

# FL MEMO

EXTRACTS

Employment

2011

Law and Practice

Human Resources



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# Preface

*Employment Memo 2011* is a well-established handbook providing **practical guidance** and **dynamic and fast moving commentary** on employment law and practice. It is accessible and easy to navigate, while retaining depth of coverage on a wide range of employment issues.

*Employment Memo 2011* has been **revised and updated** to include all of the recent developments and will continue to provide a reliable source of information throughout the current year using:

- an **online updating facility**, giving detailed updates to individual paragraphs reflecting the latest developments;
- an **online version of the handbook**. The online Memo also **includes tables** of acts, statutory instruments and cases. All online updates are automatically incorporated into the text of the online version;
- **online newsletters**, which highlight and explore new developments; and
- **email alerts** to all updates and newsletters.

*Employment Memo 2011* and its updating service will **cover**:

- the harmonisation and consolidation of equality law;
- changes to certain strands of discrimination, in particular disability discrimination;
- new statutory prohibitions against associative and perceptive discrimination;
- other equality provisions still to come into force, for example the new concept of dual discrimination;
- the introduction of additional statutory paternity leave;
- new rights for agency workers;
- the abolition of the default retirement age;
- proposals for major dispute resolution reforms; and
- case law developments in all areas.

*Employment Memo 2011* primarily covers the **law applying to** England and Wales. While reference is made in this edition to the legal systems in Scotland and Northern Ireland, specialist advice should be sought in respect of these jurisdictions. Public sector employment and those working at sea are also largely outside the scope of this handbook.

This handbook is intended to reflect **law and practice as at** 1 March 2011.

## CHAPTER 14

## Rights of parents and carers

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Parents and carers are entitled to **special rights at work**.

4400

The structure of statutory parents' and carers' rights follows a broad logic, depending on the nature of the person being cared for, and the relationship between them and the parent or carer. Thus the person with the greatest rights is an expectant mother, who has the right to take paid leave for antenatal care, in addition to periods of paid and unpaid leave following the birth of her child. At the other end of the spectrum is someone who simply cares for a neighbour or friend. Such a person is unlikely to be able to take more than brief periods of unpaid leave.

**MEMO POINTS** Some of these rights, including a mother's right to maternity pay, have been in place for many years. Some have been introduced more recently. Parental leave was introduced in 1999, paternity and adoption pay and the right to request flexible working in 2003. The rights of parents, adopters and carers to take paid or unpaid leave were extended by the Work and Families Act 2006. For example, the Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2008 (SI 2008/1966) gave employees on maternity and adoption leave the same rights to their contractual terms and conditions throughout their leave. This significant change has greatly reduced the difference between ordinary and additional leave. Most recently, the Additional Paternity Leave Regulations 2010 gave parents of babies due on or after 3 April 2011, and parents who have received notification on or after 3 April 2011 that they have been matched with a child for adoption, a new right to additional paternity leave (SI 2010/1055). Further, a new EU directive requires member states to increase parental leave entitlement by 8 March 2012 (EU Parental Leave Directive 2010/18). Further details will be covered by our updating service.

Subject to satisfying eligibility criteria, new parents are entitled to statutory **paid leave**. With the exception of the first 6 weeks of maternity pay, which are paid at a higher rate (¶4493), statutory maternity pay, maternity allowance, statutory adoption pay and statutory paternity pay are all paid at a **set rate**, which is currently £124.88 per week. **From 3 April 2011**, this set rate will increase to £128.73.

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**MEMO POINTS** With regard to the set rate, if 90% of the **employee's average weekly earnings is lower** than this rate then this amount should be paid.

Employers can choose to give **more favourable contractual or non-contractual terms**, for example longer leave and contractual paid leave. **Composite rights** will be formed of the most favourable elements of any enhanced right and the statutory minimum requirements. The same applies to any statutory procedural requirements and, consequently, if an enhanced term is silent with regard to any procedural matter or has a more onerous requirement, the statutory procedural rules will apply (with the exception of parental leave, which has slightly different rules (¶4650)).

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## SECTION 3

**Paternity rights****4570**

The following table summarises the main rights of employees to leave and to statutory paternity pay.

	PATERNITY LEAVE (PAL)	ADDITIONAL PATERNITY LEAVE (APAL)	STATUTORY PATERNITY PAY (SPP) ADDITIONAL STATUTORY PATERNITY PAY (ASSP)
QUALIFICATION FOR RIGHT	Employees who are biological father (or mother's husband or civil partner or partner, or husband or civil partner or partner of adoptive parent) and take leave to care for newborn or to support mother or adoptive parent		Earn at least NIC lower earnings limit for 8 weeks up to and including 15th week before EWC/week in which notified of match
QUALIFYING PERIOD	26 weeks' continuous employment by end of 15th week before EWC or ending with week adoptive partner notified of match		
DURATION	1 or 2 whole weeks	Minimum – 2 whole weeks. Maximum – 26 whole weeks. Latest can end is when their partner's additional maternity or adoption leave would have ended	SPP: 1 or 2 whole weeks ASSP: for period their partner would have been receiving statutory maternity or adoption pay
RATE OF PAY	n/a		Set rate
START DATE	Within 56 days of birth	– 20 or more weeks after birth/child placed for adoption; and – partner has returned to work from statutory maternity or adoption leave	SPP: at start of PAL ASSP: at start of APAL if in period their partner would have been receiving statutory maternity or adoption pay
NOTICE TO TAKE	Before end of 15th week before EWC, or within 7 days of notification of adoption	Not less than 8 weeks before start date	SPP: At least 28 days before start date. Usually satisfied by giving notice to take leave ASSP: As for APAL
EVIDENCE FOR ENTITLEMENT	Self-certificate and declaration by employee	Self-certificate and declarations by employee and partner	As for PAL and APAL
TERMS AND CONDITIONS DURING LEAVE	All terms except remuneration remain the same		n/a
WORKING DURING LEAVE	n/a	On agreement, employee can do up to 10 days' work during additional paternity leave	n/a
NOTICE TO RETURN	n/a	Once on leave, 6 weeks' notice if want to return sooner than end date	n/a

	PATERNITY LEAVE (PAL)	ADDITIONAL PATERNITY LEAVE (APAL)	STATUTORY PATERNITY PAY (SPP) ADDITIONAL STATUTORY PATERNITY PAY (ASPP)
JOB ON RETURN	Right to return to same job	If returning after 26 weeks or less additional paternity leave, right to return is same as for employees on ordinary maternity leave unless it is taken immediately after additional maternity/adoption leave or parental leave of more than 4 weeks (¶4469). Otherwise, same right as for employees on additional maternity leave (¶4474).	n/a
ENFORCEMENT AND REMEDIES	Right not to suffer detriment and right not to be unfairly dismissed in relation to above rights		

## A. Standard paternity leave

Eligible employees (including apprentices) are entitled to either 1 or 2 whole weeks' paid paternity leave where they wish to take leave to (regs 2, 4, 8 SI 2002/2788):

- **care** for a newborn or newly adoptive child; or
- **support** the child's mother or adoptive parent.

