

April 2014

English Employment Law for Overseas Investors

Introduction

The relationship of employer and employee is highly regulated under English law. There are legal provisions governing numerous aspects of an employment relationship including an employee's right to work in this country, minimum wage, minimum paid holiday, maximum permitted working hours, rest breaks, night working, special rules governing young workers, equal pay between men and women, minimum notice of termination periods, unfair dismissal, redundancy, equal opportunities by outlawing discrimination on numerous prohibited grounds, unlawful deductions from wages, pensions availability, protection of employees when businesses (or parts of business) are transferred and many more.

There are also numerous "family friendly" rights such as the right to take maternity leave, statutory maternity/paternity pay entitlement, paternity leave, parental leave, adoption leave and the right to request flexible working.

It cannot be too highly stressed that any potential foreign investor should take advice on English employment law if considering investing in a business which has employees or intends to recruit staff. If an employer fails to comply with employment law provisions or acts in breach of an employee's contract then an employee may be able to bring a claim against his employer in the employment tribunal or the courts, which could be costly for the employer, both in management time, legal costs and compensation.

In this note we seek to give an introduction to the issues which could arise at each stage of the employment relationship from recruitment through to termination of employment.

Recruitment-advertisements and interviews

Prospective employers' legal obligations to potential employees start even before the employment relationship begins. Under equality legislation, it is unlawful to discriminate on certain specified grounds, in advertisements for jobs, in the arrangements made for interview and in the recruitment of candidates and terms offered.

The grounds for unlawful discrimination are wide-ranging and include race, sex, disability, age, religious or philosophical belief, marital status, part time or fixed term working, sexual orientation, transsexual and gender re-assignment.

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When dealing with disabled applicants an employer is expected to make reasonable adjustments to facilitate a disabled candidate attending an interview and an employer must also take great care not to discriminate against a disabled candidate by refusing their application because of the person's disability.

Terms and conditions of employment

There are numerous provisions which govern the terms upon which an employee may be employed and we highlight below some of the main issues which will be of interest to an overseas investor contemplating buying a business in England.

1. The law requires employers to confirm terms and conditions of employment in writing. Those terms and conditions must set out certain minimum specified particulars and must also either contain the employer's disciplinary and grievance procedures or state where they can be accessed (and these procedures, which must be in writing, must comply with a Code of Conduct issued by ACAS (the Advisory, Conciliation and Arbitration Service)).
2. An employer has a legal duty to ensure that its employees have the right to work in this country and it is an offence to employ someone who does not.
3. Employees are entitled to a statutory minimum period of notice based on the number of years they have been employed. They are entitled to one week's notice for each complete year of employment (up to a maximum of 12 weeks' notice).
4. Employees are entitled to receive a minimum wage, currently £6.31 per hour (for workers aged 21 and over).
5. Under Equal Pay legislation an employer must pay men and women who do similar work or work of equal value the same rate of pay.
6. There are new provisions which came into force on 1 October 2012 which provide for staff to be automatically enrolled into a pension scheme unless they opt out and employers will be required to contribute a certain amount to the pension scheme for the benefit of their employees. Auto enrolment into pension schemes is being introduced in stages from 1 October 2012 with large employers being staged first and smaller employers (those with less than 250 employees) being staged between 1 April 2014 and 1 April 2017.

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7. Employees are entitled to minimum paid holiday, currently 28 days per year (including public holidays, of which there are normally 8 per year).
8. Employers may not require workers to work more than 48 hours per week unless they sign out of the provisions of the Working Time Regulations.
9. Employees are entitled to take certain specified rest breaks during the course of their working hours, if they work for longer than 6 hours and there are also provisions for weekly rest and restrictions relating to night work.
10. There are special provisions applicable to the employment of young workers, in relation to permitted working hours, hazardous work and rest breaks.

As well as ensuring that contracts of employment comply with employment law, the contract is an opportunity for the employer to include provisions for the benefit of the employer and protection for the business, for example confidentiality obligations, provisions governing intellectual property, provisions giving the employer the right to place an employee on garden leave during the notice period, and restrictive covenants preventing the employee poaching clients, suppliers and senior staff for a reasonable period after termination of employment.

During employment

There are numerous pitfalls for employers and it is essential to ensure that employees are either managed by a manager with some knowledge and understanding of English employment law or that there is someone on hand who has such knowledge and understanding, as otherwise inadvertent breaches will inevitably occur.

Below are some examples of employment related issues of which potential investors should be aware.

1. Employers are under an obligation to deduct tax and national insurance from employees' salaries in accordance with PAYE (Pay as You Earn) Regulations.
2. Employers may not make any other deductions from wages/salary without the consent in writing of the employee.
3. Employers have a duty under Health and Safety legislation to provide a safe place of work for their workers and whilst there are specific provisions and regulations applicable to employers whose workers work with potentially dangerous equipment (or substances) or drive vehicles, the general duty of employers requires them to ensure

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that health and safety and fire risk assessments are undertaken and that staff receive proper training in any task which could put them at risk. There are additional requirements for workers whose individual characteristics put them at risk, such as disabled workers, young workers and pregnant workers.

