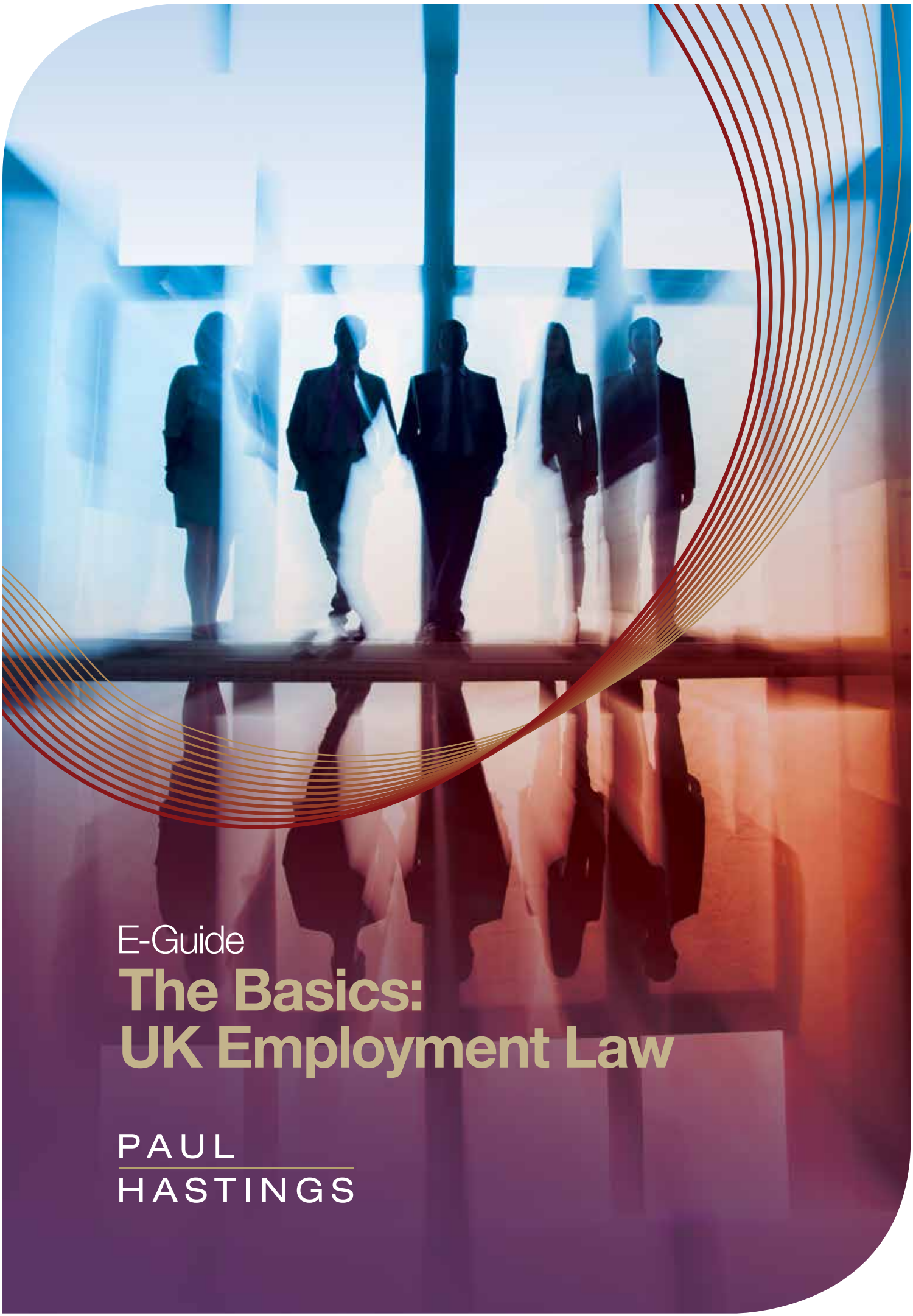
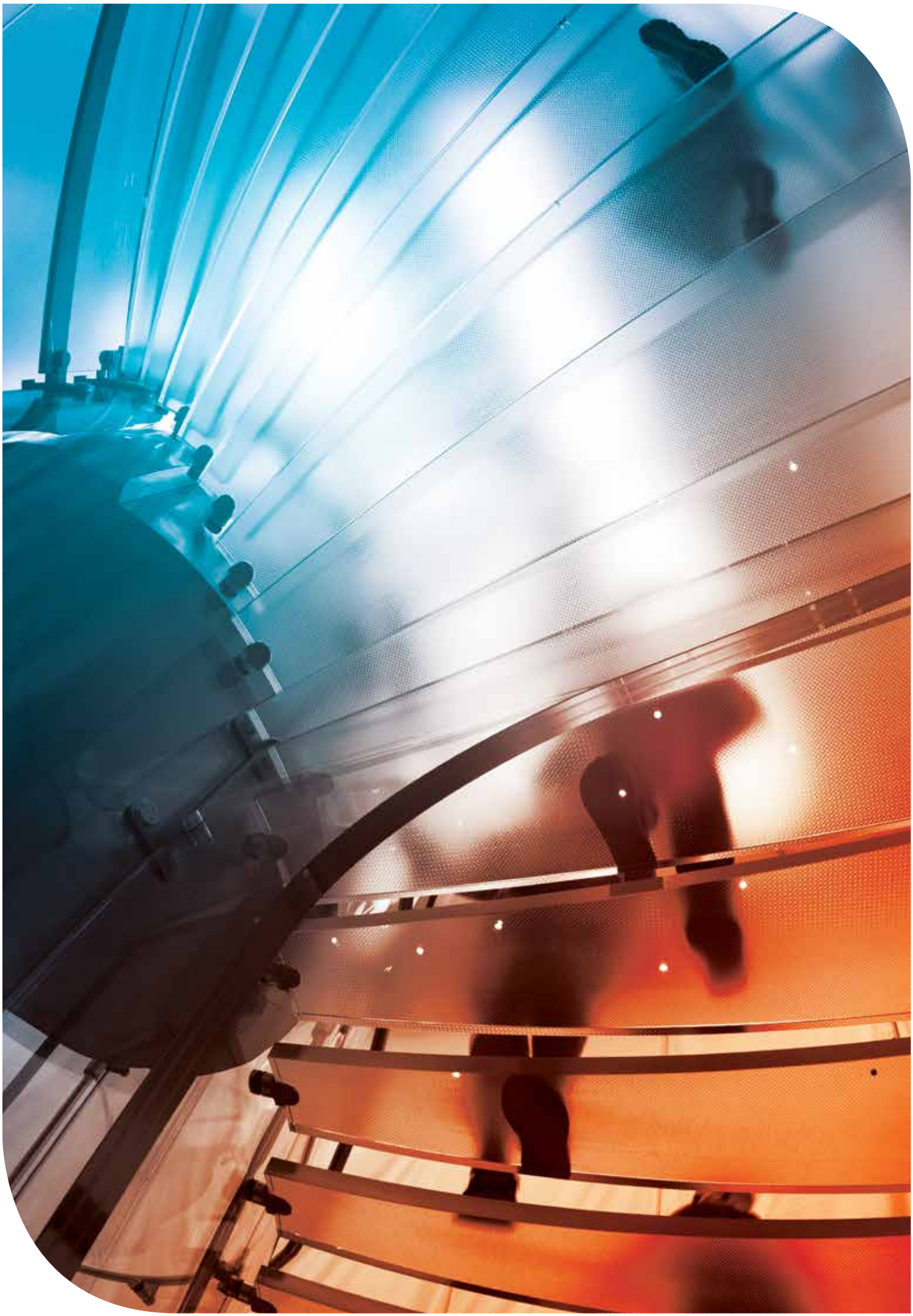