Parents of babies due on or after 3 April 2011, or parents who have received notification on or after 3 April 2011 that they have been matched with a child for adoption, also have a new right to **additional paternity leave** (¶4585). This enables those whose spouses/partners are returning to work early from maternity or adoption leave to take a certain period of leave effectively in their place.

As with every aspect of family-friendly rights, the employer can provide for more favourable contractual or non-contractual terms.

Paternity leave must also **be taken**:

- as either 1 or 2 whole weeks; and
- within 56 days of the date of birth or placement.

The employee can choose whether he/she takes 1 or 2 weeks.

The **earliest start date** is on the date of birth or placement.

### Eligibility

To be eligible for paternity leave, the employee must (regs 4, 8 SI 2002/2788):

**a.** have been **continuously employed** for 26 weeks:

- before the end of the 15th week before the EWC, be either the biological father of the child or the mother's husband, civil partner or partner; or
- ending with the week in which the adoptive parent is notified of being matched for adoption, be either married to or the civil partner or the partner of the adoptive parent; and

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**b.** have or be expected to have **responsibility for the upbringing** of the child where the employee is the child's father. Where the spouse, civil partner or partner of the adoptive parent is not the child's father, the employee must have or be expected to have the main responsibility along with the mother or adoptive parent.

With regard to adoption leave, where a **couple** is adopting jointly, they can choose which one takes adoption leave leaving the other to take paternity leave if desired.

**MEMO POINTS**

A **partner** is a person (of a different or the same sex) who lives with the mother or adoptive parent and the child in an enduring family relationship but is not a relative of the mother or adoptive parent. A relative in this context is a mother's or adoptive parent's parent, grandparent, sister, brother, aunt or uncle. Partners include **civil partners** (SI2005/2114).

With regard to taking paternity leave to support a spouse/civil partner/partner who is **adopting from overseas**, this is covered by s 80B ERA 1996; Employment Rights Act 1996 (Application of Section 80B to Adoptions from Overseas) Regulations SI 2003/920; Paternity and Adoption Leave (Adoption from Overseas) Regulations SI 2003/921; Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations SI 2003/499; Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) Regulations SI 2003/500; Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Administration) Regulations SI 2003/1192 and Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (No. 2) Regulations SI 2003/1194.

In such cases, the employee must receive an official notification. For further details, see the legislation listed above and the latest version of the BIS guide on parents adopting a child from overseas. Assistance can also be obtained from the Department of Health Intercountry Adoption Team.

## Employee notice and evidence

**4576** Employees must **notify** their employer **no later than** the end of the 15th week before EWC or no later than 7 days after being notified of having been matched with the child (regs 6, 10 SI2002/2788):

- of the EWC or the date which the adoptive parent was notified and the expected date of placement;
- whether 1 or 2 weeks of leave is to be taken; and
- the chosen start date.

In practice, most employers will accept the chosen start date as “on the date of the child's birth” together with the date of the mother's EWC as sufficient.

**4577** The employee must give **further notice**, as soon as reasonably practicable, of the actual date of birth or placement.

**4579** **Failure to give adequate notice** must be disregarded if it was **not reasonably practicable** for the employee to notify his/her employer correctly and in time. In such cases, it must be done as soon as it is reasonably practicable.

**4580** **Changing start date:** the employee can change the start date (regs 6 (4), 10 (4) SI2002/2788). Consequently, if the employee wants to vary the date to:

- the **date of birth or placement**, the employee must give at least 28 days' notice before the first day of the EWC or the expected date of placement;
- a date that is a **set number of days** after the date of birth or placement, the employee must give at least 28 days' notice before that set number of days taken after the first day of the EWC or the expected date of placement; or
- **another set date**, the employee must give at least 28 days' notice before that date.

He/she can choose to further vary the start date using the same procedure. Each change must be notified in writing if requested.

**4581** **Evidence of entitlement** The **employer can request** that (regs 6(3), 10(3) SI2002/2788):

- a.** the notices are given in writing; and
- b.** the employee provides a signed declaration as evidence of his/her entitlement. This must state that:
  - the employee is taking the leave to care for a newborn or newly adoptive child or to support the child's mother or adoptive parent;

- the employee is either the biological father of the child, the mother's husband/civil partner/partner, or spouse/civil partner/partner of the adoptive parent; and
- the employee has or is expected to have the main responsibility (apart from any responsibility of the mother/main adoptive parent) for the child's upbringing.

HMRC provides **model self-certificates and declarations** (Form SC3 (Becoming a parent) and Form SC4 (Becoming an adoptive parent)) which can be used.

## Rights during leave and on return

All terms except remuneration remain the same during leave and the employee has the right to return to the same job.

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## B. Additional paternity leave

Parents of babies due on or after **3 April 2011**, or parents who have received notification on or after 3 April 2011 that they have been matched with a child for adoption, have a new right to additional paternity leave. This enables **eligible employees** (¶4574; regs 4, 14 SI2010/1055) whose spouses/partners are returning to work early from maternity or adoption leave to take a certain period of leave effectively in their place.

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**MEMO POINTS** With regard to taking paternity leave to support a spouse/civil partner/partner who is **adopting from overseas**, this is covered by s 80BB ERA 1996; Employment Rights Act 1996 (Application of Section 80BB to Adoptions from Overseas) Regulations SI 2010/1058; Additional Paternity Leave (Adoption from Overseas) Regulations SI 2010/1059; Additional Statutory Paternity Pay (Adoptions from Overseas) Regulations SI 2010/1057; and Additional Statutory Paternity Pay (Birth, Adoption and Adoptions from Overseas) (Administration) Regulations 2010 SI 2010/154.

The employee will only be able to **start** his/her additional leave:

- 20 or more weeks after the child's birth or placement; and
- after his/her partner has returned to work from statutory maternity or adoption leave.

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The **minimum** amount of additional paternity leave that can be taken is 2 weeks and the **maximum** period is 26 weeks (regs 5, 15 SI 2010/1055). Additional paternity leave must be taken in multiples of complete weeks and must be taken as one continuous period.

The **latest** that additional leave **can end** is the date at which his/her partner's additional maternity or adoption leave would have ended, i.e. the end of the 52nd week after his/her partner's statutory maternity or adoption leave began.

**MEMO POINTS** In circumstances where the **mother/main adopter dies within 12 months of the child's birth/placement for adoption**, there are various modifications (regs 10-13, 20-23 SI 2010/1055). In such cases, the employee's entitlement may be to a longer period of leave starting earlier than it would otherwise have done and with different notification requirements.

