. Each case will be determined on its own facts, but it will always be necessary to establish that the relevant actions occurred 'in the course of employment'. This can sometimes be a difficult task, and the tribunals have grappled with the myriad of circumstances where the line is blurred between work and personal life (e.g. where the offending act occurred at work sponsored parties, client events, informal team drinks after work on a Friday or on social media to name a few).

An employer can mitigate its liability by showing that it takes all necessary and practical steps to ensure that such acts or omissions do not occur. For example, by having a clear anti-harassment or anti-discrimination policy which is regularly reviewed and updated and by providing a sufficient level of training to all staff with records kept of the training given.

See also **B for Bullying and Harassment.**

Victimisation

Victimisation is a form of discrimination. Under the Existing Legislation and the Discrimination Ordinance, it occurs when an employer treats an employee less favourably because they have made, or supported another to make, a discrimination claim. Supporting another may include giving evidence or providing information in relation to a claim. Victimisation can also occur if an employer believes or suspects that the employee has made or intends to make a claim or support another.

An employee who believes that they have been subjected to victimisation can make a claim to the Tribunal. No qualifying period applies but the claim must be made within three months of the alleged discriminatory act. The compensation available for successful claims of victimisation under the discrimination legislation is six months' pay.

Click here to access our Guernsey Discrimination in Employment Guide for more information.

W

Whistleblowing

In the UK, employees are protected from dismissal or suffering from a detriment in their employment if they 'blow the whistle' on their employer by reporting a wrongdoing, such as a criminal offence, breach of a legal obligation or a health and safety breach. This concept is not legally recognised in Guernsey.

However, employees are protected from dismissal in cases where they allege a statutory right has been infringed or where they allege that there has been a breach of health and safety obligations. These are automatically unfair reasons for dismissal and they apply to all employees regardless of length of service. Employees are also protected from being treated less favourably or being victimised if they have raised a discrimination claim or supported a colleague's claim.

Indirectly, whistleblowers can find protection by resigning and asserting constructive unfair dismissal if they have been treated unfavourably as a result of their disclosure, however this does not protect their employment status.

Without prejudice discussions

Without prejudice discussions are a useful tool in an employer's armoury. They may be helpful when an employer wishes to propose the termination of an employee's employment contract on mutually agreed terms rather than engage in a protracted internal procedure, such as a disciplinary or capability procedure. Similarly, an employee may wish to discuss the termination of their employment if they are aware that a formal procedure is likely to be instigated against them.

Unlike the UK, where there is specific statutory protection for settlement negotiations, Guernsey relies on the common law concept of without prejudice. This concept ensures that these types of discussions remain confidential and cannot be referred to in any subsequent court or tribunal proceedings. For example, as an admission of liability by a particular party. It must, however, be applied properly to ensure protection. Without prejudice discussions attract privilege, which protects those conversations and prevents any party from relying on them in future legal proceedings, or at all.

In order to apply, there must be an existing dispute between the parties. For example, if an employee has raised a claim against the employer or if the employer has proposed dismissing the employee for a particular reason. If discussions then take place to explore the possibility of an agreed departure, the parties can agree to speak on a without prejudice basis. If one party does not agree, the meeting can continue on an open basis, or it can be rearranged. If, for example, an employee is not aware of any issues relating to their employment, the meeting must be held on an open basis first to explain the issues and it can then be moved onto a without prejudice basis once a dispute has been established based on those facts discussed on an open basis.

There also must be a genuine attempt to settle the dispute, even if a settlement is not ultimately achieved. If not, any statements made during any without prejudice discussion can be referred to in any subsequent proceedings.

Privilege can only be waived with the consent of all parties. Care should be taken to ensure that privilege is not inadvertently waived, by referencing privileged communications in open communications, and to prevent one party from unilaterally waiving privilege without consent by, for example, referring to particular settlement discussions in proceedings, which may then cause the whole discussion or document to lose privilege.

