

 CILEX



# **P8 – Employment Law and Practice**

*Professional Stage*

**2026 - 2027**

# P8: Employment Law and Practice

The aim of this module is to give you, the trainee, detailed and practical understanding of key aspects of employment law and practice, providing a solid basis on which to develop specialist expertise in this area and the ability to handle a varied caseload of employment matters.

The focus of this module is on employment rights and how they affect employees and employers throughout the employment relationship (through recruitment, during employment, and on termination). You should be able to provide suitable, practical advice to employees and employers on a case-by-case basis, considering relevant facts, options and risks. You will learn practical skills to enable you to manage common employment procedures as well as developing drafting skills to support your clients effectively.

The module covers:

1. Determining employment status
2. Overview of key Employment Rights
3. Discrimination
4. Recruitment
5. Family Friendly Rights and Flexible Working
6. General principles of Unfair Dismissal and the role of policies and procedures during employment
7. Termination of employment
8. Transfers of Undertakings
9. ACAS Early Conciliation and Employment Tribunal Claims
10. Settlement Agreements
11. The future of employment law in England and Wales

## Learning Outcomes

By the end of this module, you will be able to:

1. Take instructions from a client and identify relevant facts in relation to client matters through appropriate detailed analysis
2. Identify the applicable legal issues in relation to client matters
3. Apply the relevant law and appropriate procedures to the facts to progress client matters
4. Advise clients of their appropriate options, risks and potential outcomes associated with a range of employment matters and be able to react to a change in brief
5. Draft and provide suitable advice on documents in relation to commonly arising employment matters and employment litigation
6. Understand the ACAS Early Conciliation and Employment Tribunal process and the importance of following correct procedures
7. Identify situations that potentially give rise to conflicts of interest, issues of professional ethics and obligations or other issues under the applicable Codes of Conduct

**Linked online assessment: P8**

**TQT: 300 hours**

**Prerequisite knowledge: Advanced Stage Business and Employment Law and Practice**

## Module Resources

In addition to the course book, there is a reading list that accompanies the module along with an updates document, both located in the 'Study Guide and Content Updates (latest edition)' document in the VitalSource bookshelf, Training Provider hub and in 'myCILEX'.

All CPQ candidates must read the relevant CILEx Regulation Education Standards Handbook.

## Details of updates included in 2026-2027 Module Specification

### Section 2 — Overview of Key Employment Rights

- 2a: new subsection — Particulars of Employment; s.1 ERA 1996 (employees and workers); note s.58 ERA 2025 — added note on ERA 2025 duty to include Trade Union statement within s.1 statement expected October 2026; subsequent subsections renumbered throughout
- 2b: added cross-reference to Fair Work Agency — see section 9c
- 2c: added note on ERA 2025 SSP changes, expected from 6 April 2026
- 2d: added bullet on holiday records retention obligation under ERA 2025; commencement date to be confirmed
- 2e: new subsection — Statutory Pay Protections; includes protection from unlawful deduction from wages (moved from previous 2d) and new bullet on workers' tips and gratuities — Employment (Allocation of Tips) Act 2023 and statutory Code of Practice (in force October 2024); note s.14 ERA 2025 duty to consult workers on tipping policy and three-yearly review requirement, expected October 2026
- 2f: new subsection — Health and Safety at Work; Health and Safety at Work Act 1974 duties (moved from previous 2d)
- 2g: new subsection — Right to be accompanied at disciplinary and grievance hearings (s.10 Employment Relations Act 1999) (moved from previous 2d)
- 2h: subheading retained as Employees at work; particulars of employment, unlawful deduction and health and safety removed following restructure
- 2i: added note on ERA 2025 reduction of unfair dismissal qualifying period, expected from January 2027; removed reference to Workers (Predictable Terms and Conditions) Act 2023 — repealed; added note on ERA 2025 extension of whistleblowing protection expected from 6 April 2026
- 2j: added note on Data (Use and Access) Act 2025

### Section 3 — Discrimination

- 3: new section inserted on menopause and protected characteristics; subsequent sections renumbered
- 3b: added note on ERA 2025 voluntary (expected from April 2026) and mandatory (expected from 2027) gender equality and menopause action plan
- 3e: added note on ERA 2025 strengthening harassment duty and third party harassment liability, expected October 2026
- 3e: corrected typo — EA 2020 amended to EA 2010
- 3g: added note on ERA 2025 extension of Employment Tribunal timelimits, expected no earlier than October 2026

## Section 4 — Recruitment

- 4b- added note on change of reduction in qualifying service to six months under ERA 2025, expected from January 2027
- 4c: added note changes to rights for zero hours and agency workers, expected 2027.
- 4d: updated termination and re-engagement bullet; replaced BEIS reference with statutory Code of Practice on Dismissal and Re-engagement; noted qualifying period change from January 2027; added ERA 2025 fire and rehire provisions
- Section 4d: added note on ERA 2025 impact on variation clauses, expected January 2027