E-Guide

The Basics: UK Employment Law

PAUL HASTINGS



E-Guide

The Basics: UK Employment Law

As clients move into new markets the employer's HR function and employment law counsel need to get to grips with local laws, customs and practices. We recognise that this can be a challenge for those seeking to navigate these issues for the first time. This short e-guide gives a general outline of the key aspects of the UK employment relationship from recruitment, through terms, benefits and TUPE transfers to litigation and separation. It is not intended to be an exhaustive guide but a point of reference for the key issues reflecting the law as at February 2016.

To discuss any of these issues in more detail, please contact International Employment partner Suzanne Horne at +44.020.3023.5129 or suzannehorne@paulhastings.com.

INDEX

Recruitment

1. Recruitment

1.1. Pre-employment checks

It is common practice for an employer to conduct background checks on its prospective employees. However, the extent of these checks varies:

(a) Credit checks - These are not standard in the UK but possible with the written agreement of the candidate.

(b) Criminal record checks - These are not standard in the UK and it is illegal to force a candidate to agree to carry them out, the penalty is a £5,000 fine. In theory candidates can be asked to voluntarily agree but this will create evidential issues, especially if the candidate is not subsequently given a job offer.

(c) Verification of CV information - Checks on educational achievements and job history are standard and there are several third party providers who can carry out these checks.

(d) References - References from previous employers are standard but will usually only be limited to confirmation of the role and length of service.

(e) Right to work checks - All non-EU citizens will need a work permit. In any event all employees should be asked to provide evidence of a right to work in the UK but this step should only take place at the job offer stage.

(f) Data protection - Job applicants are entitled to have their data processed fairly. A statement of what data will be collected and processed and how their data will be used should be set out in the application process.

1.2 Discrimination

Discrimination in recruitment in the UK is unlawful so care must be taken over the process and the advert. The protected characteristics are sex, race, age, religion or belief, disability, pregnancy and maternity and gender reassignment. Special care is needed with regard to age discrimination. Age discrimination works differently in the UK than in the US. In the UK, discrimination on the grounds of age can be on the basis that someone is old, young or a specific age. So an advertisement for a role requirement a “youthful and dynamic” candidate is on the face of it evidence of discrimination.

