Jersey Employment A-Z Guide

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Introduction

This guide is a high-level overview summary of employment law in Jersey. 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 / parental leave

Irrespective of their length of service, an employee who adopts a child under 18, with their cohabiting partner or jointly matched adoptive parent (the "Adoptive Parents") are each entitled to 52 weeks' parental leave, beginning no earlier than the beginning of the 11th week before the expected placement date and ending on the two year anniversary of the adoption placement. The 52 week period can be taken as a whole or split into three blocks of leave, each block being at least two weeks.

Each Adoptive Parent is statutorily entitled to six weeks' full pay during the first 12 months of the parental leave period and, other than remuneration, all other terms and conditions continue to accrue during a period of leave. This includes the accrual of annual leave.

There is also a statutory entitlement to time off to attend an unlimited number of pre-adoption appointments. Only the first 10 hours need to be paid.

Each Adoptive Parent has 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 parental leave, unlike in Guernsey, they are not entitled to be offered any suitable alternative roles ahead of others.

It should be noted that the period of parental leave is non-transferable. In other words, any remaining period of leave cannot be claimed from a new employer should an Adoptive Parent resign halfway through the adoption leave period.

See also **K** for **Keeping in touch days**.

Age discrimination and retirement

Age is one of the seven characteristics on the grounds of which it is unlawful to discriminate (the "Protected Characteristics") under the Discrimination (Jersey) Law 2013 (the "**Discrimination Law**"). A person will be directly discriminated against where their employer treats them less favorably because of the Protected Characteristic and indirectly discriminated against where their employer applies a provision, criteria or practice which has the effect of putting those with a Protected Characteristic at a particular disadvantage. In the context of retirement, this means that employees cannot be forced to retire at a certain age and any act which results in the forced retirement of an employee has the risk of constituting direct discrimination.

However, where an employer can demonstrate that the discriminatory act (i.e. forced retirement) was a proportionate means of achieving a legitimate aim, the Discrimination Law provides a defense for the employer and the discrimination will not be regarded as unlawful. In other words, there must be a good business reason behind the act. This may include health and safety, legal reasons or be on efficiency grounds. Economic reasons can also be relied upon, but not if the retirement is purely a cost saving exercise. Employers must also show that the reason is important enough to outweigh the discriminatory effect on the employee and that there was no alternative other than the retirement.

An employee who believes that they have been subjected to age discrimination can make a claim to the Jersey Employment and Discrimination Tribunal (the "**Tribunal**"). No qualifying period applies but the claim must be made within eight weeks of the relevant discriminatory act. The Tribunal has a power to make a declaration or a recommendation, and also to award compensation. Such compensation may reflect both financial loss and a sum for hurt and distress, and cannot exceed £10,000 in the cumulative. Within that limit, the amount awarded for hurt and distress must not exceed £5,000.

Separately to discrimination, retirement is one of the potentially fair reasons for dismissal in Jersey. However, to avoid an unfair dismissal claim, an employer must show that retirement was the genuine reason for the dismissal and that it acted reasonably in all the circumstances.

See our **Jersey discrimination guide** for more information.

Agency workers

Agency workers are afforded the same rights and protections as employees. Responsibility for compliance with the Employment (Jersey) Law, 2013 (the "**Employment Law**") rests with the employer (i.e. the entity who pays the worker), and not the host company. They are also protected by the Discrimination Law, meaning that agency workers are protected from discrimination in relation to each of the seven Protected Characteristics and both an employer and host company can be liable for any discriminatory acts.

Annual leave

Employers have a statutory obligation to provide all employees a minimum of three weeks' paid annual leave. The entitlement to paid leave is at the employee's full rate of pay, not a statutory minimum. Where an employee is employed pursuant to a zero hours' contract, they are entitled to an additional payment of six percent for each hour worked in lieu of the minimum statutory entitlement to annual leave.

Employees also have an additional legal entitlement to paid leave on Christmas Day, Good Friday and all public and bank holidays. Where an employee is required to work on any of those days, they are entitled to time off with pay in lieu. These entitlements must be clearly set out within the employment contract.

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. In an employment context, it is generally the employee that asserts a breach of contract claim against the employer. Claims can be brought for a breach of any express term (e.g. the requirement to pay a bonus or sick leave) or any implied term of the employment contract (e.g. the implied term to take reasonable care of an employees' health and safety in the workplace).