### 1. Starting leave

## Notification and evidence

**Not less than** 8 weeks before their chosen start date, employees must give their employers (regs 6, 16 SI 2010/1055):

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1. **written notice** as to their intention to take additional paternity leave which specifies:
  - the week which was the baby's expected week of birth and the date of birth or the date on which their partner was notified of having been matched with the adopted child and the date on which they were placed; and
  - the requested start date and end date;
2. a **written signed declaration** which states that:
  - the employee is taking the leave to care for a newborn or newly adoptive child or to support the child's mother or adoptive parent;

- the employee is either the biological father of the child, the mother’s husband/civil partner/partner, or spouse/civil partner/partner of the adoptive parent; and
- the employee has or is expected to have the main responsibility (apart from any responsibility of the mother/main adoptive parent) for the child’s upbringing; and
- 3. a **written declaration by the mother/main adoptive parent** which states:
  - their name and address;
  - that they have given notice to their employer that they intend to return to work and the date they intend to return to work;
  - their NI number;
  - that the employee is either the biological father of the child, the mother’s husband/civil partner/partner, or spouse/civil partner/partner of the adoptive parent and that the employee has or is expected to have the main responsibility (apart from any responsibility of the mother/main adoptive parent) for the child’s upbringing;
  - that the employee is, to the mother’s/main adoptive parent’s knowledge, the only person exercising the entitlement to additional paternity leave (and pay if applicable) in respect of the newborn/newly adoptive child;
  - that the mother/main adoptive parent consents to the employer processing such information as is contained in the declaration; and
  - for additional statutory paternity pay purposes if applicable, the start date of their maternity pay/maternity allowance/adoption pay period.

**4588** Employers **can request** within 28 days of receiving the leave notice a copy of the child’s birth certificate/one or more documents issued by the adoption agency which state the name and address of the agency, the date on which the adoptive parent was notified of the match and the expected date of placement, and the name and address of the mother’s/main adoptive parent’s employer (or, if he/she is self-employed, his/her business address) (regs 6(3), 16(3)SI 2010/1055).

Employees must provide this within 28 days of receiving the request.

### Changing date(s), cancelling or withdrawing leave

**4590** Before additional paternity leave starts, the employee can change his/her start or end date or cancel his/her leave by giving **written notice** 6 weeks before the new date or the date being cancelled or varied or, if this is not possible, as soon as is reasonably practicable (regs 7, 17SI 2010/1055). Likewise, if the employee wishes to return earlier than the agreed date (¶4587) once on additional paternity leave, he/she can do so if he/she gives at least 6 weeks’ notice (¶4598).

If, after giving leave notice, the employee no longer becomes entitled to additional paternity leave, the employee must give written notice (“withdrawal notice”) as soon as reasonably practicable (regs 6, (16)SI 2010/1055). This will apply if the information in the signed declaration no longer applies or if or the mother/main adoptive parent is no longer entitled to maternity/adoption leave, statutory maternity pay/maternity allowance or statutory adoption pay or does not return to work (¶4485).

In all instances, if the employee **fails to give enough written notice**, or to give any notice at all, and if it is not reasonably practicable for the employer to accommodate the change in arrangement, the employer can require the employee to take up to 6 weeks’ APAL starting on the date the employee originally requested (or any previously rearranged date) and ending no later than 6 weeks after any written notice to change, cancel or withdraw or until the original agreed end date, whichever is earlier. Likewise, where the employee has given a withdrawal notice after the period of additional paternity leave has begun and where it is not reasonably practicable for the employer to accommodate the change in arrangements, failure to give proper notice entitles the employer to postpone the employee’s return until the notice requirement has been satisfied or until the original agreed end date, whichever is earlier.

## Employer notification of dates

As a result of an employee's notice (¶4587) or when the employee gives a proposed or varied date(s) (¶4590), the employer must give **written** confirmation of the relevant dates (regs 8, (18)SI2010/1055).

This document must be sent **within** 28 days of notification unless the employee has notified his/her employer of a change to his/her start or end date, in which case the employer must give notice of the new end date within 28 days of the varied start date. Where the employer requires the employee to take a period of additional paternity leave as set out in ¶4590, the employer must notify the employee of the dates of that leave as soon as reasonably practicable, and in any event before the start of the leave.

**4592**

## CHAPTER 16

## Equality at work

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Discrimination on the grounds of **age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation** is prohibited. Discrimination is now legislated for in the Equality Act 2010 (EqA 2010), which collectively refers to these grounds as “protected characteristics”.

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Where men and women are paid differently for work of equal value, members of either gender may bring a claim under the sex discrimination provisions of the EqA 2010 in certain circumstances, but there is also an additional form of action regarding **equal pay** (also included within the EqA 2010), which is discussed in section 2.

The most common **remedy** for a successful discrimination complaint is compensation and, unlike most other tribunal claims, there is no cap on the amount which may be awarded.

Discrimination or pay inequality may also give rise to:

- **contractual claims**, including constructive dismissal or unlawful deduction of wages;
- **common law claims**, for example, psychiatric injury; or
- **non-discrimination claims** under **other legislation**.

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Workers who experience workplace bullying due to the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex or sexual orientation may also bring claims for **harassment**.

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The following illustrations of discrimination are discussed outside this chapter:

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Illustrations of discrimination in relation to:	¶¶¶
Pre-employment: advertisements, recruitment and selection procedures	¶¶540 +, 570+
Terms of employment including mobility clauses	¶¶1330, 1625
Training	¶¶6340+
Appraisal and promotion	¶6468
Pensions	¶3435

## EqA 2010

The EqA 2010 **consolidates** the law relating to discrimination and inequality, and **harmonises** the provisions of the predecessor legislation to give a single approach where appropriate. The majority of the EqA 2010 came into force on 1 October 2010. All of the previous legislation covering the various strands of equality law, including equal pay (collectively referred to as ‘predecessor legislation’), have been repealed. However, **transitional provisions** stipulate that the predecessor legislation will remain relevant in cases where the act of discrimination complained of took place and was completed prior to 1 October 2010. For acts of discrimination that commenced prior to 1 October 2010 and continued after this date, the provisions of the EqA 2010 will apply (EqA 2010 (Commencement No. 4, Savings, Consequential, Transi-

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tional, Transitory and Incidental Provisions and Revocation) Order SI 2010/2317). At the time of publication, it is possible that some cases will still be running that relate to claims brought under previous legislation, therefore differences between the old and new law have been highlighted throughout the chapter. Where the law has remained unchanged, we will give statutory references to the EqA 2010 only. Much of the case law decided before the EqA 2010 came into force remains relevant under the new provisions, and unless stated otherwise, cases referred to will apply both to the EqA 2010 and predecessor legislation.