## Section 5 — Family Friendly Rights and Flexible Working

- 5a: updated legislation bullet to reflect ERA 2025 amendment, expected 2027
- 5a: added note on ERA 2025 prescribed consultation process for flexible working requests, expected 2027
- 5a: added note on ERA 2025 changes to grounds for refusal, expected 2027
- 5b: removed "likely effect from April 2025" from Neonatal Care (Leave and Pay) Act 2023 — now in force
- 5c: added note on ERA 2025 enhanced dismissal protections for pregnant women and maternity returners, expected 2027
- 5e: added note on ERA 2025 paternity leave changes, expected from 6 April 2026
- 5g: split from previous 5g; added note on unpaid parental leave as day one right under ERA 2025 expected from 6 April 2026
- 5h: split from previous 5g; amended to reflect ERA 2025 parental bereavement leave changes
- 5i: new section added on Bereaved Partners' Paternity Leave expected from 6 April 2026 and extended bereavement leave under ERA 2025 expected 2027

## Section 6 — General Principles of Unfair Dismissal

- 6f: added note on ERA 2025 changes to confidentiality provisions
- 6f: added new bullet on employer duty to prevent harassment under ERA 2025, expected October 2026

## Section 7 — Termination of Employment

- 7c: added note on ERA 2025 reduction of unfair dismissal qualifying period, expected from January 2027
- 7c: added note on ERA 2025 reduction of qualifying period for written reasons, expected from January 2027
- 7d: added note on ERA 2025 removal of cap on compensatory award
- 7g: amended ACAS Code bullet to refer to "up to" in relation to the 25% uplift
- 7g: added note on ERA 2025 additional collective consultation threshold, expected 2027
- 7g: added note on ERA 2025 doubling maximum protective award from 6 April 2026
- 7g: added cross-reference to sections 4d for ERA 2025 fire and rehire/replace provisions
- 7h: added new bullet on ERA 2025 enhanced dismissal protections for pregnant women and maternity returners, expected 2027
- 7i: added note on ERA 2025 industrial action dismissal protection and fire and rehire as new AUD ground (latter expected from January 2027)
- 7j: updated heading; added note on ERA 2025 reduction of qualifying period to six months expected from 1 January 2027
- 7k: added note on ERA 2025 removal of cap on compensatory award expected from 1 January 2027

## **Section 9 — ACAS Early Conciliation and Employment Tribunal Claims**

- Introductory paragraph – updated to reference the Fair Work Agency
- 9a: removed outdated note on Government Equalities Office proposal; added note on ERA 2025 extension of ET time limits to six months for most claims, no earlier than October 2026
- 9b: added note on extension of maximum EC period under the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2025
- 9c: new section inserted on the Fair Work (FWA) Agency — ERA 2025 establishes the FWA expected from 7 April 2026 as a single enforcement body; existing sections 9c-9j renumbered to 9d-9k
- 9d: updated from Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to Employment Tribunal Procedure Rules 2024 (SI 2024/1155)
- 9e: updated rule references throughout to 2024 Rules
- 9f: updated rule references to 2024 Rules
- 9g: updated rule references to 2024 Rules
- 9j: updated rule references to 2024 Rules
- 9k: updated Practice Direction reference 2024 Practice Direction

## **Section 10 — Settlement Agreements**

- 10d: added note on ERA 2025 provisions voiding confidentiality terms preventing disclosure of harassment or discrimination; commencement date to be confirmed

## **Section 11 — The Future of Employment Law**

- 11a: rewritten to reflect ERA 2025 Royal Assent and phased implementation
- 11b: updated from Employment Rights Bill to ERA 2025; added note on outstanding single worker status consultation
- 11c: updated NDA Bill reference; added note that ERA 2025 separately introduces NDA provisions
- 11c: added AI in recruitment and HR decision-making as new bullet
- 11e: added managing flexible and casual workforces bullet
- 11g: added workplace culture and bullying bullet

## **Other legislative updates**

- Equality (Race and Disability) Bill — retained in section 11c
- Bullying and Respect at Work Bill — retained in section 11c
- Non-Disclosure Agreements Bill — retained in section 11, note ERA 2025 separately introduced NDA provisions

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| <b>1. Determining employment status</b>     | <p>An ability to differentiate and distinguish between employees, workers and contractors is essential for any employment lawyer as different rules and rights apply to the different relationships. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> <li>a) Employees <ul style="list-style-type: none"> <li>• s.230(1) and (2) Employment Rights Act 1996 (ERA 1996)</li> <li>• The multiple factor test</li> <li>• Other Considerations e.g. payment and National Insurance, who provides tools/equipment, holiday/sick pay entitlement, subject to company policies, risk</li> </ul> </li> <li>b) Workers <ul style="list-style-type: none"> <li>• Definition in s.230(3) ERA 1996 - the four requirements under s.230(3)(b)</li> <li>• The 'gig economy' and caselaw developments</li> </ul> </li> <li>c) Different statutory definitions of employment <ul style="list-style-type: none"> <li>• Public Interest Disclosure Act 1998 (PIDA 1998)</li> <li>• s.83(2) Equality Act 2010 (EA 2010)</li> </ul> </li> <li>d) Self Employed Contractors <ul style="list-style-type: none"> <li>• Rights granted by contract</li> <li>• Claims for breach are under the law of contract</li> <li>• Typical indicators of self-employment</li> <li>• Contractors becoming employees/workers over time and the importance of maintaining the intended relationship</li> </ul> </li> <li>e) Atypical workers, apprentices and directors</li> </ul> |
| <b>2. Overview of key Employment Rights</b> | <p>Employment lawyers need to understand a wide range of rights granted to employees and workers. These rights form the basis of employment law claims. You need to have a good knowledge of different employment rights, an ability to apply these rights in practice and be able to identify the consequences of a breach. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> <li>a) Particulars of Employment <ul style="list-style-type: none"> <li>• S.1 ERA 1996 (note: s.58 ERA 2025 — new duty to include explicit statement of worker's right to join a trade union at same time as s.1 statement, expected October 2026)</li> <li>• Consequences of breach</li> </ul> </li> <li>b) Minimum Wage <ul style="list-style-type: none"> <li>• National Minimum Wage Act 1998 (note: enforcement transfers to the Fair Work Agency from 7 April 2026 under the ERA 2025 — see section 9c)</li> </ul> </li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