1.3 Working status

There are various options for hiring workers in the UK, each carrying their own risks or treatments on income tax and social security contributions. The label attached to the role will not necessarily be determinative:

(a) Interim - A person can be taken on an interim basis, particularly with regard to providing a temporary replacement for another employee absent on maternity leave;

(b) Agency worker - A person can be hired through an agency, who will employ the worker directly and recoup the costs of employment as a fee;

(c) Consultant - A person providing services as a consultant must be genuinely self-employed. Consultants often provide their services through a service company;

(d) Workers - A worker is an individual who works under a contract where they perform the work personally. Workers have some statutory protections but not as many as an employee;

(e) Employees - An employee is defined in UK law as an individual who has entered into or works under a contract of employment. Whether there is a contract of employment is a factual test,

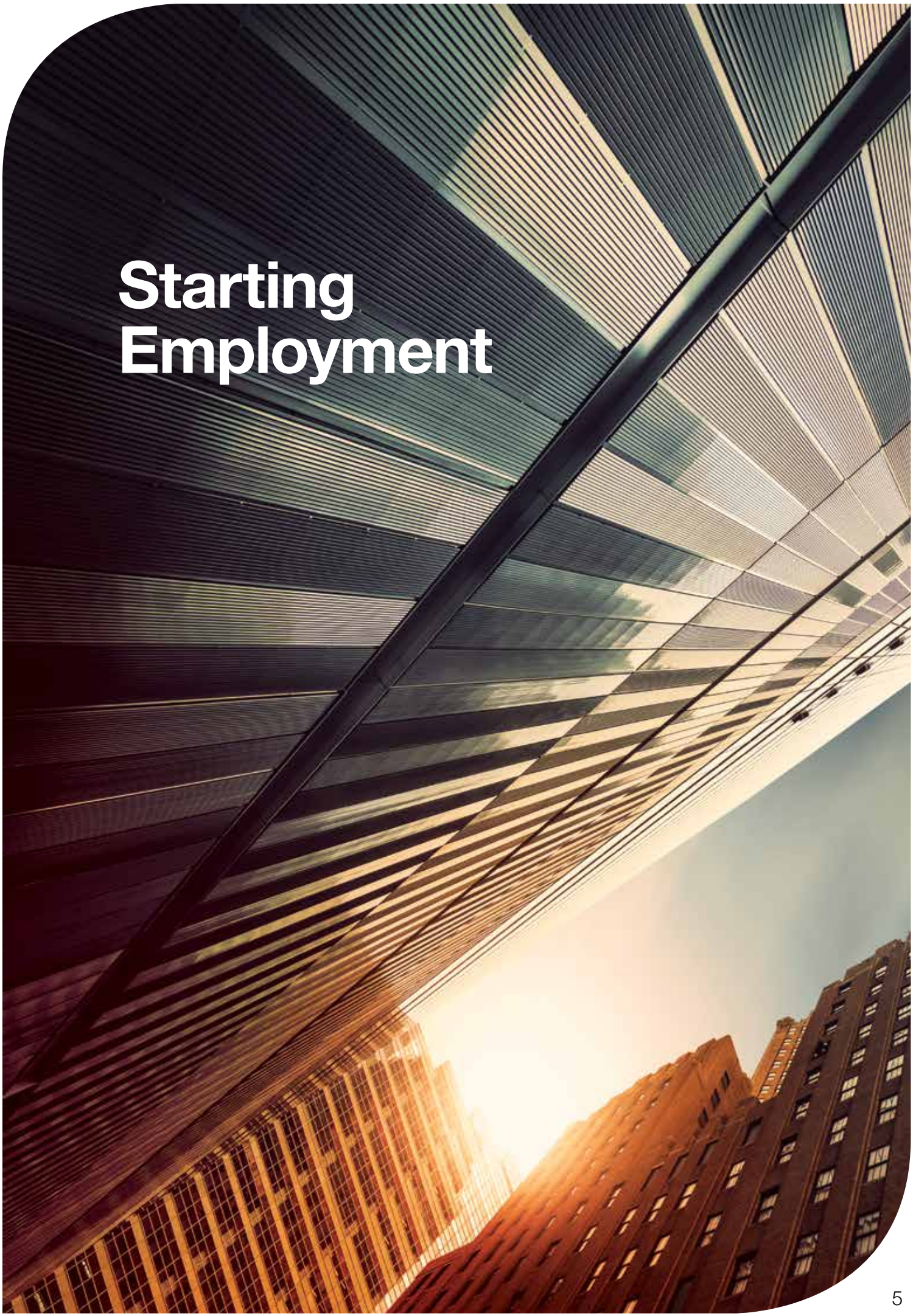
usually around issues of control and responsibility. Employment status carries a number of protective rights, particularly the right not to be unfairly dismissed after two years' service. The difference between a worker and an employee is not always easy to define;

(f) Members of LLP - Members of an LLP may be salaried partners or equity partners. They are not employees of the LLP under English law (the position is less clear in Scotland) but may be workers. The status of the individual and their rights may have tax consequences and will have to be assessed based on the overall facts in the relevant circumstance;

(g) Partners - An equity partner will typically be genuinely self-employed. The status of the individual and their rights may have tax consequences and will have to be assessed based on the overall facts in the relevant circumstance.

Employees and workers in the UK may also be employed or engaged on a part-time or fixed-term basis.

Starting Employment



2. Starting Employment

Considerations, terms and conditions

2.1 There is no employment at will in the UK or the EU. All employees should have a written contract or terms. The employment relationship in the UK is governed by a mixture of mandatory statutory rights and an individual written contract of employment. Very few employees are represented by unions.

2.2 Whatever their nationality, if the individual is working in the UK then it is likely UK employment law will govern the relationship, even if the contract contains a US choice of law clause.

