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# Employment

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EXPERTISE & EXPERIENCE



*a better perspective...*





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# EMPLOYMENT

*The Employment practice of Conybeare Solicitors is relied upon by employers, who appreciate clear and straightforward advice to ensure they do not fall foul of the ever increasing burden of employment legislation, and by employees who come to the firm to ensure that their rights are fully respected and protected.*

## OVERVIEW

Our Employment practice provides an effective employment service for both employers and employees. Our primary focus is on non-contentious matters, but we understand the implications and consequences, when things go wrong.

Our Employment practice provides a legal advisory service on a wide-range of employment law matters for both employers and employees. By ensuring that we work for both types of client, we are able to maintain a balanced and objective approach to employment issues, taking emotion out of the equation.

We cover a wide spectrum of employment issues which businesses face at some point during their operations as well as those which affect individuals from time to time. Our Employment

expertise covers employment law issues, but also employment related services such as benefits, remuneration and incentive schemes, such as share option schemes. We combine our Company & Commercial law expertise to ensure that solutions meet not only the employment law aspects, but the corporate governance and commercial issues as well, all of which means that we can readily consider and devise schemes which are fit for purpose.

*Our expertise means that you benefit from considered, effective and practical solutions.*

Our primary focus is on non-contentious matters, such as drafting and/or reviewing senior management agreements, preparing company policies dealing with grievances and disciplinary matters, health & safety, sickness, parental rights, equal opportu-

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nities, anti-discrimination and email & internet usage. However, we also deal with things when relationships deteriorate. Whilst we will always try to help you prevent issues from arising, we understand the implications and consequences when things do go wrong. We always try to help you resolve and settle issues before it becomes necessary to either issue or defend formal proceedings in the Courts or the Employment Tribunal.

Our expertise means that you benefit from considered, effective and practical solutions.

### CONTRACTS

Employers must realise that their duties and obligations begin before they employ someone. This applies to advertising job opportunities, carrying out interviews and decision making. If you get it wrong, it could prove to be an expensive recruitment campaign! Once you have found the right person, then it is important to ensure that you make a formal offer which is accepted, and which sets out the terms and conditions relating to the job, such as salary, holiday, benefits, references, medicals and probationary periods.

All employees must be provided with a written statement of their particulars of employment within 2 months of the commencement of employment. Failure to do is unlawful. Sometimes this is enough, but much more common

is to use properly drafted contracts. This ensures that the terms & conditions of employment are made clear from the outset and should mean there is less likelihood of a dispute arising. Remember that changes can be made to the contract, but only if both parties agree. Normally, you cannot unilaterally impose change.

It is a popular misconception that a non-executive director is not the same as a director or executive director. The fact is that the only difference between them is that an executive director is normally employed (and so is an employee as well as a director) whereas a non-executive director is not usually an employee, but appointed under a contract for services. In law, all directors, of whatever kind, have an equal standing in terms of rights, duties and obligations.

*Once you have found the right person, then it is important to ensure that you make a formal offer which is accepted....*

A person may also be a de facto director or a shadow director, which means that even if they are not called directors, they share the same duties and obligations. Directors are the officers of a company, and together they comprise the board of directors of a company, often referred to as the board. We regularly prepare and review employment agreements

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for executive directors and letters of appointment for non-executives. We also provide advice to directors on their statutory and common law duties.

Consultants who are retained by a business are generally speaking not employees. They are known as independent contractors who provide their services to a business under the terms of a contract for services. This compares to an employee who works under a contract of service. Consultants may either be individuals, partnerships or companies, even though the services provided may be performed by an individual belonging

*The key difference between an employee and a self-employed person primarily comes down to tax.*

to a partnership or a company. It is important to appreciate that consultants are not employees. Therefore, consultancy contracts will need special consideration. Whilst they cover similar requirements, they are not exactly the same. One of the advantages for businesses is that they will not be responsible for collecting and paying income tax (PAYE) or National Insurance on the consultants' fees. We regularly prepare and review consultancy agreements for both individuals and those who operate through service companies.