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).

Unlike in Guernsey, Jersey's Tribunal can hear and determine breach of contract claims up to the value of £10,000. Alternatively, claims can be made in the Petty Debts Court up to the value of £30,000 or in the Royal Court if over that amount. There is no cap on damages that may be awarded for breach of contract claims.

Practical tip: Employers should ensure that their employee handbooks and any employment policies are specifically and clearly marked as non-contractual so as not to create an express breach of contract claim.

Bullying and harassment

Whilst not specifically defined in legislation, guidance issued by the Jersey Advisory & Conciliation Service ("**JACS**") defines **bullying** as regular intimidation that undermines the confidence and capability of the victim. Bullying can take the form of verbal abuse, violent gestures, physical violence, allocation of blame and 'picking on' employees unfairly, public humiliation or a more subtle 'war of words' to undermine the employee's confidence. Bullying can be very similar to harassment, and often the two terms are used interchangeably, with bullying effectively representing a form of harassment. The key to bullying is that the actions or comments are seen as demeaning or humiliating and are unacceptable to the recipient.

Harassment is defined in the Discrimination Law. A person is deemed to have harassed another if they engage in unwanted conduct that is related to a Protected Characteristic 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. The key to harassment is that offence is caused, and JACS defines harassment as including such 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 Characteristic can still be harassment and prohibited under a company policy but it won't form the basis of a claim under the Discrimination Law.

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 specific Protected Characteristic (sex, pregnancy, maternity, sexual orientation, gender reassignment, race, age or disability), the employer could also be faced with a claim under the Discrimination Law. An employee may also look to claim damages through the Royal Court if they have suffered damage to their health as a result – the most common of which would be stress related. These claims are generally based on the Health and Safety at Work (Jersey) Law 1989, which imposes a duty on employers to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all the employer's employees".

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, discrimination and/or health and safety laws.

C

Compromise agreement

Other than a settlement arising directly out of a Tribunal claim or a settlement facilitated by JACS, the only lawful way for an employee to waive their right to make any statutory employment related claim (e.g. unfair dismissal, breach of employment particulars and discrimination) is for the parties to enter into a compromise agreement. 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 £350 and £500.

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 undertaking 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, and to use the wording adopted in the Employment Law, 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 52 weeks 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 shifts from the employer (in unfair dismissal claims) to 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 up to 26 weeks' pay depending on an employee's length of service, which award may be reduced at the discretion of the Tribunal.

D

Data consent and Data Subject Access Requests

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 the Data Protection (Jersey) Law 2018 (enacted following 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 four weeks 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.

Disability discrimination

Disability is a Protected Characteristic under the Discrimination Law. A person has the Protected Characteristic of disability if they have one or more long-term (i.e. six months or more) physical, mental, intellectual or sensory impairments which can adversely affect their ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under the Law. For example, recruitment, opportunities for promotion and training, dismissal or selection for redundancy.

Discrimination can be direct or indirect. An employer will directly discriminate against a disabled employee if they treat them less favourably because of something arising as a consequence of the employee's disability, unless they can show that the treatment is a proportionate means of achieving a legitimate aim.

Indirect discrimination will occur if an employer applies a provision, criterion or practice that puts a disabled employee at a 'substantial disadvantage' (i.e. more than minor or trivial) compared to other non-disabled employees. In these circumstances, the employer must make reasonable adjustments to avoid the employee being placed at a disadvantage.

Discrimination can also occur by way of victimisation (see **V** for **Victimisation**) or by way of harassment when an employee is subjected to unwanted conduct related to disability which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

An employee, or applicant for employment, who believes that they have been discriminated against can make a claim to the Tribunal. No qualifying period of employment applies, which also enables applicants for employment to be eligible to make claims. However, the claim must be made within eight weeks of the relevant discriminatory act. The Tribunal has a power to make a declaration or a recommendation, and also to award compensation. Such compensation may reflect both financial loss and a sum for hurt and distress, and cannot exceed £10,000 in the cumulative. Within that limit, the amount awarded for hurt and distress must not exceed £5,000.

See our **Jersey discrimination guide** for more information.

Disciplinary procedure

The Minister for Social Security has prepared a Code of Practice on Disciplinary and Grievance Procedures (the "**Code**") which sets out best practice when managing a disciplinary process. The disciplinary part of the Code applies when dealing with an employee's conduct and poor performance. 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 it 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.