2.3 The contract is important because once the contractual terms have been agreed with the employee they cannot be unilaterally varied by the employer. There are flexibility clauses but they have to be operated within the boundaries of the implied duty of trust and confidence.

2.4 All UK employees are entitled to receive written terms of employment. These must contain statutory information on matters such as the name of the employer, place of work, hours of work, leave entitlement and notice. **Click here** for the check list. These written terms for junior employees will usually run to 2-3 pages, backed up by an employee handbook. It is important that the employee signs the documents.

2.5 UK employees are entitled to a minimum wage, daily and weekly rest breaks, paid vacation of 5.6 weeks; a minimum period of notice of roughly one week for every year worked. There is a limit on the maximum working week of 48 hours but some employees particularly senior staff, frequently agree to sign an opt out from this.

2.6 In terms of the minimum wage, generally speaking all employees are entitled to be paid a minimum hourly rate of pay (set by the government annually) – there are no exceptions for small employers. Currently, the rates are between £3.87 to £6.70 per hour, according to age. As of 1 April 2016, employees aged 25 and over will be entitled to a higher 'National Living Wage'. The National Living Wage will start at £7.20 per hour, but is expected to increase to £9 per hour by 2020.'

2.7 Senior staff, usually at management level, will usually be expected to sign a lengthy contract (circa 20 pages) which covers both parties' contractual duties. This document will be fairly prescriptive and is intended to protect the employer in a variety of circumstances given that a breach of contract may entitle the employee to resign and render any post termination provisions unenforceable. Although all such contracts usually cover the same issues, they are often individually negotiated, especially concerning termination rights of either party.

2.8 A substantial body of legislation from the UK and Europe establishes the basic terms and rights of employees and workers. This includes protection from discrimination, the right to equal pay, statutory obligations to protect the health and safety of employees and the right not to suffer deductions from wages.

2.9 There is a statutory obligation to provide paid holiday, sick pay, certain family friendly rights and a staged roll out of new employer pension duties from 1 October 2012. Common benefits provided voluntarily are enhanced sick pay, healthcare insurance, disability insurance, death in service, life insurance and in some sectors car allowances. Membership of share or equity schemes is also common in some sectors.

2.10 Bonus schemes, whether discretionary or contractual, are common especially in the financial sector and sales, and care must be taken about their documentation. Bonus provision in the financial sector is subject to statutory caps of 100% of fixed remuneration or, with approval by the shareholders, up to 200%.

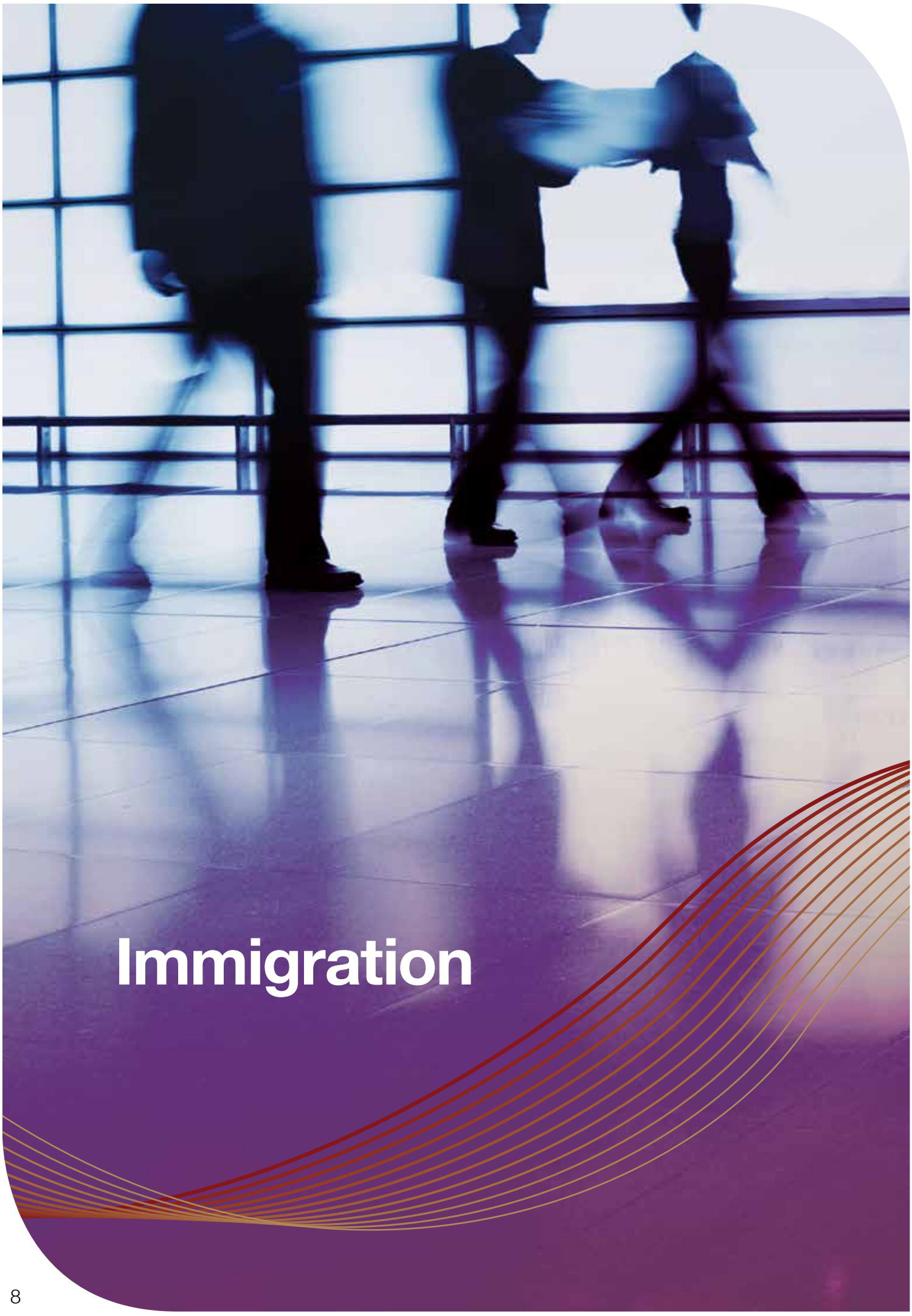
2.11 A standard US type employment agreement will not usually be suitable as it will have been drafted for a different legal regime and contain matters that are unenforceable or irrelevant in the UK. A cross referral to a standard US confidentiality and non-compete document may result in problems of interpretation and enforcement. It is usually more cost effective to take a UK style document "off the shelf" rather than try to incorporate UK employment law protection into a US document.