The key difference between an employee and a self-employed person primarily comes down to tax. All employers are liable to collect PAYE and National Insurance contributions on behalf of employees and to pay it to the Revenue. From an employer's perspective, independent contractors offer an attractive option as it reduces their administrative burden and minimises the amount of tax they have to pay (by virtue of the employer's NIC). For self-employed people, they gain the advantage of flexibility as they work for themselves. Against this, they do lose a number of legal rights afforded to employees, such as the right to claim unfair dismissal. Contrary to popular belief, the distinction between being employed and self-employed is not always clear cut. This is compounded by the different views taken by the Revenue and Employment Tribunals, which may result in the perverse situation that the Revenue claims you are an employee (so they can collect more tax) whereas the Employment Tribunal find that you are not an employee. We have experience in drafting contracts for the self-employed and reviewing them on behalf of businesses to ensure the legal distinction is understood and maintained.

**TERMINATION**

Employers who wish to terminate an employee's contract must ensure that they can justify their decision. Terminations or dismissals must be

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fair. Usually, a fair dismissal requires that it arises for one or more of the following reasons:

- ◆ Conduct – Where a person’s conduct is such that they cannot continue. The most important is gross misconduct, which is sometimes difficult to establish and to rely upon except in the most serious cases.
- ◆ Capability – Where a person is incapable to do the job for which they are employed.
- ◆ Redundancy – Where either the job or the person’s requirement to do their job has ceased to exist.
- ◆ Illegality – Where it would or has become illegal for the employee to continue to be employed
- ◆ Substantial reason – Any other reason which could be considered reasonable and appropriate but which does not fall within one of the above reasons.

If one of these reasons cannot be established, then a dismissal is likely to be an unfair dismissal, giving rise to a potential claim against an employer.

Unfair Dismissal – An employer should only dismiss an employee if the reason for the dismissal is fair and the dismissal is dealt with fairly, as stated above. An unfair dismissal has poten-

tially very expensive consequences and perhaps more importantly it can have a very damaging effect on the reputation of the employer. We work with both employers & employees to help ensure that dismissals are fair thus avoiding the need for any claims. Where claims are made, then we advise on how to deal with this and what action should be taken.

*Terminations or dismissals must be fair.*

Wrongful Dismissal – Wrongful dismissal is a claim arising from a breach of contract – usually the failure to give the contractual notice period or to make a payment due under the contract, whether a payment in lieu of notice or a contractual bonus. The claim against an employer is usually one for monetary damages. We review contracts to advise employers how to comply with their obligations and for employees to ensure they are aware of their rights.

Constructive Dismissal – Constructive dismissal occurs when an employee terminates his contract of employment due to a fundamental breach of it by his employer. Usually an employee resigns and then brings a claim for wrongful and/or unfair dismissal.

Redundancy – In the event of a true

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redundancy situation, there are several obligations imposed on employers. We help you with selection and consultation processes as well as advice regarding payments due to employees.

**COMPROMISE AGREEMENTS**

Disputes do arise. When they do it is important for employers to ensure that they act as they should and equally that employees do not make unjustified threats. With recent changes in legislation aimed at reducing the number of claims being heard by Employment Tribunals, there is a greater emphasis placed on the parties to try to reach a compromise and settle their differences before taking formal legal action.

*It is always best to try to resolve any disputes amicably. And this is what we always try to do.*

During any discussions or correspondence, which clearly relate to reaching a settlement, then we recommend that this is done on a “without prejudice” basis. This should prevent the contents from being disclosed to a Court or the Employment Tribunal. Whilst this may not always be possible, as sometimes the communications are not protected, the most important aspect is that you do not want to make an apparent admission

of liability whilst trying to reach a settlement!

One particular point to bear in mind is that it is only solicitors who enjoy what is called legal professional privilege, which seeks to protect communications passing between solicitors and clients. Such privilege does not apply to accountants, tax advisers or other consultants or advisers.

*We provide independent legal advice to ensure that the terms of any compromise are fair and reasonable.*

It is always best to try to resolve any disputes amicably. And this is what we always try to do. However, due to legislation, the only way to ensure that a dispute is fully and finally settled is to enter into a formal compromise or settlement agreement, the terms of which comply with the Employment Rights Act 1996. One of the key provisions is that employees receive independent legal advice from a suitably qualified person, such as a solicitor, and that person must provide a written certificate of confirmation.

We draft suitable compromise agreements for employers to ensure that all potential claims are fully and finally settled. For employees, we provide independent legal advice to ensure that the terms of any compromise

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are fair and reasonable. As part of our balanced approach to disputes, we maintain a fair and sensible perspective to ensure that the terms of compromise agreements meet the required business or commercial objectives, whilst of course ensuring that the dispute is settled.

