



Internships

Interns give employers access to much needed new talent but their legal status is not clear cut, and in some cases not paying interns can have serious repercussions for employers.

There is no general definition of internship but typically it is a work placement taking place after further education and before entering a profession.

In some cases organisations pay their Interns to attract a wider talent pool, and some argue that unpaid internships should be phased out because they favour the socially advantaged and well connected. However aside from these considerations, if the nature of the Internship is such that the individual would be deemed a worker or an employee then they will be entitled to all of the rights flowing from this, and this will include being paid the National Minimum Wage (NMW). Failing to pay the NMW when it is due can result in a criminal penalty and paying up to six years backdated wages.

Factors that will be taken into account as to whether an individual is a worker and therefore entitled to the NMW include whether:

- the individual is remunerated through money or benefits in kind;
- there is a contractual obligation on the individual to perform work and in return an obligation to provide the work;
- a placement may lead to an offer of permanent work on completion;
- if the individual fulfils an actual job then it is more likely that they are a worker.

An example illustrating the risks faced by organisations who engage Interns involved a Film Production Company. The Company engaged a self employed Production Designer and the Designer's assistant was an Intern who was paid expenses only. The Employment Tribunal found that the Intern was a worker and therefore entitled to the NMW.

To avoid some of the risks involved with hiring Interns it can be useful to have an Internship Agreement in place. Although there is no legal obligation to do this if the Intern is not an Employee or a Worker it can help to set out the intentions of the parties.

In 2009 the Chartered Institute of Personnel and Development drew up a voluntary Code of Practice with six principles intended to support organisations:

- Recruitment, whereby Interns should be recruited in the same way as Employees through open and honest advertising rather than reliance on connections.
- Induction, to provide a smooth transition and to ensure that Interns are quickly integrated into an organisation.
- Supervision, a dedicated supervisor to mentor and provide ongoing feedback.
- Treatment, whereby interns should be treated with the same degree of professionalism as regular employees, and not automatically assigned to routine tasks that do not make use of their skills.
- Payment and duration, as a minimum the intern should be paid necessary expenses including travel expenses.
- References and feedback, undertake a performance review and ask the Intern for feedback on the Internship upon completion, the code also recommends that the interns should be provided with a reference.

Interns can clearly bring many benefits to an organization, but it is important from the outset for employers to have a strategy in place so they understand the extent of their obligations.

INCREASE OF QUALIFICATION PERIOD ON UNFAIR DISMISSAL CLAIMS

The Government has now announced that from 6 April 2012 the qualification period for the right to claim unfair dismissal will be extended from 1 to 2 years. The Government believes that this, together with speeding up the Tribunal process and introducing issue fees, will see the number of unfair dismissal claims drop by about 2000 a year. Detractors from the scheme say that this will simply lead to employees making claims of discrimination where no length of service requirements are necessary.



Gullands HR Law reaches century

We have now been tweeting for several months and have passed the 100 mark on our tweets. For regular commentary on employment issues follow us @ Gullands_HR_Law



QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- one week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2010)

| | |
|---------|-------|
| 16 – 17 | £3.68 |
| 18 – 20 | £4.98 |
| 21+ | £6.08 |

Statutory Sick Pay
(from April 2011)
£81.60 per week

Statutory Maternity/Paternity/Adoption Pay
(basic rate from April 2011)
£128.73

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- One week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years.
Maximum week's pay is capped under the Statutory Scheme at £400 for dismissals after 1.2.11.



Employment law and the charity sector

There is a misconception that employment law does not apply to the charity sector in the same way as it does in other areas. However Employment Tribunals have made it clear that the law applies equally to charities as it does to any other organisation.

Reputation is important to any business, but this is particularly the case with charities. There are steps that charities can take to safeguard their reputation insofar as their employees go and to be seen to be treating employees fairly:

- It is crucial that every employee is issued with a contract. In addition to this employers should have in place full policies and procedures dealing with non-contractual matters such as an equal opportunities policy and disciplinary and grievance procedures. Employers must have in place the relevant contractual documentation to comply with their employment obligations.