- c) Statutory sick pay
  - Eligibility (note: ERA 2025 ss.10-11 changes — removal of lower earnings limit and waiting days period, 80% rate applies for lower earners; expected from 6 April 2026)
  - The relationship with contractual sick pay
- d) Working Time Regulations (WTR) 1998
  - Defining working time
  - Daily and weekly rest, rest breaks, maximum weekly working
  - Holiday pay: including calculation - Art 7 of the Directive, ss221-224 ERA 1996 and recent case law. Post 1<sup>st</sup> January 2024, the impact of the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023
  - Holiday pay: Commission/overtime, carrying over holiday pay into subsequent holiday years
  - Compelling employees to take holiday leave
  - Refusal of holiday requests
  - Holiday records: s.35 ERA 2025 amending WTR 1998 - six year retention obligation; criminal offence for non-compliance; Fair Work Agency enforcement powers apply (see section 9c); commencement date to be confirmed
- e) Statutory Pay Protections
  - Protection from unlawful deduction from wages (s.13 ERA 1996/breach of contract considerations). Tribunal claim for unlawful deduction.
  - Employment (Allocation of Tips) Act 2023 and statutory Code of Practice; note s.14 ERA 2025 duty to consult workers on tipping policy and three yearly review requirements, expected October 2026.
- f) Health and Safety at Work
  - Health and Safety at Work Act 1974 duties.
- g) Right to be accompanied at disciplinary and grievance hearings (s.10 Employment Relations Act 1999)
- h) Employees at work
  - Protection from unfair dismissal (s.94 ERA 1996) - in outline (note s.25 the ERA 2025 provides that the qualifying period is reduced from two years to six months - expected from 1 January 2027)
  - Maternity and Family Friendly Rights - in outline
  - Protection from discrimination- protected characteristics under the EA 2010 in outline
  - Fixed term employees (Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002)
  - Information and Consultation of Employees Regulations 2004
  - Part time employees (Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000)

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|                          | <ul style="list-style-type: none"> <li>Protected disclosures (Public Interest Disclosure Act 1998 and ERA 1996) - s.23 ERA 2025 extends whistleblowing protection to cover sexual harassment disclosures, expected from 6 April 2026)</li> <li>Transfer of undertakings – in outline</li> <li>Trade union related rights – Employment Relations Act 2004.</li> <li>Statutory minimum notice periods (s.86 ERA 1996)</li> </ul> <p>i) Employees and insolvency</p> <ul style="list-style-type: none"> <li>The impact of different forms of insolvency of the employer on employees</li> <li>Rights of employees on insolvency; s.386 Insolvency Act 1986, ss.166-70 ERA 1996, and impact on SSP/Maternity Pay</li> <li>Insolvency and its relationship with TUPE</li> </ul> <p>j) Data protection rights of employees</p> <ul style="list-style-type: none"> <li>General Data Protection Regulation (Regulation (EU) 2016/679)</li> <li>Data Protection Act 2018 (Data (Use and Access) Act 2025 introduces amendments to UK GDPR and the Data Protection Act 2018 in force from February 2026, including changes to subject access requests and legitimate interests)</li> <li>Controlling, using and processing employee personal data and employee rights</li> </ul> |
| <b>3. Discrimination</b> | <p>Protection from discrimination is a key right which extends beyond the field of employment law. You need to be able to identify and advise on potential/actual instances of discrimination. Therefore, you will need to know the following:</p> <p>a) The protected characteristics under the EA 2010 (statutory definitions and consideration of relevant case law as well as the EHRC Code of Practice on Employment)</p> <p>b) Menopause and the protected characteristics: identify how menopause claims are brought under sex, age and/or disability under EA 2010, note the ECHR guidance on menopause in the workplace. S.33 ERA 2025 sets out voluntary action plans on gender equality and menopause support for employers with 250+ employees expected from 6 April 2026, with mandatory plans expected from 2027.</p> <p>c) Introduction to equal pay</p> <ul style="list-style-type: none"> <li>s.64, 66-70 EA 2010</li> <li>Defences</li> <li>Enforcement</li> <li>Employer requirements: equal pay audit/gender pay gap reporting</li> </ul>                                                                                                                                                                                                          |