Any disciplinary policy must also refer to the employee's statutory right to be represented at a disciplinary hearing by a fellow employee or trade union official. If an employee is denied the opportunity to be represented at the hearing they may complain to the Tribunal and, if upheld, in addition to any other award (e.g. for unfair dismissal), the Tribunal may make a compensatory award of four weeks' pay and quash any disciplinary action, other than dismissal, taken by the employer.

The existence, or otherwise, of a disciplinary policy must be referred to in the employment contract and it is also important that any disciplinary policy is stated to be non-contractual to avoid any breach of contract claims being brought if an employee asserts that the policy has not been appropriately applied.

E

Effective date of termination

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

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. In this scenario, 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.

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.

Employment status

An 'employee' is defined as a person who is employed by an employer. Unlike in the UK, Jersey law does not distinguish between a worker and an employee. Recent amendments to the Employment Law suggest that zero hours' contract employees will have relevant employment status for statutory claims (see **Z** for **Zero hours' contracts**).

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, protection against unfair dismissal, redundancy pay and the right to request flexible working.

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 Jersey Employment and Discrimination Tribunal (the "**Tribunal**") is a judicial body established to resolve employment and discrimination related disputes both in the workplace and otherwise. These include claims involving parental rights, redundancy, unfair dismissal, flexible working, annual leave, breaches of the employment contract (by employer and employee) and all types of discrimination. Unlike in Guernsey, the Tribunal has jurisdiction to hear breach of contract claims up to a value of £10,000.

All claims must be made (and responded to) in a prescribed form and there is no fee payable for the lodgment of any 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 time limits. With some exceptions, claims must be submitted within eight weeks of the act complained of. For example, within eight weeks of the effective date of termination (see **Effective Date of Termination** above) in unfair dismissal claims and within eight weeks of the discriminatory act in discrimination claims.

Parties do not need to be legally represented, but can be if they so wish, and the Tribunal has no power to award legal costs in respect of any hearing.

Upon lodgment of an employee's claim with the Tribunal, the employer has the opportunity to formally respond.

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. A hearing will be determined by a single chairperson sitting alone or a panel including a chairperson and two lay members.

The Tribunal has a number of powers in relation to matters preliminary to hearing, including powers to dismiss all or part of a claim or a response, to make case management orders, add or remove parties, recognize a lead case, strike out all or part of a claim and/or make an unless order. The Tribunal also has the power to conduct interim hearings to determine preliminary issues, determine any strike out application, explore the possibility of settlement or alternative dispute resolution or conduct a preliminary consideration of a claim.

During the hearing itself, the parties are given the opportunity to present their evidence (including by way of witnesses), challenge the evidence of the other party by way of cross examination and make submissions in relation to their case.

The presiding chairperson or Tribunal panel will then generally retire for a short period and either uphold or dismiss the claim. If upheld, the Tribunal has the power to award compensation. Where the claim involves dismissal or threatened dismissal, the Tribunal also has the power to order continued employment, reinstatement or re-employment. Compensatory awards for breaches of the law in respect of employment particulars, minimum rest periods and annual leave and flexible working are four weeks' pay for each contravention and, in relation to unfair dismissal, awards are determined on a sliding scale based on length of continuous service (see **U** for **Unfair dismissal**). Such award can be reduced at the discretion of the Tribunal. In respect of discrimination claims, the Tribunal has the power to make a declaration or a recommendation, and also to award compensation (see our **Jersey discrimination guide** for more information). There is a right of appeal to the Royal Court on a question of law only.

F

Failure to provide written reasons for dismissal

Unlike in Guernsey, employees in Jersey have no right to request a written statement of reasons for their dismissal.

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.

Fixed term employees can be employed under successive contracts and, except for redundancy purposes (see **R** for **Redundancies and reorganisations**), 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 less than 26 weeks apart. The length of the contracts can be added together but the length of the interval cannot be included.

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, however, the fixed term contract, or two or more fixed terms contracts, continue beyond 13 weeks, the statutory minimum notice periods will apply (see **N** for **Notice periods**).