The EqA 2010 covers the following **protected characteristics**:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pay discrimination (equal pay);
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation;

The Act covers the same **forms of discrimination** (with some changes to definitions) as the previous legislation, and adds two new forms. The forms of discrimination which have been re-enacted are:

- direct discrimination;
- indirect discrimination;
- in the case of disability, failure to make reasonable adjustments;
- victimisation; and
- harassment.

The **two new statutory forms** of discrimination are:

- **associative** discrimination (treating a person less favourably because of his association with someone with a protected characteristic, for example the carer of a disabled person); and
- **perceptive** discrimination (treating a person less favourably because he is perceived to have a protected characteristic, even if he does not in fact possess that characteristic).

Some elements of the EqA 2010 have **yet to come into force**. This includes a new area of protection: **intersectional multiple discrimination claims**. Such a claim would apply where a person has experienced direct discrimination because they have a combination of two of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation. For example, black women may experience discrimination because of stereotyped attitudes or prejudice, which white women and black men in the same circumstances would not encounter. Details of when and if this provision is likely to come into force will be covered in our updating service.

**MEMO POINTS** The Government has announced that it will not be going ahead with plans to require companies with more than 250 employees to publish **gender pay audits** from 2013. The plans would have been incorporated into the EqA 2010 and employers who failed to comply with the requirements could have faced civil and criminal penalties, including fines of up to £5,000. Employers are instead being encouraged to audit and publish pay information on a voluntary basis.

This announcement follows the recent decision not to enact the proposed measures to compel **public bodies** to reduce inequalities caused by socioeconomic background, which would also have formed part of the EqA 2010.

## CHAPTER 18

# Training and performance

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**Training** ensures that employees have the **requisite skills** for their job. Further, developing employees' skills and abilities so that they can progress within the company should assist in their retention as well as ensuring a skilled and able workforce. Although there is no implied term requiring an employer to train an employee, failure to adequately train, properly instruct or support an employee may result in a variety of legal consequences.

As well as training employees, employers may also have **trainees and apprentices**, who are required to undergo specific training and are subject to special rules. There are also a number of government-backed training **initiatives** that help young people and those who may find it more difficult to return to work.

Finally, **work experience** can be a useful tool for those who would like to find out more about and gain experience in a particular job or organisation. Employers also benefit in gaining an opportunity to assess and encourage young graduates. Work experience can take a variety of forms: sandwich or work placements, participation in work-based projects, work shadowing, internships, and voluntary, part-time and vacation work.

**MEMO POINTS** With regard to work experience, readers are referred to the National Council for Work Experience at [www.work-experience.org](http://www.work-experience.org) for more information.

**Union learning representatives** (ULRs) are another potentially useful resource in the training of the workforce.

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**6302** The following groups are specifically **entitled to paid time off** to study or train:

Type of employee	Purpose of time off	¶¶
Under notice of redundancy	Make arrangements for training for future employment	¶8885
Young persons	Study or training for a relevant qualification	¶6330
Trade union representatives	Undergo training so that they can carry out their duties	¶7153
Union learning representatives	Carry out training and learning functions	¶7155
Safety representatives and representatives of employee safety	Undergo training so that they can carry out their duties	¶4930
Employee representatives and candidates in election	Undergo training so that they can carry out their duties	¶8931
Trustees of occupational pension scheme	Undergo training so that they can carry out their duties	¶3432

**6303** The Apprenticeships, Skills, Children and Learning Act 2009 has **introduced a new right to request time off to undertake relevant training**. This is being **phased in** and has been in force for large businesses with 250 or more employees since April 2010. Such requests need to meet certain conditions in order to qualify for the scheme. See section 2 at ¶6400 for further details.

**6304** There are various methods of **monitoring and assessing performance** of employees. On a larger organisational scale, benchmarking is often used to measure standards.

## SECTION 2

### Time to train applications

**6400** The Apprenticeships, Skills, Children and Learning Act 2009 introduces a new right to request time off to undertake relevant training (s 40 Apprenticeships, Skills, Children and Learning Act 2009 which inserts ss 63D-63K into the ERA 1996). This has been in force for large businesses with **250 or more employees since 6 April 2010** and had been set to in force for **all other employers** from 6 April 2011. The postponement of the wider implementation of this right by the coalition Government was announced on 16 February 2011 and further developments will be covered by our updating service. A qualifying condition of 26 weeks continuous employment applies and certain groups are excluded. However, employers are free to offer enhanced rights so, for example, they may wish to offer the right to all employees so that they use the same procedure to formally consider training requests from all their staff.

While employee requests may involve agreeing time away from their duties, the primary focus of the new right is employers agreeing relevant training with their staff. The entitlement does not give employees the right to time off and, if the employer refuses an application, the tribunals cannot force the employer to give the employee time off. Rather the right is a **procedure** that employees can use to facilitate the discussion for and mutual agreement of taking time off to undertake training that is relevant to their work (be it in their current role or in a future one). Consequently, the **initial onus** is on the employee to present a carefully thought-out application well in advance of when he would like the time off to train/study. On receipt of an application, the employer must follow a set procedure, with him only refusing a request where the study or training will not help the employee's productivity or performance, or there is a clear business reason for doing so. It is up to the employer and employee to agree as to how to meet any costs. There is no obligation on the employer for the time off to be paid, or for the employer to pay for the training. In practice, many employers

may agree to paid time off and/or paying for or contributing towards training, recognising the value of the investment.

The process is similar to that for requests to work flexibly (¶4690). The extent to which this new time to train right is used will undoubtedly depend of what else the employer already has in place, for example employees may already be raising their training and development needs at annual performance reviews.

**MEMO POINTS** In certain circumstances a **young person** has the **right to take paid time off work** for study and training, see ¶6330.

## Type of study or training

The study or training **must** set out to **improve** both the employee's effectiveness and the performance of the employer's business (s63D(4)ERA 1996).

Study or training is a broad concept and can follow accredited programmes (leading to the award of a recognised qualification) or shorter unaccredited training sessions that help employees develop specific skills relevant to their job, workplace or business. This includes training or study (s63E ERA 1996):

- undertaken on the employer's premises or elsewhere (including at the employee's home);
- undertaken by the employee while performing his duties of employment or separately;
- provided or supervised by the employer or by a third party (for example, an external provider or college);
- undertaken without supervision;
- undertaken within or outside the United Kingdom; and
- that leads or does not lead to the award of a qualification.

## Qualifying employees

The right only applies to employees who have been **continuously employed** for at least 26 weeks (s63D(6)ERA 1996; SI 2010/800).

**Exclusions** Further, **children and young persons** whose learning needs are already catered for in other ways are excluded (s63D(7)ERA 1996). This category includes:

- those of compulsory school age;
- those who are 16 or 17 years old who have a duty to participate in education or training (once that duty comes into force); and
- young persons who already have a statutory right to paid time off for study or training (¶6330).

**Agency workers** are also specifically excluded (s63D(7)(e)ERA 1996).

## A. Making a request

**Form and content of application** The application must be **dated and in writing** and can be by letter, on a form provided by the employer or by email (reg 4 SI 2010/156).