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|                       | <p>d) Protected parties (e.g. ss. 39, 40, 41, 50, 57, 108 EA 2010); before, during or after employment</p> <p>e) Different categories of discrimination: s.13, s.19, s.26, s.27 and s.15, s.20/21, s.18 EA 2010 and how they apply to different protected characteristics</p> <ul style="list-style-type: none"> <li>• Direct <ul style="list-style-type: none"> <li>• s.13 EA 2010</li> <li>• Association/perception-based discrimination</li> </ul> </li> <li>• Indirect Discrimination <ul style="list-style-type: none"> <li>• s.19 EA 2010</li> </ul> </li> <li>• Harassment and Victimisation <ul style="list-style-type: none"> <li>• Harassment: s.26 EA 2010</li> <li>• Victimisation: s.27 EA 2010</li> <li>• Burden of proof for Harassment and for Victimisation (s.136 EA 2010)</li> <li>• Worker Protection (Amendment of Equality Act 2010) Act 2023 (note: s.20 ERA 2025 - expected from October 2026 to require employers to take 'all reasonable steps', s.21 introduces third party harassment liability for all types of harassment, and enables regulations to specify 'reasonable steps')</li> </ul> </li> <li>• Disability Discrimination: additional claims: <ul style="list-style-type: none"> <li>• Reasonable Adjustments (ss. 20 and 21 EA 2010 and schedule 8 guidance/explanatory notes in EA 2010 and consideration of appropriate caselaw)</li> <li>• Discrimination arising from disability (s.15 EA 2010 and appropriate caselaw)</li> </ul> </li> </ul> <p>f) Remedies in the employment tribunal</p> <ul style="list-style-type: none"> <li>• s.124 EA 2010: declaration, recommendation, compensation</li> </ul> <p>g) Determining limitation periods for discrimination claims to the Employment Tribunal (Schedule 12 ERA 2025 extends ET time limits to six months for most claims from no earlier than October 2026)</p> |
| <b>4. Recruitment</b> | <p>Managing the employee/employer relationship properly from the outset is essential. You should understand the potential risks arising through recruitment and provide suitable advice to employers to manage an effective process while minimising their risk. You should also be able to advise potential employees and newly engaged employees of their obligations and rights. Therefore, you will need to know the following:</p> <p>a) Sourcing and recruiting</p> <ul style="list-style-type: none"> <li>• Sourcing employees and advertising</li> <li>• Discrimination issues arising through recruitment</li> <li>• Balancing valid job requirements and potentially discriminatory practices</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

- Pre employment checks (e.g. obtaining references/DBS checks/right to work checks)
- Appointment: (s.1 ERA 1996 statement of terms, the contract of employment, automatic enrolment pension obligations). Also consider the implied duties and responsibilities of employees and employers

b) Drafting the contract of employment

- Continuity of employment
- Term (fixed term or rolling)
- Implied duties: trust and mutual confidence/fidelity
- Hours and Pay (including overtime/bonuses)
- Contractual Holiday entitlement and pay
- Contractual Sick entitlement and pay
- Place of work/mobility clauses
- Confidentiality/trade secrets
- Restrictive Covenants: non-dealing/non-compete/non-solicitation/non-poaching; drafting considerations to maximise enforceability
- Notice and Termination
- PILON clauses and Gardening Leave: including the potential impact of failing to have a payment in lieu of notice re: restrictive covenants
- Share schemes (Micklefield clauses)
- Contractual Disciplinary/Grievance Procedures; benefits of making any procedures non-contractual for employees under two years' service (note change from two years' service to 6 months expected from January 2027)

c) Other considerations when employing staff

- Zero hours contracts/workers contracts (s.1-3 ERA 2025 sets out guaranteed hours rights, reasonable notice of shifts, and compensation for cancelled or curtailed shifts for qualifying zero-hours and low-hours workers, s.4 ERA 2025 extends these rights to agency workers - expected 2027)
- Directors Service Contracts (disclosure – s.228-230 CA 2006, additional duties, share schemes, removal as director under both company law and employment law)
- Service Occupancies
- Use of online template contracts

d) Subsequent variation of contracts of employment

- Contract cannot be unilaterally varied
- Seeking employee consent: consultation with employees and best practice
- Termination and re-engagement; impact of length of service on options and risks; termination for Some Other Substantial Reason (SOSR) - currently requires two years' service but note qualifying period reduces to six months from January 2027 under the ERA 2025 (noting best practice –Code of Practice on Dismissal and Re-engagement) (note: s.28 ERA 2025 inclusion of fire and rehire automatically unfair for 'restricted

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|                                                       | <p>variations' from January 2027; fire and replace scenarios also caught; enhanced fairness test applies to non-restricted variations; revised Code of Practice anticipated)</p> <ul style="list-style-type: none"> <li>• Variation clauses in the contract – note the impact of ERA 2025 on drafting variation clauses (expected from January 2027)</li> <li>• Imposition of terms without agreement; risks/employee options: (e.g. acceptance, resignation and claiming constructive unfair or wrongful dismissal, refusal to work, remain but litigate for breach of contract)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>5. Family Friendly Rights and Flexible Working</b> | <p>An employment trainee must fully understand the range of family friendly rights available to employees and the appropriate eligibility criteria. You need to be able to identify rights appropriate to a situation and understand and advise on the correct processes in order to advise employees and employers effectively. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> <li>a) Flexible Working requests <ul style="list-style-type: none"> <li>• ss.80F-80I ERA 1996 (as amended by the Employment Relations (Flexible Working) Act 2023 and further amended by the ERA 2025; Flexible Work Regulations 2014)</li> <li>• Qualification and process; including the prescribed consultation process introduced by s.9 ERA 2025 (detail subject to consultation, expected in force 2027)</li> <li>• Grounds for refusal, including the reasonableness test for refusal introduced by s.9 ERA 2025 (expected 2027)</li> <li>• Tribunal claim and remedies</li> </ul> </li> <li>b) Time off for antenatal and neonatal care <ul style="list-style-type: none"> <li>• s.55-56 ERA 1996,</li> <li>• unpaid time off and protection for partners/fathers under s.57ZE ERA 1996)</li> <li>• Neonatal Care (Leave and Pay) Act 2023 (in force from April 2025)</li> </ul> </li> <li>c) Maternity leave <ul style="list-style-type: none"> <li>• Notice (reg. 4(1) MPLR 1999)</li> <li>• Right to return to work</li> <li>• Protection from Redundancy (Pregnancy and Family Leave) Act 2023 (s26-s27 ERA 2025 introduced broader enhanced dismissal protections for pregnant women, those on maternity leave and maternity returners within six months, covering all types of dismissal; specific circumstances in which dismissal remains permitted to be set out in regulations; expected 2027)</li> <li>• Compulsory maternity leave</li> <li>• Right not to be dismissed or to suffer detrimental treatment</li> <li>• Statutory Maternity Pay and contractual pay</li> <li>• Ordinary Maternity Leave (s.71 ERA 1996)</li> <li>• Additional Maternity Leave (s.73 ERA 1996 as amended)</li> <li>• Working during maternity leave (in touch days reg 12A MPLR 1999)</li> </ul> </li> </ul> |