Flexible, hybrid and agile working

Provided a request has not been made in the last 12 months, employees have a statutory right to request flexible working if the change relates to hours, times or place of work. The employer can either immediately agree to the request or hold a meeting with the employee to discuss it further. If the request is agreed, this must be confirmed in writing. If the request is refused, it must be for one of the specified statutory grounds, including, for example, the burden of additional costs, or an inability to meet customer demand. A full explanation of the refusal must also be given. The employee must be given a right of appeal. If a request is still refused, a claim may be made by the employee to the Tribunal, where an order may be made for reconsideration of the employee's request and/or a compensatory award of up to four weeks' pay.

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 garden leave 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 52 weeks' 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 a Code of Practice on Disciplinary and Grievance Procedures which sets out best practice when dealing with grievances. 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 a grievance should an aggrieved employee subsequently resign and claim constructive unfair dismissal (see **C** for **Constructive unfair dismissal**).

Grievances must be dealt with in a fair, objective and consistent manner and, therefore, it is advisable to have a formal grievance policy detailing the procedure for submitting a grievance, holding a grievance hearing, the right of appeal and time limits for each stage of the process.

The policy must also refer to the employee's statutory right to be represented at a grievance hearing by a fellow employee or trade union official. If an employee is denied the opportunity to be represented at the hearing they may complain to the Tribunal and, if upheld, the Tribunal may make a compensatory award of up to four weeks' pay.

The existence, or otherwise, of a grievance policy must be referred to in the employment contract. It is also important that the policy is non-contractual 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. 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 Law, there are five potentially fair reasons that an employer may have to dismiss an employee fairly. '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, to be of a more serious nature or to have 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 which 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 substantive 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

Employers have a statutory obligation to offer all employees a minimum rest break of 20 minutes in any continuous six hour period. The break may be taken at any point during the six hour period but it must be continuous, not, for example, two 10 minute breaks. It can be paid or unpaid.

Employees are also entitled to an uninterrupted rest period of no less than 24 hours in each seven day period worked or, where there is a relevant agreement in place, employees are entitled to two 24 hour rest periods or one 48 hour rest period in a 14 day period. If the employee's rest day is interrupted, the employer must provide a compensatory rest period within 14 days of the interruption.

Details of rest breaks must be set out in the employment contract. Failing to allow an employee to take the requisite rest period may result in the employee making a claim to the Tribunal. If upheld, a compensatory award of an amount not exceeding four weeks' pay may be made.

I

Immigration and work permits

British and Irish citizens can enter Jersey without a visa and remain indefinitely to take up employment. Since Brexit, and with effect from 1 January 2021, all EU nationals require immigration permission to enter and remain in Jersey. Any individual already in Jersey for five years on 1 January 2021, is permitted to continue to live and work in Jersey but they must apply for settled status. If they had been in the Island for less than five years, they can apply for pre-settled status, attaining settled status after five years. Nationals from other countries also require permission to enter and stay in Jersey and they must also have a visa.

In addition to immigration clearance, employers must apply for a work permit for prospective employees before they come to Jersey. There are two types of permit, skilled and temporary. Skilled work permits are granted for an initial period of three years but can be extended further. Temporary permits are granted for the hospitality, fishing and agricultural industries and are granted for up to nine months.

Everyone living in Jersey has a residential and employment status. There are three types of status: 'Entitled', 'Licenced' and 'Registered'. Anyone who has lived in Jersey for 10 consecutive years has 'Entitled' status and can be employed anywhere without any further permission. 'Entitled for work' status applies to someone who has lived in Jersey for five consecutive years, or is married to, or the civil partner of, someone who has 'Entitled', 'Licensed' or 'Entitled for Work' status. 'Licensed' status is given to an essential worker and 'Registered' status is given to someone who does not qualify under the other categories.

Employers must also have a business licence before they can employ someone. Once obtained, anyone with 'Entitled' or 'Entitled for work' status can be employed. If it is not possible to recruit somebody from these status groups, because of a skills shortage or a requirement for a very specific skill set or level of seniority, an application can be made to the Population Office to obtain permission to employ a person with 'Licensed' or 'Registered' status. To obtain permission to employ a 'Licensed' person, a business will need to provide evidence of its efforts to recruit on Island, together with details of succession planning and training and its financial contribution and benefit to Jersey. 'Registered' permissions are usually only given to seasonal businesses such as hospitality and agriculture.

Industrial relations

Trade unions are organizations of employees created to protect and advance the interests of their members by negotiating agreements with employers on pay and conditions of work. Trade unions are legally recognized in Jersey and regulated by the Employment Relations (Jersey) Law 2007 (the "**Industrial Relations Law**").