2.12 Employees will have income tax deducted by the employer at source under the PAYE scheme and both employer and employee will additionally have to pay social security payments known as National Insurance Contributions (NIC). The major US payroll providers will usually have a department that can deal with UK payroll tax issues.

2.13 Pre-employment checks are possible only with the agreement of the candidate and there are several providers of such services in the UK. References from previous employers are usually limited to factual matters such as start and end dates of employment.

2.14 All employers must take out employee liability insurance of at least £5 million and carry out pre-employment checks on the employee's ability to lawfully work in the UK without additional immigration documents.

2.15 All information relating to the employee is protected by the EU derived privacy laws and procedures are necessary before information can be transferred outside the EU.



Immigration

3. Immigration

3.1 An employer may be liable to civil liability if it negligently employs someone who does not have the right to work in the UK and criminal liability if the employer knows that they do not have the right.

3.2 EEA nationals have freedom of movement within the EEA and as such may (with their families) work in the UK without a licence, with the exception of workers from Croatia, to whom special rules apply. Swiss nationals and spouses of a British citizen or Swiss national can also work in the UK with no visa. Commonwealth nationals with a grandparent born in the UK or British Isles can also work in the UK with no visa. There is currently no limit on the number of EEA, Commonwealth and Swiss nationals that a company may employ.

3.3 Non-EEA nationals require a licence before they are legally allowed to work in the UK. The UK operates a tiered points-based system for such individuals. For certain tiers employers have to register as sponsors and issue certificates of sponsorship to employees.

3.4 There are five tiers into which an immigrant may fall. These will influence the type of visa that may be obtained and the need for sponsorship of the employee by the employer. The open categories are as follows:

(a) Tier 1: high-value migrants – entrepreneurs, investors, graduate entrepreneur and exceptional talent. A Tier 1 applicant is awarded points based on various factors and does not need employer sponsorship. A Tier 1 visa lasts for three years and can generally be renewed for another two years.

(b) Tier 2: sponsored skilled workers (including intra-company transferring employees). The employer must register as a sponsor and grant a certificate of sponsorship for the role in question. The worker must meet the points total and then apply for clearance. Generally a resident labour market test must be satisfied to show that no EEA worker could fill the position. A Tier 2 permit lasts for up to three years and one month but it can be extended up to a maximum of six years. The UK government has imposed monthly limits on the number of individuals who may enter the UK via this tier.

(c) Tier 4: students.

(d) Tier 5: temporary or exchange workers.

3.5 The employer (or sponsor) must check key documents and keep certain records and documents pertaining to the worker, who must also comply with any visa requirements.

3.6 As a general rule, all employees ordinarily working in the UK are entitled to the protection of UK employment law. In addition, those with a sufficiently strong connection to the UK may also be covered.

Time Off

4. Time off

4.1 Annual Leave

Full time workers are entitled to a minimum of 5.6 weeks' paid annual leave per year (inclusive of public holidays). Many workers will receive additional holiday above this statutory minimum under their contracts of employment. Part time workers are entitled to a pro-rated equivalent.

Employees should receive "normal remuneration" as holiday pay. Recent case law has confirmed that this should include payments intrinsically linked to the individual's employment including commission, overtime (contractual and possibly voluntary) as well as possibly performance-linked bonuses.

A worker is entitled to payment in lieu of unused leave on termination of their employment.

Workers can bring claims for unpaid statutory holiday as unlawful deduction from wages in the Employment Tribunal. Following the recent confirmation that holiday pay should include payments such as commission, there was widespread concern about claims for large historic deductions. However, the government has introduced legislation putting a two year back-date limit on claims for underpaid holiday pay. Moreover, a gap of more than three months between holidays will preclude a claim in relation to the period before the gap.

4.2 Rest periods

Adult workers are entitled to: (i) 11 hours' uninterrupted rest per day; (ii) 24 hours' uninterrupted rest per week (which can be converted into 48 hours rest per fortnight); and (iii) a rest break of 20 minutes if the working day is more than six hours. These periods do not count as time worked for any calculation of national minimum wage and a worker is not entitled to pay for these periods.