- Suspension during maternity under s.66 ERA 1996 and full pay
- Risk assessments as good practice and implications for failing to do so (s18 and s.26 EA 2010)

d) Adoption leave and pay

- ss.75A-75D ERA 1996
- Paternity and Adoption Leave Regulations 2002 (PALR 2002)
- ordinary and additional adoption leave
- protection from detriment/automatic unfair dismissals
- redundancy rights
- Statutory Adoption Pay; SPPSAP (General) Regulations 2002 and SSCBE 1992

e) Statutory Paternity Leave and Statutory Paternity Pay; PALR 2002 and amendments under the Paternity Leave (Amendment) Regulations 2024. (note: s15-17 ERA 2025 changes to eligibility for paternity leave expected from 6 April 2026; employees newly eligible may give notice from 18 February 2026; the restriction on taking paternity leave after shared parental leave is also removed expected from 6 April 2026)

f) Shared Parental Leave, Shared Parental Pay (qualification and refusal of SPL or ShPP)

g) Parental Leave- Unpaid leave (note eligibility and extent of right) - unpaid parental leave is to be a day one right expected from 6 April 2026 under ERA 2025; employees newly eligible may give notice from 18 February 2026.

h) Parental bereavement leave: note right and eligibility (Parental Bereavement (Leave and Pay) Act 2018 as amended by s.18 ERA 2025)

i) Bereaved Partners' Paternity Leave (Paternity Leave (Bereavement) Act 2024; Bereaved Partner's Paternity Leave Regulations 2026) from 6 April 2026.

- Extended bereavement leave s18 ERA 2025 extends entitlement to death of a qualifying person and pregnancy loss before 24 weeks; detail subject to regulations; expected 2027

j) Carer's Leave under the Carer's Leave Act 2023

k) Time off to care for dependants

- s.57A ERA 1996 and protection from detriment

**6. General principles of Unfair Dismissal and the role of policies and procedures during employment**

An employment trainee must be able to guide clients through a range of common processes arising during the employment relationship and understand the importance of following appropriate procedures to avoid claims (particularly relating to Unfair Dismissals). You need identify the appropriate process/procedure for the circumstances and advise on how to best implement it in the client's circumstances. Therefore, you will need to know the following:

- a) Dismissal (s.95 ERA 1996)
  - Unfair dismissal (s.94 ERA 1996)
  - The potentially fair reasons for dismissal; conduct, capability, redundancy, illegality/statutory, some other substantial reason; each subject to following a fair process
  - Determining an effective date of termination and limitation periods
- b) Grievances
  - Informal and formal grievance processes
    - ACAS Code of Practice on Disciplinary and Grievance procedures and an employer's internal grievance procedure
  - Drafting a grievance and outcome
  - Advising an employer on receipt of a grievance; identifying key facts/issues in an employee's grievance, how to conduct a grievance meeting (right to be accompanied under s.10 Employment Relations Act 1999 - extent of the right), approach to grievance meetings, adjournment for investigation
  - Rights of appeal
- c) Disciplinary Meetings - Misconduct
  - Determining difference between misconduct and capability/misconduct and gross misconduct
  - Suspension - when is suspension a neutral act?
  - Managing an investigation fairly, determining if there is a case to answer, weighing up relevant evidence, dealing with anonymous informants, handling sickness absence during disciplinary processes
  - Conducting formal disciplinary meetings: ACAS Code, right to be accompanied; providing an appropriate outcome
  - Disciplinary warnings: tiered process, justifying missing staged warnings
  - Reviewing evidence, determining an appropriate sanction and drafting the disciplinary outcome
  - Appeals
  - Use of online tools to conduct disciplinary processes
- d) Capability
  - Managing persistent Intermittent Absence: discrimination considerations, Bradford points/traffic light systems, managing a fair process/warning
  - Long term ill health; managing long term absence, meetings with the employee/consultation, obtaining medical information (Occupational