Approved Codes of Practice issued by the States of Jersey pursuant to the Industrial Relations Law deal with the recognition of trade unions, balloting and union conduct in employment disputes and also provide a framework to resolve collective disputes.

Under the Industrial Relations Law, trade unions must be registered but, unless they are recognized by a particular employer, they do not have the right to collectively bargain on behalf of the employees.

Collective bargaining is a process of conducting negotiations in relation to matters relevant to the workplace. Typically, it involves negotiations relating to working conditions including pay, working time, holidays and other benefits. The desired outcome of the process is a collective agreement, the relevant parts of which are then incorporated into the individual contracts of employment of those employees covered by the collective bargaining process. This agreement will contain provisions on how to deal with disputes.

Where a collective agreement is not in place, unions may seek voluntary recognition with an employer as a means by which to resolve disputes. JACS can assist parties in relation to voluntary recognition of unions. Where such voluntary recognition cannot be achieved, the Tribunal has jurisdiction to hear and determine any dispute between a registered trade union and an employer that does not recognize that union, so long as the trade union fulfills the criteria for recognition and the employer has employed an average of at least 21 employees in the 13 weeks immediately preceding the day on which the dispute arose.

Disputes are commenced by the lodgment of a prescribed form and can involve matters relating to:
– terms and/or conditions of employment;
– suspension, disciplinary or grievance;
– the allocation of work or duties between employees;
– the engagement, non-engagement or termination or suspension of one or more employees; or
– other related matters relevant to trade union activity and membership.

Employees are protected under the Industrial Relations Law from liability for damages to their employer for a breach of their employment contract arising out of industrial action, whether that be a cessation of work, refusal to work or a refusal to work in a manner lawfully required by their employer. Employees are also protected against unfair dismissal on the basis of their involvement with a trade union or trade union activities and any dismissal arising out of, or connected to, such association will be deemed automatically unfair.

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 days

During a period of maternity or adoption leave, except during any 'compulsory period', an employee can request to work any number of days without impacting their remaining period of leave. Employees are entitled to receive the same pay rate and benefits for KIT 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 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. Being clear on when an absence will be regarded as 'long-term' and how it is then treated by the business is important for both the employer and the employee in managing those absences and helping support employees to return to work or, ultimately, exit the business if they are no longer capable of performing the role. 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 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 to work is not possible, the employer will need to determine the employee's capability to perform their role. This should be assessed on a periodic basis and informed by medical opinion. 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, employees should be consulted with at every stage and genuine consideration given to any adjustments required to support the employee. Dismissing an employee without following appropriate steps and a reasonable process may lead to unfair dismissal, discrimination (if the absence was due to or arising from a disability), breach of contract and/or personal injury claims.

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

M

Maternity / parental leave

Irrespective of their length of service, an expectant mother, her spouse/partner or the father of the expected child (the "**Parents**") are each entitled to 52 weeks' parental leave beginning no earlier than the beginning of the 11th week before the expected due date and ending on the child's second birthday. The 52 week period can be taken as a whole or split into three blocks of leave, each block being at least two weeks.

Each Parent is statutorily entitled to six weeks' full pay during the first 12 months of their parental leave period (the mother's paid period must begin on the day of the birth) and, other than remuneration, all other benefits and terms and conditions continue to apply during a period of leave. This includes the accrual of annual leave.

There is a statutory entitlement to paid time off during working hours for the mother to attend an unlimited number of ante-natal appointments. This also applies to her spouse/partner or father of the child, but only the first 10 hours need to be paid.

An employee has the right to return to their pre-parental leave job or, if that role is no longer available, to a suitable alternative role, on equivalent terms and conditions. If a redundancy situation arises while on parental leave, unlike in Guernsey, employers are not required to give preference to an employee on parental leave to be offered any suitable alternative roles ahead of other employees not on parental leave.

The period of parental leave is non-transferable. In other words, should an employee resign from one employment during a period of parental leave, they forfeit any remaining period of leave, and do not have an entitlement to any further periods of parental leave from their new employer.

See also **K** for **Keeping in touch days**.

Minimum wage

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

The minimum wage is generally reviewed and updated on an annual basis around January each year, following recommendations from the Employment Forum. 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 is provided by an employer.