- Documentation should be reviewed at least once a year to ensure that it is in line with current legislation. One thing that we are often finding on reviewing employment contracts is that these still set a retirement age of 65. As of October 2011 it is unlawful to set a blanket retirement age, unless you are able to justify this.
- In recent years there has been a marked increase in litigation arising out of the use of social media. It is good practice for employers to have in place social media policies to ensure that employees know what is acceptable when using social media, particularly if this is during the working day or using the employer's equipment.
- Engaging volunteers is covered in our October Employment Brief, and is of particular relevance to charity clients. Voluntary workers are excluded from the National Minimum Wage, but to ensure that the volunteer in question is not deemed to be a worker, organisations should have some form of agreement in place evidencing that the individual in question is a volunteer. Similarly, if the volunteer is paid expenses, any payments made should relate to specific expenses incurred. Employers need to avoid making payments to volunteers that could appear to be a wage and therefore lead to a conclusion that the individual is in fact an employee.

Gullands Employment team have significant experience in acting for charity clients, both in Employment Tribunal litigation and in drafting employment documentation.

Checklist: Dismissing an employee for ‘some other substantial reason’

There are five potentially fair reasons for dismissing an employee:

- Conduct
- Capability
- Redundancy
- Breach of a statutory restriction
- Some other substantial reason (SOSR).

Almost any reason that does not fall within the other four potentially fair reasons for dismissal may amount to SOSR, if it is not an insignificant or frivolous reason that justifies the dismissal of an employee carrying out a particular role. This checklist highlights some of the more common examples of SOSR.

Business re-organisation

- If you are restructuring your business, but are not making any redundancies, SOSR may be relied on as a potentially fair reason for dismissal.
- Business re-organisations often include making changes to employees' terms and conditions. Dismissing an employee for their refusal to accept the proposed changes (either within the context of a business re-organisation or not) can also amount to SOSR.

Refusal to accept changes to terms and conditions

- An employment contract can only be varied in accordance with its terms or with the parties' agreement. If an employee refuses to accept a change to their terms and conditions and your business dismisses them for that reason, the reason may constitute SOSR.
- However, these cases are unlikely to be straightforward because an employee is contractually entitled to resist unilateral changes to their terms. In some instances, where the change amounts to a breach of contract, the employee may be able to resign and claim unfair constructive dismissal.
- For a unilateral change to amount to SOSR, your business must be able to demonstrate that the changes were not imposed arbitrarily, but were for a "sound business reason". There is no need for to prove that the re-organisation was crucial to the survival of the business. However, you must provide evidence to demonstrate the business reasons for the change and show that they were not trivial.
- Where the overwhelming majority of employees accept the change, individual employees may struggle to show that their dismissal for refusing to accept the change was unfair.

Conflicts of interest

- Your business may be able to dismiss an employee for SOSR if they are in a situation that creates a potential conflict with your business' interests.
- You must be able to provide evidence demonstrating that the employee posed a risk to your business interests. Your business will need to show that:
 - the employee had access to commercial information;
 - the employee had close connections with a competitor (or an employee of a competitor); and
 - you feared the employee may leak confidential information.

To rely on SOSR, your business must be able to show that continuing to employ the employee would create a real commercial risk.

Personality clashes

Personality clashes or irreconcilable differences between colleagues can amount to SOSR. However, to do so, the conflict would have to be causing substantial disruption to your business. An employment tribunal will expect you to take reasonable steps to solve the problem without resorting to dismissal, for example:

- Re-deploying one of the workers
- Changing work patterns
- Attempting to mediate.

Pressure from third parties

- Where a third party (for example, a customer or supplier) requires an employee's dismissal, the dismissal can be regarded as fair for SOSR.
- Your business should take into consideration the:
 - importance of the third party's continued business with your own business; and
 - seriousness of the third party's threat to leave.

For example, if a major client is adamant that it will never contract with your business again unless you dismiss an employee, this is more likely to be regarded as fair than where a minor client simply requests removal of an employee, but does not threaten cessation of business.

Breakdown in trust and confidence

Businesses sometimes maintain that they must dismiss an employee because of a breakdown in trust and confidence. In some cases, SOSR can be relied on as a potentially fair reason for dismissal.