|                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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|                                     | <p>Health referrals/Access to Medical Reports Act 1988), disability discrimination, reasonable adjustments, considering alternatives to dismissal, conducting dismissal hearings)</p> <ul style="list-style-type: none"> <li>Managing poor performance; distinguished from conduct, informal management of performance issues, formal processes; full process - identify issues and set reasonable goals/standards to be met within reasonable timeframes, appropriate staged warnings, discrimination considerations</li> <li>Applicability of the ACAS Code</li> </ul> <p>e) Other common policies</p> <ul style="list-style-type: none"> <li>Sickness</li> <li>Equality and Diversity</li> <li>Bullying and Harassment</li> <li>Health and Safety</li> <li>Whistleblowing</li> <li>Social media</li> <li>IT/BYOD</li> </ul> <p>f) Vicarious liability during the employment relationship</p> <ul style="list-style-type: none"> <li>Overview of vicarious liability in tort</li> <li>Liability for acts of directors</li> <li>Breaches of confidentiality and data protection (note s.24 ERA 2025 changes to contractual provisions preventing workers from disclosing or alleging harassment or discrimination expected October 2026).</li> <li>Statutory provision: e.g. Enterprise and Regulatory Reform Act 2013 re. whistleblowing</li> <li>Employer duty to prevent harassment: s.40A EA 2010 as amended by s.20 ERA 2025 (all reasonable steps to prevent sexual harassment) and s.40 EA 2010 as amended by s.21 ERA 2025 (duty not to permit third party harassment) expected October 2026.</li> </ul> |
| <b>7. Termination of employment</b> | <p>You need to be able to identify appropriate processes applicable to termination and the associated employee rights and advise employers and employees accordingly. Therefore, you will need to know the following:</p> <p>a) Wrongful dismissal</p> <ul style="list-style-type: none"> <li>Key principles</li> <li>Calculating compensation/damages</li> </ul> <p>b) Notice by employee or employer</p> <ul style="list-style-type: none"> <li>How it is given, when it is binding, when it can be revoked</li> </ul> <p>c) Background to unfair dismissal</p> <ul style="list-style-type: none"> <li>Eligibility criteria (s25 ERA 2025 reduces the qualifying period from 2 years to six months – expected from 1 January 2027);determining continuity of employment</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

- Certain exclusions/considerations e.g. share fishermen, armed forces, police
- Onus on employer to show a potentially fair reason for dismissal
- Employees entitlement to written reason for dismissal (s.92 ERA 1996, as amended by Schedule 3 para 1(2) ERA 2025 — qualifying period reduces to six months expected from 1 January 2027)

d) Constructive dismissal

- What amounts to a constructive dismissal; s.95(1)(c) ERA 1996/s.136(1)(c), significant breaches of express or implied terms amounting to constructive dismissal/repudiatory breach
- Examples of potentially dismissal; unilaterally reducing pay/altering duties/changing work hours; requiring an employee to change place of work without adequate notice; imposing a disproportionate disciplinary sanction
- Last straw vs series of events leading to resignation
- Breaches of trust and confidence
- Right to claim Constructive Unfair Dismissal and calculation of compensation/awards (note: s25(3) ERA 2025 removes the cap on the compensatory award expected from 1 January 2027 — see also section 7j)
- Link with grievances and impact on tribunal awards for employee's failure to raise a grievance
- Effective resignation in response to the breach and the impact of timing on resignation
- Practical considerations of constructive dismissal: advising employees of options and legal/practical risks associated with resignation

e) Potentially fair reasons for dismissal: s.98(2) ERA 1996 and the burden of proof

f) Substantive fairness

- s.98(4) ERA 1996
- The band of reasonable responses

g) Procedural Fairness

- ACAS Code; up to 25% uplift discretionary power of the ET
- s.10 ERA 1999 right to be accompanied
- Following appropriate, fair procedures
- Capability e.g. using appropriate processes to terminate employment fairly depending on the capability circumstances
- Conduct: processes
  - The Burchell test
  - The role of warnings/stages
  - Dismissing employees for misconduct building on a final written warning
  - Overview of gross misconduct; when it may be appropriate to dismiss an employee without prior warnings e.g. theft, violence,