If an employee has **previously made an application**, he **must wait** a year before making a further application to the same employer (s63F(1)ERA 1996). However, employers must **ignore an earlier application**, at an employee's request, even where it is within a year of the current application, if (reg 3 SI 2010/155):

- a.** the employee failed to start the agreed study or training due to:
  - an emergency or unforeseen circumstance beyond his control; or
  - the cancellation of the study or training (unless this was the employee's responsibility); or
- b.** where the employee makes a mistake and applied too soon after his last request and has told his employer about his mistake when making his next application and has asked for the earlier application to be withdrawn.

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- 6411** The application must (s 63D(5), s 63E(4) ERA 1996; reg 3 SI 2010/156):
- a.** state that the **application** is being **made under** the statutory right to request time off to train (i.e. that it is made under “Section 63D of the Employment Rights Act 1996”);
  - b.** give details of the **proposed study or training**, including:
    - the subject matter;
    - where and when it will take place;
    - who will provide or supervise it; and
    - what qualification (if any) it will lead to;
  - c.** explain **how** the employee thinks the proposed study or training will **improve**:
    - the employee’s effectiveness in the employer’s business; and
    - the performance of the employer’s business; and
  - d.** give the date and method of submission (i.e. by letter, form or email) of any **previous application**.

- 6412** As best practice employers should **acknowledge** the application. Alternatively, if the employee has **failed to provide all of the required information**, it is good practice to inform the employee of what he has omitted and ask him to re-submit the application.

## CHAPTER 25

## Ending employment

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## D. Retirement

A retirement is normally considered a **dismissal** by the employer. If an employee chooses to take **early retirement**, this will usually be a **resignation** rather than a dismissal (in some cases it will be a termination by **mutual agreement** – ¶8260).

On retirement, the employee may be entitled to certain **benefits** (in particular, a **pension**).

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### 1. Retiring age

**Retirement dismissals taking place after abolition of default retirement age** The Government has confirmed plans to abolish the default retirement age of 65 by October 2011. Along with the default retirement age, the accompanying retirement procedure (Sch 6 SI 2006/1031; ¶¶8210+) and retirement as a fair reason for dismissal (s 98 ERA 1996) will also be abolished (which due to transitional provisions may apply in certain circumstances until 6 April 2012).

At the time of publication, the regulations were in draft form only, and further developments will be included in our update service. It is not expected that the draft regulations will change, and according to them, it is possible to retire employees using the old provisions on or before **5 April 2012** provided that the retiree obtains the **age** of 65 (or the employer's normal retirement age) on or before **30 September 2011** and **notice** to retire is given on or before **5 April 2011** (¶¶8210+). This is the last day to provide notice (which to be valid must be between 6 to 12 months) and employers cannot issue notices relying on the default retirement age after this date. It is key to remember that the notice will only be valid if the retiree obtains the age of 65 (or the employer's own normal retirement age) on or before 30 September 2011.

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**Retirement dismissals taking place before abolition of default retirement age** Where an employer wishes to use the default retirement age or his own compulsory retirement age for dismissals that will take place prior to its abolition, the following applies.

Where an employer follows the set **retirement procedure** (¶¶8210+) correctly, the employer **can rely** on his normal retirement age (NRA) (provided it does not amount to unlawful age discrimination if it is under 65), or the default retirement age of 65, for dismissing an employee on the grounds of retirement, without facing liability for unfair dismissal or unlawful age discrimination. See ¶¶5600+ for a detailed discussion of the age discrimination legislation.

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**MEMO POINTS** 1. Note that the **requirement to follow** a retirement procedure and the default retirement age of 65 only applies to “employees” within the meaning of s 230 ERA 1996, rather than the wider group of employees to whom the equality legislation is applicable generally (s 230 ERA 1996).

2. **Prior to** the outlawing discrimination on ground of age in **October 2006**, an employee aged over 65 could not claim unfair dismissal. In a case concerning a cleaner who was dismissed from his post at the age of 82 before the age discrimination legislation came into force, the EAT considered whether the ECJ case of *Mangold v Helm* (see memo point to ¶5639) had the effect of making this prohibition unlawful on the grounds that the ECJ ruled in this case that a claimant acquired the right to bring an action under a Directive from the date of its enactment, and this right over-rode subsequent national legislation which offended against the Directive (*Lloyd-Briden v Worthing College* [2007] UKEAT 0065\_07\_2206). The EAT held that since the UK's domestic legislation was not in breach of the UK's obligations under the Directive, it was not necessary for there to be a direct operation of the Directive and there was no need to address the question of whether the anti-discrimination provisions could apply earlier in time than the 2006 implementation of the Directive into UK law.

3. Non-discrimination on grounds of age is a general principle of EU law. It does not follow, however, that **compulsory retirement ages** are in fact contrary to European law. In a case concerning a collective agreement which regulates the Spanish textile trade, the European Court

of Justice (ECJ) has held that compulsory retirement ages are not contrary to European anti-discrimination law where they are objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market, and where the means put in place to achieve that aim are not inappropriate or unnecessary (*Palacios de la Villa v Cortefiel Servicios SA*, Case C-411/05 [2007] IRLR 989, ECJ).

Likewise, the ECJ has also held, in a long-standing case (commonly known as the *Heyday* litigation) concerning the compatibility of the then UK age regulations with the EC Equal Treatment Amendment Directive, that it is permissible to have a **default retirement age** provided that it is justified by reference to legitimate aims, which in this case would be social policy objectives (*R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07 [2009] IRLR 373, ECJ). The Court confirmed that the Directive did not require member states to set out an exhaustive list of factors justifying exemptions from the Directive. The case returned to the High Court, which held that the UK default retirement age of 65 was justified by social policy objectives, including facilitating workforce planning and avoiding an adverse impact on occupational pensions (*Age UK, R (on the application of) v Attorney General* [2009] IRLR 1017, HC(Admin)). It commented, however, that had the review of the default retirement age not been brought forward to 2010 it would not necessarily have come to the same conclusion.

**8202** Consequently, an employer can retire employees, or set **retirement ages, at or above the default retirement age** of 65 without such retirements amounting to unlawful age discrimination (¶5611) or unfair dismissal (¶8380).

Where an employee has a **normal retiring age (NRA) over the default retirement age** (¶8206) which is applicable to him, an employer may be liable for unlawful age discrimination if he dismisses the employee on retirement grounds before he has reached that normal retiring age. Furthermore, an employer can only retire an employee at an age which is **lower than the default retirement age** without infringing the age discrimination legislation if such lower age can be justified, i.e. the employer can demonstrate that it is a proportionate means of achieving a legitimate aim (outlined at ¶5615) (*Seldon v Clarkson Wright and James* [2010] EWCA Civ 899, which emphasised the need for justification in a case where the default retirement age did not apply – the same principles will apply where the employer seeks to retire employees lower than the default retirement age). In this case, the Court of Appeal confirmed that, at least in respect of a partnership, a compulsory retirement age of 65 may be justified by such aims as (*Seldon v Clarkson Wright and James* [2010] EWCA Civ 899):

- providing promotion opportunities for younger employees;
- facilitating succession planning; and
- promoting a good working environment by reducing the potential for performance management procedures to arise involving older workers.