KEY INDICATORS OF EMPLOYED/SELF EMPLOYED STATUS

The table below sets out some of the factors that may indicate Employment or Self Employed status. However, the Employment Tribunal and Courts will determine each case on its particular facts. What is clear from the case law in this situation is that no matter how the relationship is described on paper the Employment Tribunal will look at what is actually happening on a day to day basis to establish the true nature of the relationship.

| FACTOR | FACTORS INDICATING EMPLOYEE STATUS | FACTORS INDICATING SELF EMPLOYED STATUS |
|-------------------------------------|--|---|
| Mutual obligations | The Company is under an obligation to provide the individual with regular work. The individual is under an obligation to make themselves available to do the work. | The Company is not obliged to offer work on a regular or frequent basis. The individual has no obligation to accept any work that is offered. |
| Personal service | The individual must provide their services personally, and either: <ul style="list-style-type: none"> • There is no right to appoint a substitute, or • Any right of appointment is subject to the Company's approval. | The individual is not required to carry out the services personally and has a right to appoint a substitute. |
| Control | The Company controls what the individual does, how they do it and when they do it. | The individual has the ability to determine when and how they work and is not under any direct supervision by the Company. |
| Integration | The individual is integrated into the Company (for example they have a Company email address or a Company business card). | The individual is not sufficiently integrated within the Company to have a defined role and does not perform services similar to or substantially the same as those performed by an Employee. |
| Pay and benefits | The individual is paid a fixed amount on a regular payment date, irrespective of performance targets or the completion of a specific task. | The individual is paid on completion of a specific task or project, or on a commission only basis. |
| Exclusivity | The individual is not normally free to work for other organisations without the permission of the Company. | The individual is free to provide their services to whomever they chose without operating exclusively for one organisation. |
| Facilities and equipment | The Company provides the individual with the facilities and equipment required by them to carry out their job. | The individual provides their own equipment and materials to perform the services. |
| Financial risk | The individual is paid, even if there is insufficient work to keep them fully occupied. | The individual risks their own capital in the business and will be personally responsible for any losses arising from the work. |
| Taxation | The individual is not responsible for payment of Income Tax and National Insurance contributions on their earnings. | The individual is responsible for payment of their Income Tax and National Insurance contributions on their earnings. The individual is also responsible for registering for VAT if the level of their supplies exceeds the relevant registration limits. |
| Nature and length of the engagement | The length of engagement is not determined (with the exception of Fixed Term Contracts) and does not relate to performance of a specific task. | The individual is engaged for a finite period to carry out a specific task or project. |

TUPE: POPULAR MYTHS

There is much misunderstanding arising from the provisions of the Transfer of Undertakings and Protection of Employment (TUPE) regulations. It is fair to say that it is a very complex matter and anyone considering transferring their business should take legal advice at an early stage. Over the years, it has become clear that there are instances where people have completely misunderstood some of the key issues and their obligations under TUPE. Below are highlighted some of those key issues:

- Although it is true to say that the further away from the date of the transfer a dismissal takes place the stronger your argument to say that the dismissal is not TUPE related, there is no set point at which this can be said with any certainty. Case law abounds on this issue. One dismissal 2 years and 4 months after the transfer was found not to be TUPE related as there had been significant intervening events between the transfer and the dismissal. Business owners should be aware that each case will be decided on its own facts evidenced by the fact that the EAT in a separate case decided that a dismissal after two year was still transfer related.
- Another popular misconception is that in the course of a transfer, only the Employees from the transferring business need to be subject to the duty of informing and consulting. The regulation makes it quite clear that any Employees of the Transferor or Transferee who may be affected by the transfer or the measures taken in connection with it are owed this duty.
- Getting rid of Employees from the transferring business before the date of transfer will not absolve the parties from liability. Much will depend here as to whether the Employer has dismissed staff to try and evade liability and transfer rights under TUPE, or whether at the time of the dismissals the business was simply struggling and owing to financial constraints had to take certain actions. Many of the cases in this area revolve around arguments from the Government about picking up the bill for unpaid wages upon dismissal where Companies are insolvent.
- Changes made to Employment Contracts are permitted under TUPE if the sole or principal reason for the variation is an economic, technical or organisation reason entailing changes in the workforce or a reason entirely unconnected with the transfer. Even in situations where TUPE does not apply, changing anyone's terms and conditions is an extremely delicate matter and businesses should take advice at an early stage.

CONTACT

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