4. There are complex provisions relating to transfers of businesses and change of service provision which are governed by the Transfer of Undertakings (Protection of Employees) Regulations 2006 - as amended by the 2014 Regulations ("TUPE"). These provisions are intended to protect employees' jobs in situations ranging from a straightforward transfer of a business (or part of a business) to another owner, changing a service provider, and outsourcing a function of the business (or bringing services in-house). If TUPE applies then the consequence is that the employees who are assigned to the work being transferred/outsourced (or brought in-house) automatically transfer to the new owner or the new service provider, on the same terms and conditions of employment as previously applied. If either the existing employer or the new employer fails to comply with the provisions of TUPE then employees may bring claims in the employment tribunal. The provisions of TUPE are complex and many employers and businesses do not always appreciate the implications so it is imperative to seek early advice in any situation where there is either a potential transfer of a business (or part of a business) or a change in the provision of services (such as putting services out to tender or bringing services in-house).
5. As referred to in the section on recruitment above there are many prohibited grounds on which it is unlawful for an employer to discriminate against its employees or workers (and partners in a business partnership are also covered by the legislation). Employers are expected to have in place an Equal Opportunities Policy and to provide equal opportunities training to staff. The training is intended to ensure that all employees and workers may work with dignity and without fear of discrimination, bullying or harassment. Employers are liable for the discriminatory acts of their employees (except in exceptional circumstances). If an employee is discriminated against on one of the prohibited grounds during their employment or in relation to termination of their employment then it will be costly for an employer should a claim be brought to the employment tribunal. Compensation for discrimination is unlimited although the amount will include actual financial loss and an award for hurt feelings.
6. There are wide ranging provisions described as "family friendly" which give employees rights to take leave (time off work) for various reasons including maternity, paternity, adoption, parental, dependants' leave with different obligations for payment to the employee during the leave period. There are also provisions entitling employees to seek flexible working in certain circumstances, and an employer must consider an

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employees' request in a "reasonable manner" should an application for flexible working be made (with effect from 6 April 2014, the right to request flexible working will be extended to all employees with not less than 26 weeks' service).

7. Employers should have in place a disciplinary and grievance procedure (which must comply with the ACAS Code of Conduct) for dealing with disciplinary issues and employees' grievances. Not only are there good management reasons for doing so but the failure to use a disciplinary and grievance procedure in relevant circumstances may increase an award of compensation in a claim in the employment tribunal by 25% (or decrease it if the employee fails to use the employer's internal procedures).

Termination of employment

Once an employee has worked for an employer for one year (or two years for those employees whose employment commenced on or after 6 April 2012) they have the right under English employment law not to be unfairly dismissed. This means that even if the employer gives the employee due contractual notice to terminate their employment the dismissal will be "unfair" unless it is for a "fair" reason as set out in the Employment Rights Act 1996 ("ERA"). Employees who are unfairly dismissed can bring a claim in the employment tribunal for unfair dismissal and seek compensation against the employer. For a dismissal to be fair the employer must have a "fair" reason (under the legislation) **and** it must follow a fair procedure. Fair reasons are set out in the ERA and include conduct, capability, redundancy, breach of statutory requirement and "some other substantial reason" sufficient to justify dismissal. A fair procedure requires an employer to take certain specific steps including investigation, giving notice to the employee of what the allegations/reasons for potential termination are, holding a meeting (or disciplinary meeting in the case of misconduct) and providing an appeal procedure. In the case of redundancy dismissals it is also necessary to embark on consultation to see if redundancy can be avoided and to consider if suitable alternative employment is a possibility. As employment procedures are fraught with difficulty it is strongly recommended that advice be sought in relation to any contemplated dismissal because an error in procedure or a misunderstanding of the law (or its application to the facts in question) can prove expensive whereas it is often possible to achieve the employer's aims (and avoid a potential claim) provided early advice is sought.

As stated above, employees who have been employed for less than a year (two years for those who commenced employment on or after 6 April 2012) may not bring an unfair dismissal claim (except in certain specific cases where a dismissal is automatically unfair). However, employees who are dismissed before they have reached the requisite period of service to bring an unfair dismissal claim, are often advised to bring a claim based on discrimination on a prohibited ground, because such a claim can be brought without any period of service. This means that it is advisable and good practice for an employer to follow a fair termination procedure even where the employee

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does not have the qualifying period of service to bring a claim, so that if a claim is brought alleging discrimination, the employer can show that the dismissal was for a good reason which was not discriminatory.

In terminating an employee's employment an employer must also have regard to any contractual provisions relating to termination as if the employer breaches an employer's contract there may be a claim for breach of contract and a breach might also prevent the employer from being able to enforce restrictive covenants contained in the contract.

As will be apparent from the above note, there are many legal and practical issues to consider when acquiring a business in England which has or intends to recruit staff to work in the business and we will be pleased to advise further in relation to any contemplated acquisition.

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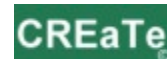
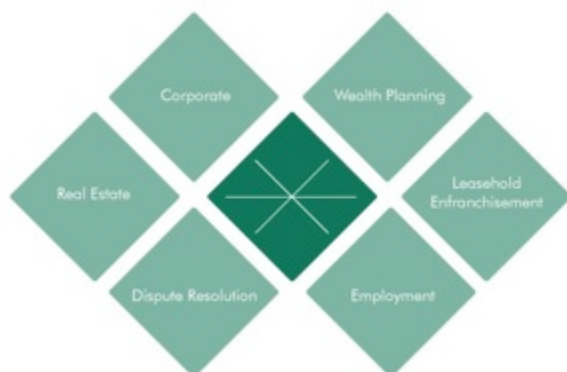
If you would like more information on the above, or any related matter, please contact a member of Rooks Rider Solicitors' Dispute Resolution and Employment team.



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