The Court noted in particular that, between partners, there was equal bargaining power, and this was part of the basis for their decision on justification. It may be, therefore, that such arguments are less likely to succeed in an employment case on justifying a retirement age.

In order to avoid liability for unfair dismissal, an employer must follow the **fair retirement procedure** set out below at ¶8210. When considering the fairness or otherwise of a retirement procedure, it is necessary to not only consider any applicable contractual retiring age (CRA), but also to determine the normal retiring age (NRA) of the particular employee concerned. The **fairness** or otherwise **of retirement dismissals** is discussed at ¶¶8515-8519.

## Contractual retiring age

**8203** The employer may have a **retirement policy** giving a contractual retiring age for the employment (referred to here as the CRA), or one may have arisen by virtue of an established **custom or practice** (¶1180). Note that mere comments made at a job interview regarding the retirement age of the position's predecessor cannot be interpreted as implying a commitment by the employer that the job applicant can retire at the same age as his predecessor (*Tarbert (Loch Fyne) Harbour Authority v Currie*, EAT(S) case 0033/05).

If the employer wishes to **change the CRA**, the normal principles of variation of contract (as discussed at ¶1600) apply.

**8204** In order to **avoid liability for sex discrimination**, the CRA must be the same for men and women (*Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] IRLR 140,

ECJ). The **state pension age** cannot be a CRA as it differs according to sex (currently 60 for women, 65 for men). The CRA may, however, differ for **different occupations**.

**MEMO POINTS** The **state pension age** is to be equalised at age 65, to be phased in over 10 years from 6 April 2010 (Pensions Act 1995).

**Pensionable age under occupational pension schemes** (which must also be the same for men and women as pension is “pay” for the purposes of EU equal pay provisions (*Barber v Guardian Royal Exchange Assurance Group* [1990] IRLR 240, ECJ)) is distinct from both the state pension age and any CRA, although it can be the same.

The Department of Work and Pensions (DWP) **code of practice** gives standards of good practice in employment, although it has no formal statutory authority (Code of Practice on Age Diversity at Work). The code **recommends** that employers:

- base any retirement policy on business needs while also giving individuals as much choice as possible;
- carefully evaluate the loss to their business in terms of skills and abilities in cases of early retirement and consider alternatives to early retirement;
- avoid using age as the sole criterion for early retirement schemes (subject to pension rules);
- use flexible retirement schemes, where possible;
- use phased retirement, where possible, to allow employees to alter the balance of their working and personal lives and prepare for full retirement (also preparing the business for the loss of the employee’s skills); and
- make pre-retirement support available for employees.

## Normal retiring age

If there is a contractual retiring age (**CRA**) (§8203), which is well known and observed, this is the normal retiring age (referred to here as the **NRA**). Where there is **no CRA**, the **NRA** in respect of an employee is the normal retiring age for employees in the employer’s undertaking who hold, or have held, the same kind of position as the employee concerned.

Where there is no **CRA**, or there is a **CRA** but it is not well known and observed, **in order to determine the NRA**, one must examine the reasonable expectations of the group of employees holding the employee’s position at the date of dismissal. The relevant group is identified by reference to their status, nature of work and terms of employment, including any terms dealing in particular with retirement (*Barber v Thames Television plc* [1992] IRLR 410, CA). The expectations of the group are determined by reference to the group in general and not merely those employees approaching retirement (*Brooks v British Telecommunications plc* [1992] IRLR 66, CA). Normal is not to be equated with usual, which suggests a narrow, statistical approach.

If the employee occupies a **unique position**, in that there is no other employee employed by the undertaking with the same job, it does not mean that such an employee does not have an **NRA** (*Wall v British Compressed Air Society* [2004] ICR 408, EAT; confirmed on appeal [2004] IRLR 147, CA). In such cases, the **NRA** will ordinarily be the **CRA**.

**MEMO POINTS** Note that an employee’s **NRA does not transfer** under TUPE (*Cross and anor v British Airways plc* [2006] ICR 1239, CA). See chapter 24 for further details.

If the **CRA is expressly abandoned** or **regularly departed from** in practice, it will be displaced as the **NRA** as the group’s reasonable expectations will have changed (*Waite v Government Communications Headquarters* [1983] IRLR 341, HL; *Whittle v Manpower Services Commission* [1987] IRLR 441, EAT). However, **limited exceptions** to the **CRA** will not displace it as the **NRA** (*Barclays Bank plc v O’Brien* [1994] IRLR 580, CA).

If the employer lawfully **changes the CRA** and the relevant employees are made aware of this change, their expectations will also change and the **NRA** will be altered (*Barclays Bank plc v O’Brien*).

If, however, the employer attempts to **lower the CRA in breach of contract**, it seems that the **NRA** will not be affected (*Bratko v Beloit Walmsley Ltd* [1995] IRLR 629, EAT). If the employee

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refuses to agree to a lower CRA, the employer could terminate the current contract by notice and offer new employment on revised terms (¶1655).

**8208**

On the basis that an employee with a CRA has a reasonable expectation that he will not be retired before this age, the **NRA cannot be lower than the CRA** (*Royal and Sun Alliance Insurance Group plc v Payne* [2005] IRLR 848, EAT). An employer who unilaterally makes the NRA lower than the CRA will therefore be acting in breach of contract.

## CHAPTER 27

**Employment claims**

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## SECTION 2

### Tribunal claims

**9500** The **litigation process is commenced** by lodging a claim. If the other party wishes to defend the proceedings, he will need to file a response.

**MEMO POINTS** The Government has published **proposals** to charge fees for tribunal cases and appeals. Further developments will be covered by our updating service when available.

**9501** In order to bring cases to a hearing as quickly and efficiently as possible, and to ensure that the issues to be determined at the main hearing are clear both to the parties and the tribunal, the tribunal may deal with the following matters **before the main hearing** (and these can be the subject of an **interim order** granted by the tribunal):

- the contents of the claim and the response;
- disclosure and exchange of documents;
- witness statements and witness orders;
- the issue of a default judgment in an uncontested case; and
- striking out of hopeless cases.

Pre-hearing procedure is covered at ¶9530.

**9502** Tribunal procedure **at the main hearing** (discussed at ¶9600) aims to ensure the fair and efficient handling of the case, with rules governing the composition of the tribunal, representation, publicity and evidence.