We have recently provided advice to a significant number of employees in the banking sector when their employment comes to an end. In addition to the usual requirements, our advice has covered, in particular, equity compensation schemes and guaranteed bonus schemes which are operated by banks.

**POST-TERMINATION ISSUES**

It is quite common for employees to request a reference from their former employers as part of their departure or otherwise some time after they have left. Giving references should be an easy task, but unfortunately there are pitfalls for the unwary. Recent cases have confirmed that employers (and individual managers authorised to give references) owe a duty of care to employees; and if that duty is breached then this may entitle an adversely affected employee to claim for damages it suffers.

An employee gains important skills and knowledge whilst working. They also learn useful confidential and commercially sensitive information.

When they leave they should not take that information with them. Employers naturally want to protect certain business interests both during and after employment. We deal with these issues. We draft appropriate restrictions for inclusion in contracts as well as standalone agreements.

Restrictive Covenants are express terms incorporated into an employment contract to restrain an employee's activity both during and after their employment. This includes non-solicitation of customers and potential customers, non-dealing and non-competition covenants.

*Employers naturally want to protect certain business interests both during and after employment. We deal with these issues.*

In relation to protecting business interests after the relationship has ended, contractual provisions will only be enforceable if reasonable. We draft enforceable restraint of trade provisions and advise you on the steps available to you in the event that these provisions are breached.

There is an implied duty of confidentiality both during and after the employment relationship. We help you to determine if information is confidential and when necessary help you to

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enforce such obligations. However, protection is better than cure (and cheaper!), so we always recommend seeking early advice.

Competition can be an issue both during and after the employment relationship. Usually contained in the contract, they cover a range of activities which an employee may be prevented from undertaking both in terms of type and geographical location. We understand how to draft and review non-compete clauses for employment contracts to ensure that they are enforceable. We advise employers on the available options when breaches do occur, which may include seeking injunctions to prevent further damage or seeking to recover damages when a business has suffered financially. We help employees understand the implications and consequences of agreeing to non-compete provisions and also help them to consider if they are reasonable and enforceable.

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◆ **EMPLOYMENT** – Senior Management / UK

We have advised and assisted a number of senior management employees and both executive and non-executive directors on their contracts, their rights, obligations and duties, both statutory and common law, as well “behind the scenes” discussions relating to potential termination of employment, loss of office and/or loss of benefits. Whilst these issues involve a significant amount of related legislation, there is usually a commercial rationale which underpins the discussions, as well as tending to be emotional for those concerned. We have always been cognizant of these sometimes diverging interests and maintain a commercially robust but sensitive approach to our analysis and advice.

◆ **EMPLOYMENT** – Share Options / UK

We acted for a senior portfolio fund manager in a detailed and extensive review and negotiation of the terms of a proposed share option agreement to be granted to them as part of wider negotiation relating to their proposed employment by a fund manager.

◆ **EMPLOYMENT** – Compromise Agreements / UK

We have advised on a significant number of compromise agreements for managing directors and senior executive personnel who worked at a number of global investment banks and hedge funds on the termination of their employment for various reasons including redundancy and voluntary resignations. The terms of compromise agreements usually had to deal with both issued and future stock and shares awarded as part of remuneration and required the review of all related contracts and agreements.

◆ **EMPLOYMENT** – Consulting Agreements / UK / Hungary / Denmark / Gibraltar  
Isle of Man

We have advised on a significant number of consulting agreements for both consultants and client companies where the consulting services ranged from management consultancy, business development to oil & gas engineering services for both specific projects as well as ongoing services.

◆ **EMPLOYMENT** – Share Options / UK

We have drafted, reviewed and established a number of Inland Revenue unapproved share option schemes and share option agreements for employers including schemes and agreements which qualified under the Enterprise Management Incentive (EMI) scheme.

◆ **EMPLOYMENT** – Employment Agreements / UK

We have drafted and reviewed a very large number of employment agreements for both employers and employees, dealing with the full range of employment issues, from remuneration and discretionary bonuses through to specific issues relating to restrictive covenants and their enforceability post-termination.

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### ◆ **EMPLOYMENT** – Executive Service Agreements / UK

We have drafted, reviewed and negotiated a number of service agreements over the years for directors and senior management personnel, including complex remuneration and bonus structures.



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