The rate for an employee above compulsory school leaving age, effective from 1 January 2022 is £9.22 for all employees other than trainees, £6.91 for Trainee rate 1 and £8.07 for Trainee rate 2. These figures are correct at the time of writing and subject to change.

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 and differ depending on who has given notice.

If notice is given by the employer, a minimum of one week's notice must be given if the employee has been continuously employed for more than one week but less than two years. Two weeks' notice must be given if they have been continuously employed for over two years but less than three years. This increases by a further week's notice for each continuous year of employment up to a maximum of 12 weeks for those continuously employed for 12 years or more.

If the employee gives notice, a minimum of one week's notice must be given if they have been continuously employed for one week or more but less than 26 weeks, two weeks' notice if their period of continuous employment is 26 weeks 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.

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. An OH assessment will focus 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 minimise any further absences in the future. These may include:

- a phased return in terms of time and/or duties;
- adjustments to workspaces or equipment;
- 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 obtained, the employee's doctor or a doctor appointed by the employer may also make recommendations. 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, eligibility for ill-health retirement may need to be considered. 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 likely to provide their opinion as to whether the employee will be covered by the disability provisions of the Discrimination Law. Whilst this would not be definitive, the ultimate decision being made by the Tribunal, it would be prudent to consider their opinion to ensure compliance with the law. For example, by not treating the employee less favourably when considering sickness absence, performance targets etc. and by complying with the duty to make reasonable adjustments to avoid an employee being placed at a disadvantage.

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 **S** for **Sex discrimination**).

Pension

There is no statutory obligation on employers to provide a pension to employees. However, the Employment Law requires that an employee's statement of terms and conditions of employment must refer to an employee's pension entitlement, whether one is provided or not.

Pay in lieu of notice - PILON

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 confirmation of the employee's final day of employment and 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 employer could enable an employee to 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**), an employee must have been continuously employed for 52 weeks or more.

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 (see **N** for **Notice periods**), maternity leave (see **M** for **Maternity / parental leave)** and the right to make a claim of discrimination (see **D** for **Disability Discrimination**, **R** for **Race Discrimination** and **S** for **Sex discrimination**).

R

Race discrimination

Race is a Protected Characteristic under the Discrimination Law. It includes colour, nationality, national origin (including being of Jersey origin) and ethnic origin.

Discrimination can occur at any stage of the employment relationship and beyond (e.g. recruitment, opportunities for promotion and training, dismissal or selection for redundancy, or providing references), and it can be direct or indirect.

An employer will directly discriminate against an employee if they treat them less favourably because of race. Indirect discrimination occurs when an employer applies a seemingly neutral provision, criterion or practice, which nevertheless puts the employee and others at a particular disadvantage because of a Protected Characteristic, and it cannot be shown that it was a proportionate means of achieving a legitimate aim.

Discrimination can also occur by way of victimisation (see **V** for **Victimisation**) and by way of harassment (see **B** for **Bullying and harassment**) when an employee is subjected to unwanted conduct related to race which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

An employee who believes that they have been subjected to race discrimination can make a claim to the Tribunal. No qualifying period applies, but the claim must be made within eight weeks of the relevant discriminatory act. The Tribunal has a power to make a declaration or a recommendation, and also to award compensation. Such compensation may reflect both financial loss and a sum for hurt and distress, and cannot exceed £10,000 in the cumulative. Within that limit, the amount awarded for hurt and distress must not exceed £5,000.

See our **Jersey discrimination guide** for more information.

Redundancies and reorganisations

If an employee is made redundant, and they have been continuously employed for two years or more prior to the date of redundancy, they have a statutory right to a redundancy payment equating to one week's pay for every full year of service. For these purposes, 'pay' is capped at the rate of average weekly earnings in Jersey published by Statistics Jersey in the month prior to the redundancy. The payment must be agreed and paid, or claimed by the employee, within six months and is in addition to any statutory minimum or contractual notice pay to which the employee is entitled. Employees are also statutorily entitled to paid time off (equivalent to 40% of their working week) to look for new employment during their notice period. Note this is a one-off entitlement not a weekly one.

If 12 or more employees are likely to be made redundant within a period of 30 days or less, employers are statutorily obliged to inform the Social Security Minister and consult with elected representatives on behalf of employees. Failure to do so may result in claims to the Tribunal and, if upheld, a protective award of nine weeks' pay to each employee may be made.