Additional protections apply to young workers, those carrying out monotonous or pre-determined work, such as on a production line and night workers.

4.3 Sick leave

Employees' contracts of employment may contain the right to full or partial pay during sickness. However, this is not a statutory right. Under statutory provisions the first three days of sickness absence are unpaid. After the third day of absence, statutory sick pay is payable at a rate for 2015/2016 of £88.45 per week for up to 28 weeks.

4.4 Training

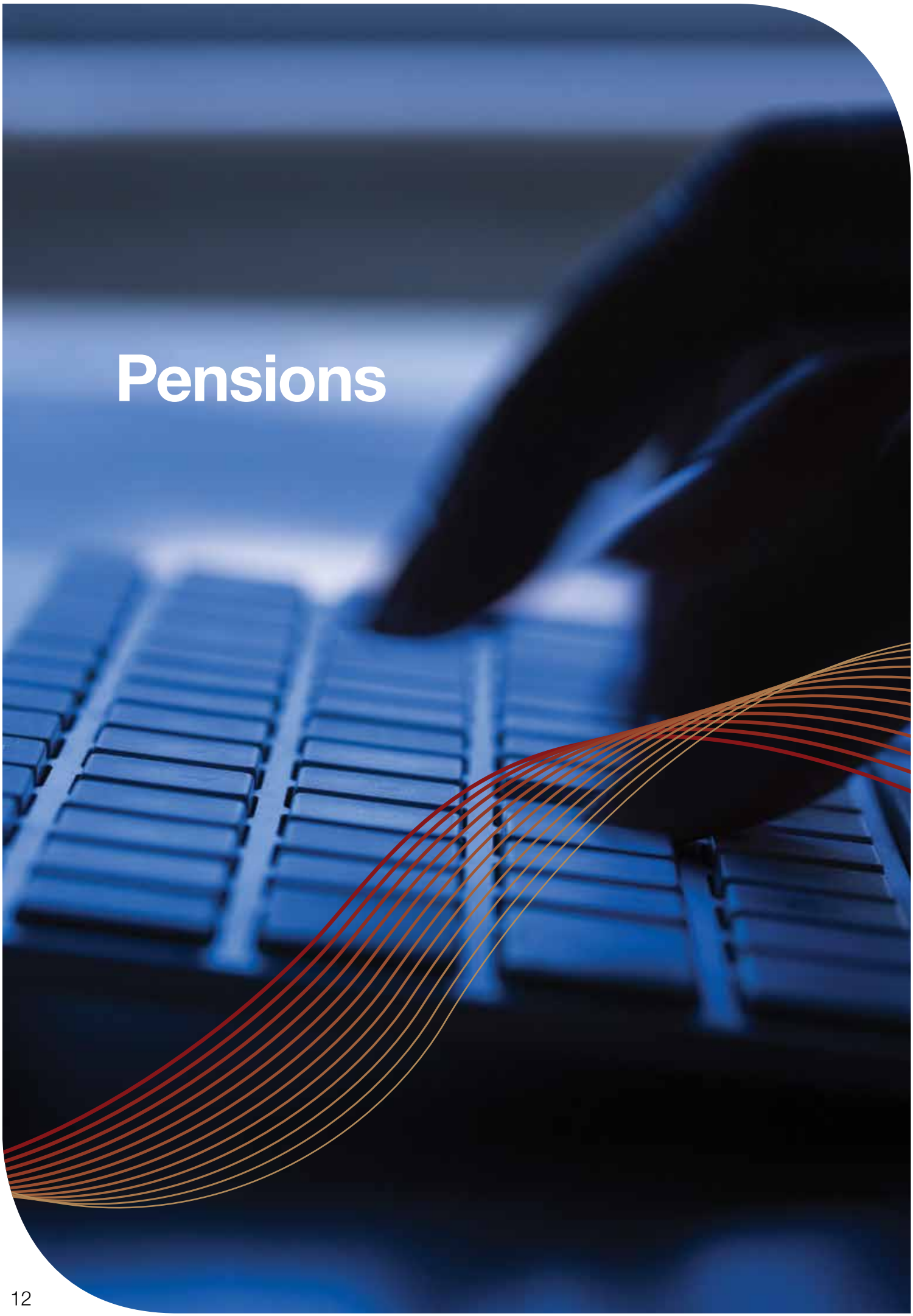
Young workers may be entitled to time off for study or training and employees working for an employer with over 250 employees are entitled to request time off for study or training.

4.5 Redundancy

An employee with more than two years' service who is working their notice period by reason of redundancy is entitled to reasonable time off to look for a new job or arrange training for future employment. The employee must be paid at the "appropriate hourly rate" for the time taken.

4.6 Time off for dependants

Employees are entitled to take a reasonable amount of time off work to deal with emergencies affecting their dependants and to allow them to put in place long term arrangements. This includes illness, injury or death of a dependant, dealing with unexpected incidents which occur whilst the dependant is at school or because of disruptions to care provision. The employee should notify their employer the reason for their absence as soon as reasonably practicable and specify how long they expect to be absent. There is no length of service requirement to qualify for this right.