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|  | <p>unauthorised absence, gross negligence, subject to surrounding circumstances</p> <ul style="list-style-type: none"> <li>• Redundancy <ul style="list-style-type: none"> <li>• Definition of redundancy: s.139 ERA 1996</li> <li>• Redundancy principles</li> <li>• Redundancy processes: warning and consultation; individual and collective consultation; representatives under s.188 TULR(C)A 1992/Information and Consultation Regulations 2004/HR1 notification of Secretary of State (note s.29 ERA 2025 introduction of an additional organisation-wide threshold for collective consultation obligations, in addition to the existing 20 or more redundancies at one establishment trigger, expected 2027)</li> <li>• Fair basis for selection; appropriate selection processes/criteria</li> <li>• Bumping</li> <li>• Consideration of alternative employment</li> <li>• Appeals</li> <li>• Time off to seek alternative employment</li> <li>• Renewal of contract, re-engagement and trial periods</li> <li>• Redundancy Pay calculation and claims (note ERA 2025 doubles the maximum protective award from 90 to 180 days expected from 6 April 2026)</li> </ul> </li> <li>• Illegality <ul style="list-style-type: none"> <li>• Dealing with common examples</li> <li>• Where an employee needs to drive for their role or a substantial part of it and is disqualified</li> <li>• Immigration status</li> <li>• Failure to achieve a national statutory qualification</li> <li>• Requirement to follow a fair procedure</li> </ul> </li> <li>• SOSR: Substantial requirement and fair processes <ul style="list-style-type: none"> <li>• When SOSR may be a fair and reason to dismiss</li> <li>• Cases concerning variation of contracts/refusal of re-engagement (see section 4d and 7i for ERA 2025 fire and rehire/replace provisions)</li> <li>• Imprisonment of employee</li> <li>• Employer required to dismiss by a third-party</li> <li>• customer</li> <li>• Expiry of a fixed term contract</li> </ul> </li> </ul> <p>h) Enhanced Dismissal Protections: note the circumstances of enhanced dismissal protections for pregnant women and maternity returners under ERA 2025, expected 2027 (see section 5c)</p> <p>i) Automatic Unfair Dismissals (AUD): an overview of common AUD grounds and their impact on unfair dismissal eligibility/reasonableness test (s.28 ERA 2025 introduces new automatic unfair dismissal grounds for fire and rehire (restricted variations) and fire and replace, plus an enhanced fairness test for non-restricted variations; expected from January 2027)</p> |
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|                                     | <p>j) Dismissing employees under two years' service (note: qualifying period reduces to six months expected from 1 January 2027 s25(2) ERA 2025)</p> <ul style="list-style-type: none"> <li>• Obtaining facts in respect of the termination</li> <li>• Applying potential claims/considerations e.g. breach of contract, discrimination, AUD</li> </ul> <p>k) Calculating compensation for unfair dismissal/automatic unfair dismissal s25(3) ERA 2025 removes the cap on the compensatory award expected from 1 January 2027</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>8. Transfers of undertakings</b> | <p>The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to a large number of different commercial transactions. You need to be able to identify when TUPE applies, how it impacts both transferor and transferee, the necessary steps required of the transferor and transferee and the rights of transferred employees. Therefore, you will need to know the following:</p> <p>a) Application of TUPE</p> <ul style="list-style-type: none"> <li>• Relevant transfers under reg 3</li> </ul> <p>b) Business transfers</p> <ul style="list-style-type: none"> <li>• Reg 3(1)(a); test</li> <li>• Is there an economic entity? (3(2) TUPE)</li> <li>• Has that entity transferred?</li> </ul> <p>c) Service provision changes</p> <ul style="list-style-type: none"> <li>• Reg 3(1)(b)</li> </ul> <p>d) Effect of a TUPE transfer</p> <ul style="list-style-type: none"> <li>• Reg 4(1) TUPE</li> <li>• Transfer of contractual terms under reg 4(2) TUPE</li> <li>• Eligibility (reg 4(3) TUPE)</li> <li>• Right of employee to object under reg 4(7) and 4(8).</li> <li>• Transfer of liability under reg 7(1)</li> </ul> <p>e) Unfair dismissal and Automatic Unfair Dismissal relating to TUPE</p> <p>f) Process of a TUPE transfer</p> <ul style="list-style-type: none"> <li>• duties imposed by regs 11-16 TUPE - including duty to inform and consult (reg 13 TUPE) and remedies.</li> <li>• The amendments to TUPE under the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023.</li> </ul> <p>g) Variation of terms post transfer:</p> <ul style="list-style-type: none"> <li>• Regulations 4(4), 4(5) and 7(1) TUPE</li> <li>• When variations may be lawful</li> </ul> |

## 9. ACAS Early Conciliation and Employment Tribunal Claims

Employment disputes can result in action being taken in the Employment Tribunal (ET). You must have an outline understanding of employment litigation starting with ACAS Early Conciliation. You will need to understand the Early Conciliation process as well as the key elements and procedure of handling an ET claim. Students should also be aware of the Fair Work Agency introduced by the ERA 2025 (expected from April 2026) which has powers to enforce certain employment rights. Therefore, you will need to know the following:

- a) Limitation periods
  - Time limits for commonly occurring claims (note: Schedule 12 ERA 2025 extends ET time limits to six months for most claims no earlier than October 2026)
  - How they are calculated and the ET's power to extend.
- b) The role of ACAS
  - ACAS Early Conciliation (EC)
  - Purpose of EC and claims to which EC applies; relevant proceedings under s.18(1) Employment Tribunals Act 1996 (ETA 1996) and exemptions
  - Impact of EC on limitation periods for claims
  - Submitting prescribed information, process under s.18A ETA 1996 and the Early Conciliation Rules,
  - Extension of EC period (Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2025 extended the maximum EC period from six to twelve weeks from 1 December 2025; review scheduled October 2026)
  - Conclusion of EC if there is agreement between parties
  - Conclusion of EC without agreement between parties and issue of EC certificate
  - The impact of failure to comply with the EC requirement
- c) Introduction to the Fair Work Agency: - The ERA 2025 establishes the Fair Work Agency expected from April 2026 as a single enforcement body, consolidating existing enforcement functions including minimum wage, agency worker standards, holiday pay and SSP; note powers include workplace inspection, issuing underpayment notices and bringing ET proceedings on workers' behalf.
- d) Introduction to the Employment Tribunal Procedure Rules 2024 (SI 2024/1155), which came into force on 6 January 2025, replacing the procedural rules in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
- e) Issuing employment proceedings
  - Preparing an ET1; preparation of an ET1 form in respect of claims such as unlawful treatment, unfair dismissal and discrimination with a particular focus on drafting the details of claim
  - Rules 10 and 12(1)