Other than this, there is no set redundancy regime in terms of the redundancy process. However, the employer must show, amongst other things:

- that there was a genuine redundancy situation;
- 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 employees were consulted with at every stage; and
- that they had a right of appeal.

A failure to do so would create a right for an employee to assert that they had been unfairly dismissed.

If a fixed term contract comes to end after the completion of a specific task, it may be considered a redundancy. In establishing whether an employee employed under successive fixed term contracts has any statutory redundancy rights, an employee's 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 less than nine weeks apart. The length of the contracts can be added together but the length of the interval cannot be included. This nine week period only applies for redundancy purposes. (See **F** for **Fixed term contracts**)

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, sexual orientation, gender reassignment, pregnancy and maternity at any stage of the employment relationship and beyond. For example, in recruitment, opportunities for promotion and training, dismissal or selection for redundancy, or providing references).

The Protected Characteristic of 'sex' refers to a man, a woman or a person who has intersex status (i.e. having physical, chromosomal, hormonal or genetic features that are neither wholly male nor female, a combination of male or female, or neither male nor female).

Discrimination can be direct or indirect. An employer will directly discriminate against an employee if they treat them less favourably because of a Protected Characteristic. Indirect discrimination occurs when an employer applies a seemingly neutral provision, criterion or practice which nevertheless puts the employee and others at a particular disadvantage because of a Protected Characteristic, albeit pregnancy and maternity are not separately included in the scope of indirect discrimination, and it cannot be shown that it was a proportionate means of achieving a legitimate aim.

Discrimination can also occur by way of victimisation (see **V** for **Victimisation**) and by way of harassment (see **B** for **Bullying and harassment**) when an employee is subjected to unwanted conduct related to a Protected Characteristic or of a sexual nature which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee. This can also occur if the employee rejects or fails to submit to the conduct and they are treated less favourably as a result.

An employee who believes that they have been subjected to discrimination can make a claim to the Tribunal. No qualifying period applies but the claim must be made within eight weeks of the relevant discriminatory act. The Tribunal has the power to make a declaration or a recommendation, and also to award compensation. Such compensation may reflect both financial loss and a sum for hurt and distress, and cannot exceed £10,000 in the cumulative. Within that limit, the amount awarded for hurt and distress must not exceed £5,000.

See our **Jersey discrimination guide** for more information.

Sick leave and pay

There is no statutory entitlement to paid sick leave. Any entitlement, above any rate of sickness benefit claimed from the States of Jersey Social Security Department, 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 directed not to attend the workplace and not to engage in any work, usually because an employer is investigating the employee's alleged misconduct.

Technically, it 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 active employment. 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 had 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 placing them 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 sex discrimination claim if, for example, two employees are treated differently on the grounds of gender.

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. Failure to do so is a criminal offence, punishable by fine[78].

The contract should contain, at a minimum, the following information:

- the names of the employer and the employee;
- the date upon which the employment commenced and the date on which the employee's period of continuous employment began;
- the rate of pay or method of calculating pay, including overtime rates and other pecuniary benefits, the day on which, and the intervals at which, they are paid;
- hours of work and rest periods;
- holiday entitlement, including public holidays and holiday pay, with sufficient details given 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;
- any terms and conditions relating to maternity leave, redundancy and disciplinary and grievance procedures;
- notice periods to be given and received on the termination of the employment;
- where the employment is not intended to be permanent, the period for which it is expected to continue, the end date if it is for a fixed term, any event/task that the occurrence, non-occurrence or completion of which will terminate it;
- job title;
- place of work;
- any collective agreements which directly affect the terms and conditions of the employment; and
- applicable terms and conditions if the employee is required to work outside Jersey for a continuous period of more than four weeks.

The fact that the contract must refer to the information outlined above does not mean that the terms need to be contractual. In that respect, employers should ensure that certain procedures, such as those relating to disciplinary and grievance procedures, are clearly stated as being non-contractual.

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

When a business is sold in Jersey, how the sale is structured will have a direct impact on the employees and their employment relationship with their employer. Broadly speaking, business ownership is transferred either by way of a sale 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, 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.

There is no statutory protection in Jersey against dismissal or changes to terms and conditions when a business transfers ownership. There is, however, some protection for the employee under the Employment Law in relation to continuity of service. This provides that an employee's continuous employment will not be broken by the transfer of a business to a new employer.