Pensions

5. Pensions

5.1 Auto enrolment

(a) Rules were introduced on 30 June 2012 that will eventually require all UK employers to automatically enrol eligible workers in a qualifying pension scheme. Auto enrolment obligations are being implemented month by month over a five-and-a-half-year staging period from 1 October 2012.

(b) The Pensions Regulator contacts employers with a staging date in the future by which point they must comply with the auto enrolment rules. Employers can bring their staging date forward before this date.

(c) Under auto enrolment rules UK employers are obliged to automatically enrol eligible workers into a qualifying pension scheme.

(d) Eligible workers are those aged between 22 and 65 and, for 2015, who earn at least £10,000 a year. This includes permanent and temporary employees, agency workers, apprentices and LLP partners. Workers on notice given or received more than six weeks before their auto-enrolment date do not need to be enrolled.

(e) A qualifying pension scheme can be either an occupational or personal pension scheme that satisfies the requirements of the legislation. For employers who do not currently operate such schemes the Government has established its own scheme, called Nest, in which employees can be enrolled.

(f) Eligible workers have to be registered with effect from the day they meet the qualifying requirements set out above. However, the employer has a period of one month to make these arrangements and can also opt to use a three month postponement period from either: (i) its staging date in relation to existing employees or (ii) the joining date of any new employee.

(g) Once it has passed its staging date, an employer must make regular future assessments of whether its workers are eligible for auto-enrolment or if they need to be told about their right to opt into a scheme

(h) The employer must initially match employee contributions of 1% of annual earnings between £5,824 and £42,385. From October 2017, this obligation will be to match employee contributions of up to 2% of annual salary (with a total employer and jobholder contribution (including tax relief) of 5%). From October 2018, this obligation will be to match employee contributions of up to 3% of annual salary (with a total employer and jobholder contribution (including tax relief) of 8%).

(i) It is possible for employees to opt out of auto-enrolment. However, eligible jobholders who have opted out will be automatically re-enrolled every three years.

(j) Employers are required to provide certain information to its workers about auto-enrolment (for example when an eligible jobholder is automatically enrolled (or re-enrolled) or when the employer uses postponement to defer auto-enrolment for particular workers). This information (which includes details of workers' rights to opt in or join the scheme) and the format it must be provided in changes depending on the category of worker concerned and how the employer is complying with the new duties.

(k) The previous statutory requirement for employers with five or more employees to designate a stakeholder pension scheme has been repealed with effect from 1 October 2012.

5.2 State Pensions

Employees may be entitled to an old age state pension from the government when they reach the state pension age. The amount of any such payment is based on payment of national insurance contributions (social security contributions) by the employer and employee.

5.3 Private Pensions

Many UK employers provide access to an occupational pension or group personal pension arrangement' administered by an insurance company to supplement the state pension.

Performance Management

6. Performance Management

6.1 Employees often have less contractual protection at the start of their employment. Many employees have a probationary period in their contract of employment during which they can be dismissed on short notice. Employers should always review performance during and at the end of probationary periods. Employees who have failed to impress during their probationary period very rarely improve afterwards.

6.2 Employees also have reduced statutory protection early in their employment. Until an employee has two years' service they do not (generally) have the right to unfair dismissal protection. Therefore, it is important for employers of underperforming employees to take action before the employee reaches two years' service.

6.3 It is always important to consider and explore whether performance issues are connected to health or other personal issues. Employees have protection from detriment and dismissal because of disability or something arising in consequence of disability from day one of their employment. Employers are also under an obligation from day one to make reasonable adjustments to accommodate disabled employees who are placed at a substantial disadvantage by a provision, criterion or practice.

6.4 Employees with more than two years' service have the right not to be unfairly dismissed. A fair dismissal requires a fair reason and a fair process. Capability is a potentially fair reason to dismiss and includes situations where an employee does not have required qualifications or where performance is below standard. A fair process in the context of a dismissal for poor performance will depend on the nature of the poor performance and the employee's seniority. In this context it is important to discern between genuine poor performance and issues such as dishonesty that are essentially conduct issues.