Tribunals can **decide** cases **without any hearing** if all the parties have consented in writing (ss 7(3A), (3AA) Employment Tribunals Act 1996 as amended by the Employment Act 2008).

Consent of parties is not required with regard to **default judgments** issued without a hearing (¶9526).

**9503** Tribunal decisions may be **appealed** on points of law to the Employment Appeal Tribunal (EAT), and from there, to higher courts. Appeals are discussed further at ¶9740, together with details on relevant European issues.

## Publicity

Following a ruling by the Information Commissioner under the Freedom of Information Act 2000, the **names and addresses of respondents** in employment tribunal proceedings can be **disclosed**. The ruling will not apply to claimants' details, which will continue to be confidential. The Secretary of the Employment Tribunal Office is also responsible for maintaining a **public register** of applications, appeals and decisions (¶¶9517, 9698).

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Further, since 1 April 2009, **employers who fail to pay awards** made by employment tribunals or the EAT, and who have had enforcement proceedings brought against them, will be entered onto the **Register of Judgments, Orders and Fines**. This register is available to the public and is used by banks, building societies and credit companies when considering applications for credit.

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## I. Commencement of proceedings

### Commencement of a claim

A claim is commenced by presenting details of the claim in writing to an Employment Tribunal Office (rule 1(1) ETR). Presentation may be carried out by post or fax, or online via the Employment Tribunals' website.

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The claim should be **addressed** to the Secretary of the Employment Tribunal Office (the "Secretary"). The Secretary will submit it to the appropriate regional Employment Tribunal Office. These offices are set up to cover specific geographic areas and each has a Regional Secretary who deals with the administration of the employment tribunal within his region. Any function of the Secretary may be performed by the Regional Secretary or by a person acting with the authority of the Secretary (rule 60(3) ETR). The term Secretary will be used throughout this section even though a Regional Secretary may be acting with his authority. The **appropriate Regional Office** might be the one that covers the postcode area specified in the ET1 Form, i.e. where the claimant worked or where the subject matter of the complaint occurred, although it could also be presented either at the Central Office or at any other regional Employment Tribunal Office (rule 61 ETR).

**Form** A standard form (**Form ET1**) is mandatory (SI 2005/435). This form, which can be obtained from tribunals and from Jobcentres, requires the **following information** to be given:

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- the name and address of the employee ("the claimant");
- a UK address for correspondence, if different;
- the name and address of those against whom the case is brought ("the respondent(s)");
- the grounds on which relief is sought (i.e. sufficient information to show what sort of complaint is being made); and
- if whether since leaving the employment of the respondent, the claimant has obtained new employment and, if so, the details of his new salary.

Where a claimant is required to provide minimum information in his claim form, his failure to do so should not immediately render it inadmissible (*Richardson v U Mole Limited* [2005] IRLR 668, EAT).

In other cases on the admissibility of claim forms, the EAT has repeatedly criticised the Rules and emphasised that they must **not be interpreted** so as to **deny a claimant access** to the tribunal system (*Grimmer v KLM Cityhopper UK* [2005] IRLR 596, EAT) and that they are "simply a procedural vehicle to enable important statutory claims to be advanced before the tribunal service" (*Hamling v Coxlease School Ltd* [2007] IRLR 8, EAT).

Consequently, a claimant will have given sufficient details of a **complaint** if it **can be discerned** from the details provided on the claim form that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the tribunal. This

threshold for access should, in the interests of justice, be kept low. If it becomes necessary, as a case proceeds, for additional information to be obtained (for example, to clarify the issues) this can be requested, either by application from either party or by the judge on his own initiative (¶9539).

Likewise, **whether** any **omission is relevant** and, if so, whether it is also **material** has to be answered in the affirmative before a claim form can be rejected for being incomplete. In *Hamling v Coxlease School Ltd*, the fact that the claimant's solicitors' address was given instead of her own was not relevant or material as the form had been submitted and signed by the solicitors on the claimant's behalf, full particulars for the representatives had been given and the form indicated that if representative details were given all further communication would be with the representative.

**MEMO POINTS** If a claimant fails to use the form, his claim will be returned to him together with an explanation of why the claim has been rejected and a copy of the prescribed form (rule 3(1) ETR).

**9512 Presentation** The claim may be **presented** by hand, post or electronic communication (rule 61(1) ETR). Claims can also be submitted online on the Employment Tribunals' website, see [www.employmenttribunals.gov.uk/claim/claiming\\_responding.htm](http://www.employmenttribunals.gov.uk/claim/claiming_responding.htm)

It is presented upon **receipt** in the tribunal office (*Hammond v Haigh Castle & Co Ltd* [1973] 2 All ER 289, NIRC). A claim is **deemed** to have been **received** (unless proved otherwise) either when delivered in the ordinary course of the **post** or (in the case of **personal delivery**) on the date of delivery (rule 61(2) ETR). **Online applications** will usually be received very shortly after being sent. When submitting a claim online it is important to ensure that the claimant's place of work is stated where it is different from the employer's address. Otherwise the central server may relay the form to the wrong jurisdiction, for example where the claimant worked in Scotland, but the employer's address was in England (as happened in *McFadyen and ors v PB Recovery Ltd and ors* [2009] UKEAT 0072\_08\_3107).

It is advisable that **confirmation of receipt** should always be obtained.

For discussion of the **timing** of presentation see ¶9450.

**9513 Pre-acceptance procedure** When the claim is received, the Secretary will **review** it to establish whether or not the claim (or part of it) can be accepted by the tribunal (rule 2(1) ETR).

A claim will **not** be **accepted** if one or more of the following circumstances applies (rule 3(1), (2) ETR):

- the mandatory claim form has not been used;
- the claim form does not include all the relevant information required; or
- the tribunal does not have power to consider the claim (for example, if it seeks a relief which the tribunal does not have power to give).

The Secretary will refer the claim, together with his statement of reasons for not accepting it, to the judge who will decide whether the claim (or part of it) should be allowed to proceed. The Secretary will inform the claimant in writing of the judge's decision as soon as reasonably practicable, together with information on how that decision may be reviewed or appealed (rule 3 ETR).

**MEMO POINTS** The claimant can apply to the tribunal to **review its decision** not to accept his claim on the grounds that the decision was wrongly made as a result of an administrative error or that it is in the interests of justice to do so (see ¶9720 for further details).

**9514 Tribunal action on acceptance of claim** If the claim (or part of it) is accepted, the **Secretary sends a copy** of it to each respondent and records in writing the date on which it was sent (rule 2(2)(a) ETR). He will give **notice to every party** (in writing) of the case number which has been assigned to it and the address to which notices and other communications to the Secretary must be sent (rule 2(2)(b) ETR). The Secretary sends a **further notice to the respondent** which includes information about the means and time limit for entering a response to the claim, the consequences of the failure to do so and the right to receive a copy of the decision.