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|                                  | <ul style="list-style-type: none"> <li>• Overlapping claims</li> <li>• Preparing a response; preparing the ET3, Rule 17</li> <li>• Initial consideration of the claim (Rule 27/28) and case management (Rule 30)</li> <li>• Disclosure and evidence in ET claims (e.g. Rule 33/Rule 49)</li> </ul> <p>f) Preliminary hearings</p> <ul style="list-style-type: none"> <li>• Rules 52-54 and including strike out (Rule 38)</li> <li>• Deposit orders (Rule 40),</li> <li>• Withdrawal of claim (Rule 50/51)</li> </ul> <p>g) Conduct of final hearings (Rules 55-57) and general hearing rules (rules 41 – 49)</p> <p>h) Awards and Costs</p> <ul style="list-style-type: none"> <li>• Calculating compensation/awards for common claims (including overlapping claims)</li> <li>• recoupment of benefits</li> <li>• Calculation of interest</li> <li>• Tax treatment of awards</li> </ul> <p>i) Enforcement of ET decisions</p> <p>j) Reconsideration (Rules 68-71)</p> <p>k) Appeals</p> <ul style="list-style-type: none"> <li>• Grounds of appeal</li> <li>• Practice Direction (Practice Direction of the Employment Appeal Tribunal 2024, in force from 1 February 2025)</li> </ul> |
| <b>10. Settlement Agreements</b> | <p>Settlement agreements can be used to resolve an employment dispute without the need for a tribunal claim saving both claimants and respondents significant legal costs, time and stress. You need to understand how to negotiate and draft an appropriate, legally binding settlement agreement. Therefore, you will need to know the following:</p> <p>a) Binding settlements:</p> <ul style="list-style-type: none"> <li>• s.203 ERA 1996</li> <li>• COT3 and settlement agreements</li> <li>• Settlement agreement criteria: in writing, independent advice, relate to the actual complaint and compliance with statutory provisions</li> <li>• ACAS 2013 Statutory Code of Practice on Settlement Agreements</li> </ul> <p>b) Breaches of settlement agreements</p> <ul style="list-style-type: none"> <li>• Implications of a breach</li> </ul>                                                                                                                                                                                                                                                                                                                                  |

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|  | <p>c) Negotiation/protected conversations</p> <ul style="list-style-type: none"> <li>• Without Prejudice negotiations/ s.111A ERA 1996; identifying appropriate settlement terms and negotiation</li> <li>• Tax treatment of termination payments</li> </ul> <p>d) Drafting a settlement agreement</p> <ul style="list-style-type: none"> <li>• Appropriate clauses (s24 ERA 2025 voids contractual terms preventing workers from alleging or disclosing harassment or discrimination; exceptions to be defined in regulations; commencement date to be confirmed)</li> <li>• Potential issues: tax indemnity clauses, pensions, restrictive covenants such as non-disclosure terms</li> </ul> <p>e) Certifying a settlement agreement</p> <p>f) COT3</p> <ul style="list-style-type: none"> <li>• The role of COT3 agreements</li> <li>• The COT3 process</li> </ul> |
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## 11. The future of employment law in England and Wales

As an ever-evolving area of law, you should not only keep up to date with current developments, but also consider and be mindful of the future direction of employment law and policy.

- a) The Employment Rights Bill received Royal Assent on 18 December 2025, becoming the Employment Rights Act 2025 — the most significant overhaul of employment law in a generation. Implementation is phased across 2026 and 2027. Key changes are noted throughout this module spec where relevant. Students should keep up to date with the phased implementation timetable, noting that several provisions remain subject to further consultation on the detail and secondary legislation
- b) Additional measures not included in the Employment Rights Act 2025 but aspirations of the Government include:
  - Ethnic and disability pay gap reporting (consultation closed June 2025; mandatory requirements anticipated but detail and commencement outstanding)
  - Moving to a simpler two-part framework for employment status (consultation promised but outstanding as of March 2026; no confirmed timeline)
- c) Other legislation proposed including:
  - Equality (Race and Disability) Bill
  - Skills England Bill
  - Bullying and Respect at Work Bill
  - Non-Disclosure Agreements Bill (note however that ERA 2025 separately introduces NDA provisions commencement date to be confirmed — see section 10d)
- d) Challenges and benefits of technological advancements
  - Automation and AI, and their impact on the workforce
  - AI in recruitment and HR decision-making
  - Cross-jurisdiction outsourcing
  - Increased use of remote/digital resources
  - Privacy concerns if employers monitor employees remotely
  - Automated decision making - awareness of use and risks associated with algorithms
- e) Increasing flexibility in the workplace
  - Locations
  - Flexible hours
  - Technology which can accommodate flexibility
  - Fair processes
  - Managing flexible and casual workforces: balancing business flexibility with increasing statutory protections for zero-hours and agency workers, including guaranteed hours provisions under ERA 2025 (see section 4c).
- f) Employers' responsibility for employees

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|  | <ul style="list-style-type: none"><li>• Health and Safety law for home working</li><li>• Mental health in the workplace</li></ul> <p>g) Employee engagement</p> <ul style="list-style-type: none"><li>• Collective contribution and corporate responsibility</li><li>• Addressing negative business cultures</li><li>• Workplace culture and bullying: the growing focus on employer responsibility for workplace culture</li><li>• Encouraging inclusivity and diversity</li></ul> |
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