Wrongful dismissal

Wrongful dismissal refers to a contractual breach relating to the termination of an employee's contract of employment. This can include breaches of both the implied and express terms of the employment contract and may include, for example, a breach of the implied term to provide the minimum statutory notice period, the failure to provide any, or sufficient, notice or pay in lieu of notice, or a refusal to allow an employee serve their full contractual notice in circumstances where the contract does not make provision for a PILON.

Wrongful dismissal claims cannot be made in the Tribunal and must be initiated before the Petty Debts Court if below £10,000 or the Royal Court of Guernsey if above £10,000. Unlike in the Tribunal, which is a no-costs jurisdiction, the unsuccessful party in a wrongful dismissal claim in the court can be ordered to pay the costs of the successful party in bringing or defending the claim.

Practical tip: wrongful dismissal should not be confused with unfair dismissal. The two are entirely separate claims.

X

eXit interviews

Whilst exit interviews are not compulsory, nor are they a legal requirement, holding an exit interview is an effective way of obtaining candid feedback from an exiting employee about the workplace, how it operates, any issues that exist and the general culture that employees may not be prepared to share whilst in continuing employment.

Exit interview questions could include:
- Why did you decide to leave?
- Could we have done anything to persuade you to stay?
- Do you feel you were supported by management during your employment? and
- Could anything have been done differently?

Utilising the feedback obtained can assist a business to effectively deal with any issues that have arisen. For example, if work culture needs addressing, if there are issues with particular individuals or team structures, if any policies or procedures need to be amended or if any further support could be given by management or to management to address any areas of concern. Consideration should be given to the maintenance and confidentiality of notes from these interviews for data protection purposes.

Y

WhY should equal pay be considered?

There is no equal pay legislation in Guernsey.

However, the Existing Legislation (and the Discrimination Ordinance once phase two has been completed) prohibits less favourable treatment on the basis of sex. This less favourable treatment includes any actions in relation to the terms and conditions offered to an employee, and extends to what an employee is paid. Whilst this does not create a 'right' to equal pay per se, it does create a 'right' to not be treated less favourably than a relevant comparator, and a recent case in the Tribunal has confirmed that a failure to pay a female partner the same as her comparative male counterpart without reasonable objective justification was discriminatory.

Having a board approved pay strategy and remuneration policy which defines the parameters within which decisions regarding pay can be made, and applying the policy in a consistent and objective way will enable an employer to objectively justify decisions made in relation to pay.

Z

Zero hours contracts

Zero hours contracts are permissible in Guernsey and are not independently regulated. If engaged on a true zero hours contract there will be no mutuality of obligation to provide or accept work, which is necessary for an employment contract to exist. It is, therefore, unlikely that the person engaged will have any employment protection rights.

Zero hours contracts are, however, often misused by employers to try to avoid employment obligations and yet many workers engaged under zero hours contracts do consider themselves to be employees.

This is by no means a straightforward area. Currently, if a dispute arises, the Tribunal will look behind the wording of the contract and investigate the true nature of the relationship between the two parties to determine whether an employment relationship can be inferred. If so, notwithstanding the relevant contractual terms, the person engaged will be deemed to be an employee and have protected employment rights.

Does this then mean that the zero hours contract employee will accrue certain statutory rights, such as the right to claim unfair dismissal, if employed under a zero hours contract for a period of more than 52 weeks, albeit they may only be engaged to work on three short separate occasions during that time? This would depend on whether the zero hours contract is structured as an 'umbrella' or 'overarching' contract, meaning that there is a continuing contractual relationship between the parties even if the employee is not working at the time. Again, this goes back to whether there is a mutuality of obligation between the parties during those periods which will be determined by the wording of the contract and the conduct of the parties. If an 'umbrella' contract is established, any week during the whole or part of which the employee's relationship with the employer is governed by a contract of employment shall count in computing a period of employment.

As such, whilst it may not be determinative, employers should consider including wording into any zero hours contract confirming that each assignment shall be regarded as separate and that no contract is deemed to exist between the parties between assignments.