Also see **N** for **Novation**.

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 the six statutory lawful reasons (substantive fairness). These lawful reasons for dismissal include:

- conduct;
- capability;
- redundancy;
- retirement;
- 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 of trade union membership or activity, family reasons, assertion of a statutory right 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 eight weeks of the effective date of termination (see **E** for **Effective Date of Termination**). 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 52 weeks to be eligible to bring a claim.

If the Tribunal finds in the employee's favour, a compensatory award based on the employee's length of service will be made, which the Tribunal has the discretion to reduce in certain circumstances. That sliding scale is currently:

- four weeks' pay for less than six months' continuous service (for automatically unfair dismissals) and employment between six and 12 months;
- eight weeks' pay (between 12-24 months);
- 12 weeks' pay (between 24-36 months);
- 16 weeks' pay (between 38-48 months);
- 21 weeks' pay (between 48-60 months); or
- 6 weeks' pay (more than 60 months).

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 circumstances, an employee will likely have a claim for breach of contract (see **B** for **Breach of contract**). Employers should think about all the circumstances in which they may wish or need to deduct money from employees that are relevant to their business (e.g. training fees, loans to employees, loss or damage to company property or overpayments of salary, holiday or sick pay) and ensure that they have a detailed deductions clause in their employment contracts or in a contractual part of an employee handbook.

V

Variations to an employment contract

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 to an employee's contract of employment if they are expressly authorised in the contract and/or if there has been adequate consultation before effecting the change. Failure to do so could lead to breach of contract (see **B** for **Breach of contract**) and/or constructive unfair dismissal claims (see **C** for **Constructive unfair dismissal**).

Where an employee's consent to a change in terms is not forthcoming, after an appropriate period of consultation, employers can terminate the existing 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. 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 eight weeks of the alleged discriminatory act.

See our **Jersey discrimination 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 wrong-doing. For example, a criminal offence, breach of a legal obligation or a health and safety breach. This concept is not legally recognised in Jersey.

However, employees are protected from dismissal in cases where they allege a statutory right has been infringed. This is regarded as an automatically unfair reason for dismissal, and it applies 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, whistle-blowers 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, Jersey 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 to serve their full contractual notice in circumstances where the contract does not make provision for a PILON.

Wrongful dismissal claims are brought before the Tribunal if below £10,000, the Petty Debts Court if below £30,000 or the Royal Court if above £30,000. The Tribunal is a no-costs jurisdiction. However, 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 Jersey.

However, the Discrimination Law prohibits less favourable treatment on the basis of any Protected Characteristic. This less favourable treatment includes any actions in relation to the terms and conditions offered to an employee, and obviously 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 Guernsey Employment and Discrimination Tribunal has confirmed that a failure to pay a female partner the same as her comparative male counterpart without reasonable objective justification was discriminatory. Whilst this decision would not be binding on the Jersey Tribunal, it would be persuasive authority, particularly given the similarities in the sex discrimination laws in both Islands.

In that case, the employee was awarded the maximum amount of compensation, being three months' pay. In Jersey, that compensatory award would be £10,000. However, the Tribunal has a power to recommend particular action be taken by an employer to obviate or reduce the adverse effect of the discriminatory act on the employee. Whilst it is yet untested, there is arguably scope in the law to seek orders that an employee's pay be adjusted to remove the discriminatory effect and, potentially, that a back payment be made to obviate the effect of the discriminatory underpayment.

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

A zero hours' contract is defined in the Employment Law as "… a contract of employment where the employee may work for the employer from time to time but there is no minimum requirement for the employee to do any work for the employer".

Other than in relation to exclusivity and annual leave, there is currently no specific regulation of zero hours' contracts in Jersey. In that respect, zero hours' employees are entitled to three weeks' statutory annual leave, which is generally payed on a 'rolled up' basis to zero hours' employees at a rate of six percent of their hourly rate. Since 27 May 2022, exclusivity clauses in zero hours' contracts are prohibited. This means that employers cannot prevent an employee from being employed by another employer, nor can they require the employee to obtain the employer's consent to be employed by another employer.

Does this then mean that zero hours' employees 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? This is not a straightforward area. 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 generally.

Where there is an 'umbrella' contract in place, 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. However, any period during which an employee is not working does not count towards an employee's period of continuous service.

Practical tip: 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.