**MEMO POINTS** If only **part of a claim** is **accepted**, the Secretary will inform the parties which part(s) of the claim have not been accepted and that the tribunal will not deal with those part(s) unless they are accepted at a later date.

The Secretary must notify the parties (in every case where legislation provides for conciliation) that the **services of a conciliation officer** may be available to them (rule 2(2) (d) ETR) (§9218).

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**Copies of all documents** and notices in the case are sent by the Secretary to:

- an appropriate conciliation officer, if relevant;
- the Secretary of State for BIS if the proceedings may involve payment out of the National Insurance Fund (for example where a redundancy payment or notice pay is being claimed from an insolvent employer); and
- the Equality and Human Rights Commission in equal pay, sex, race and disability discrimination cases.

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The Secretary is responsible for maintaining a **public register** of applications, appeals and decisions. The Secretary must enter a copy of the following documents in the register:

- a. any judgment (including any costs, expenses, preparation time or wasted costs order); and
- b. any written reasons provided in relation to any judgment (unless the evidence has been heard in private and the tribunal or judge orders otherwise).

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**MEMO POINTS** In cases which involve allegations of the commission of a **sexual offence**, the Secretary can omit or delete from the register or any judgment, document or record of proceedings any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation (§9583).

**Multiple claimants** Often, a number of claimants will have identical or very similar cases, for example, where a large number of claimants have been made redundant by the same employer. In such cases the tribunal can order one claimant to represent the interests of all the claimants, order all the applications to be heard and dealt with together, or permit two or more applications to be submitted in a single document by claimants claiming the same relief in respect of the same set of facts (rules 10(2) (j), 1(7) ETR).

9518

## Submission of a defence

If he wishes to contest the proceedings, the respondent must enter a defence to the proceedings called a **response** (rule 4(1) ETR).

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**Form** A standard form (**Form ET3**) is sent out to the respondent by the Secretary along with the copy of the ET1, and this form must be used (SI2005/435). The following **information** will be required:

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- the respondent's full name and address;
- a correspondence address in the UK if different;
- a statement of whether or not he intends to defend the claim (in whole or in part); and
- if he does intend to defend it, on what grounds.

**MEMO POINTS** If a respondent fails to use the prescribed form, his response will be returned to him together with an explanation of why the response has been rejected and a copy of the prescribed form (rule 6(1) ETR).

**Entering a defence** The response must be **addressed to** the Secretary and be **presented** by the respondent (using the same **methods** of presentation as are allowed for the claim (§9512)) **within** 28 days of the date on which a copy of the claim was sent to him (not including the date of receipt).

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This applies even if the claim form is **never received** by the respondent (*Bone v Fabon Projects Ltd* [2006] IRLR 908, EAT). In such circumstances where the respondent has failed to enter a response as a result, he can either make an application for an extension so that he can enter a late response (see below) or, if he is too late to make such an application and is time

barred, he can seek a review of the decision not to accept his response (¶¶9718+). On review, the tribunal can extend the time limit in which a response can be presented if it considers it is just and equitable to do so.

Where a **respondent is legally represented**, the respondent or his representative must, at the same time as the application is sent to the Employment Tribunal Office, **provide all other parties** with the following information in writing (rule 4(4A) ETR as inserted by SI 2008/3240):

- details of the application and the reasons why it is made;
- notification that any objection to the application must be sent to the Employment Tribunal Office within 7 days of receiving the application or, if a hearing of any type is due to take place before then, before the date of that hearing; and
- that any objection to the application must be copied to both the Employment Tribunal Office and all other parties.

Further, the respondent or his representative must confirm in writing to the Employment Tribunal Office that this rule has been complied with. The above time limit of 7 days may be extended where the judge or tribunal considers it in the interests of justice to do so.

Where a **respondent is not legally represented**, the Secretary shall send a copy of the application to all other parties and inform them of the matters listed above.

## 9522

Where a respondent wishes to present a **late response**, an application for an **extension of time** must be made (rule 4(4) ETR). The application must be presented to the tribunal **within** 28 days of the date on which the respondent was sent a copy of the claim (excluding the date on which the claim was received) and must explain why the respondent cannot comply with the time limit. A respondent may apply for **more than one extension** of time to enter his response (*Skinnners Hastings Ltd v Wilkin* [2001] UKEAT 1023\_00\_2102).

In considering the application, the tribunal (which may consist of a judge sitting alone) will have regard to the following **factors**:

- the reasons given for the failure or anticipated failure to present the response in time;
- the relative prejudice to the parties of granting or not granting the extension; and
- the merits of the respondent's proposed defence.

This will often be done without the tribunal requiring the parties to attend a hearing, but it is open to the tribunal to invite the views of the claimant in writing, and/or convene a hearing before making its decision.

The tribunal will only extend the time limit in which a response can be presented if it considers that it is just and equitable to do so.

## 9523

**Pre-acceptance procedure** On receipt of the response, the Secretary will consider whether the response should be accepted (rule 5(1) ETR).

The response will **not** be **accepted** if one or more of the following circumstances applies (rule 6(1), (2) ETR):

- the mandatory response form has not been used;
- the response does not include all the required relevant information; or
- the response has not been presented within the relevant time limit.

If the Secretary considers that the response should not be accepted for either of the two latter reasons, the Secretary must refer the response, together with an explanation as to why he does not accept it, to the judge who will decide whether or not the response should be accepted in respect of these grounds.

If the judge decides that the response **should be accepted**, he will inform the Secretary in writing and the Secretary will accept the response and deal with it accordingly (¶9524).

If the judge decides that the response **should not be accepted**, the judge will record his decision, together with the reasons for it, in writing in a document signed by him, and the parties will be informed of this decision by the Secretary. The Secretary will also notify the respondent of the consequences of that decision and that the respondent may apply for the decision to be reviewed or appeal against it. The response will be returned to the respondent and the claim will be dealt with as if no response had been presented (rule 6(5), (6) ETR).

**MEMO POINTS** The respondent can apply to the tribunal to **review its decision** not to accept his response on the grounds that the decision was wrongly made as a result of an administrative error or that it is in the interests of justice to do so (see ¶9718 for further details).

**Tribunal action on acceptance of response** If the response is accepted, on receipt, the **Secretary sends a copy** of it to each other party and records in writing the date on which this is done (rule 5(2) ETR).

**9524**

**Multiple claimants** Where there are multiple claimants (¶9518), the response form can include the response to more than one claim where the relief sought arises out of the same set of facts provided that the respondent (rule 4(5) ETR):

- intends to resist all the claims and the grounds for doing so are the same in relation to each claim; or
- does not intend to resist any of the claims.

Moreover, a single response form can be used by more than one respondent to a single claim provided that (rule 4(6) ETR):

- each respondent intends to resist the claim and the grounds for doing so are the same for each respondent; or
- none of the respondents intends to resist the claim.

**9525**