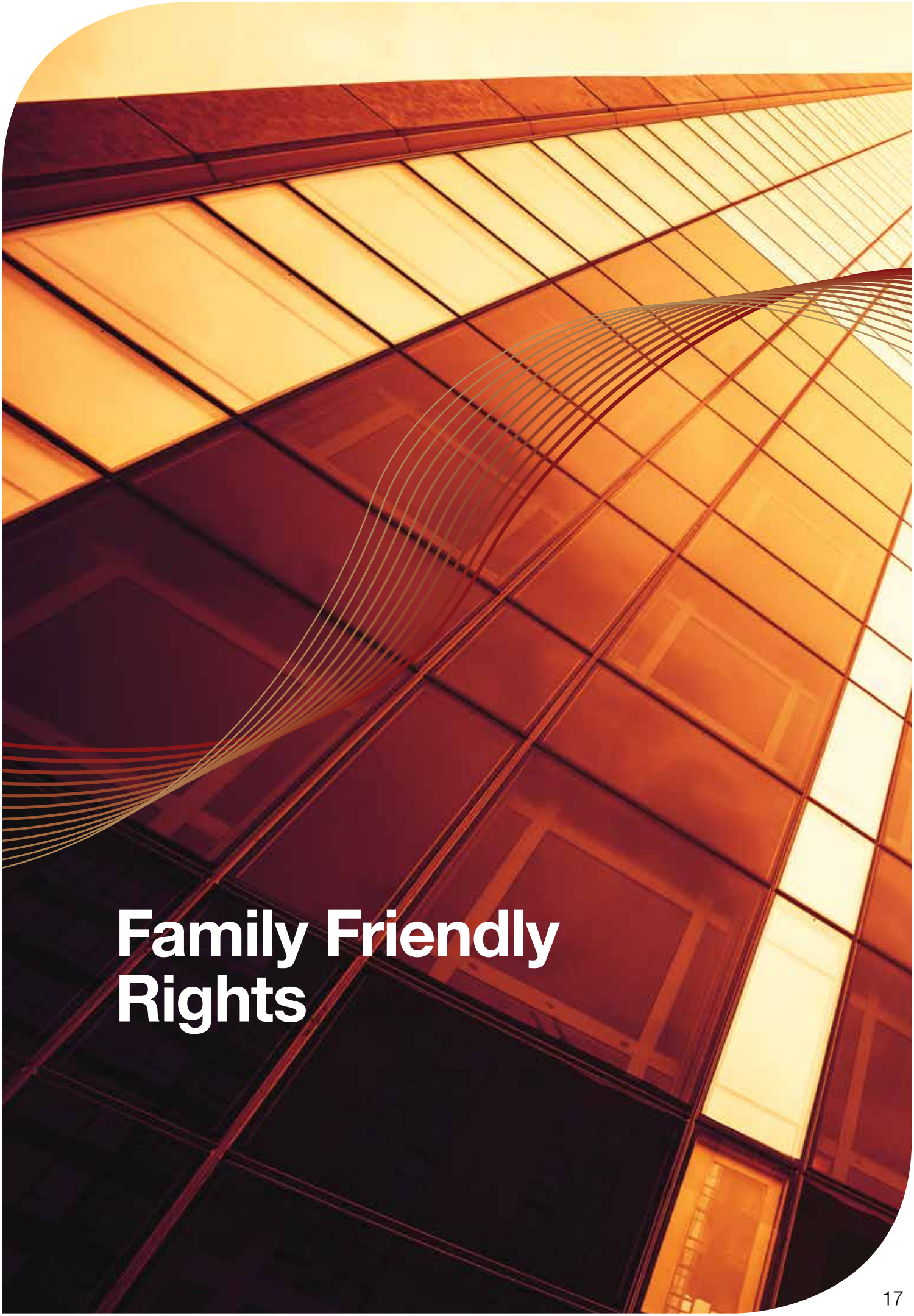
6.5 It is important for employers to have a performance management policy and for managers to comply with it. A key factor in showing that a decision to dismiss is fair and not discriminatory is to be able to point to a documented record of previous poor performance. Unfortunately, managers are often unwilling to address poor performance in appraisals, which creates a long term problem when ultimately looking to dismiss for poor performance.

6.6 Performance management policies will often provide for a performance improvement plan for underperforming staff. This generally involves a meeting to discuss the poor performance and identify any underlying causes. A set of achievable performance targets will be set with a review period during which the individual's performance will be monitored at monthly performance review meetings. The individual should be made aware that failure to improve could ultimately lead to dismissal.

6.7 To the extent that targets are not achieved at the review meetings the employee should be invited to a separate disciplinary meeting (to be conducted in accordance with the disciplinary procedure). The incremental warning process set out in the disciplinary process should generally be followed (written warning, final written warning, dismissal). The employee should be allowed the opportunity to appeal each disciplinary sanction in the usual way.

6.8 The process set out above (with variation depending on company policy) should satisfy the requirements of a fair process in the majority of cases. In cases of poor performance leading to serious problems for the employer (for example poor performance on the part of a senior manager or conduct so serious it undermines all trust and confidence in the employee) it may be appropriate to follow a shortened procedure.

6.9 Employers should always bear in mind their ability to offer an employee a negotiated exit on agreed terms under a settlement agreement. Under section 111A Employment Rights Act 1996 such offers if made in the appropriate manner will not be admissible in cases of unfair dismissal (although they could still be admissible in other types of cases such as discrimination).



Family Friendly Rights

7. Family Friendly Rights

7.1 In the UK, workers have a number of rights which come under the general heading of "family friendly" rights, i.e. they are intended to protect workers who have family obligations.

7.2 All employees, whatever their length of service, are entitled to up to one year's statutory maternity and adoption leave. They have the right to return to the same job (or a suitable and appropriate alternative job), priority for alternative employment in redundancy cases and protection from dismissal, detriment or discrimination by reason of pregnancy, maternity leave or adoption leave.

7.3 During maternity leave the employee has the right to the benefit of terms and conditions of employment other than remuneration. So non cash benefits such as health insurance will continue. Also paid statutory holiday entitlement of 4 weeks will continue to accrue and is generally added onto the end of the maternity leave.

7.4 Statutory maternity pay, generally funded by the UK Government, is payable for up to 39 weeks provided the employee has completed six months service and met the minimum earnings limit. It consists of 90% earnings for the first six weeks of leave and then a statutory weekly rate set by the Government, currently £139.58 per week for 2015/2016. Many companies pay enhanced maternity pay, sometimes conditional on the employee returning to work for a set period.

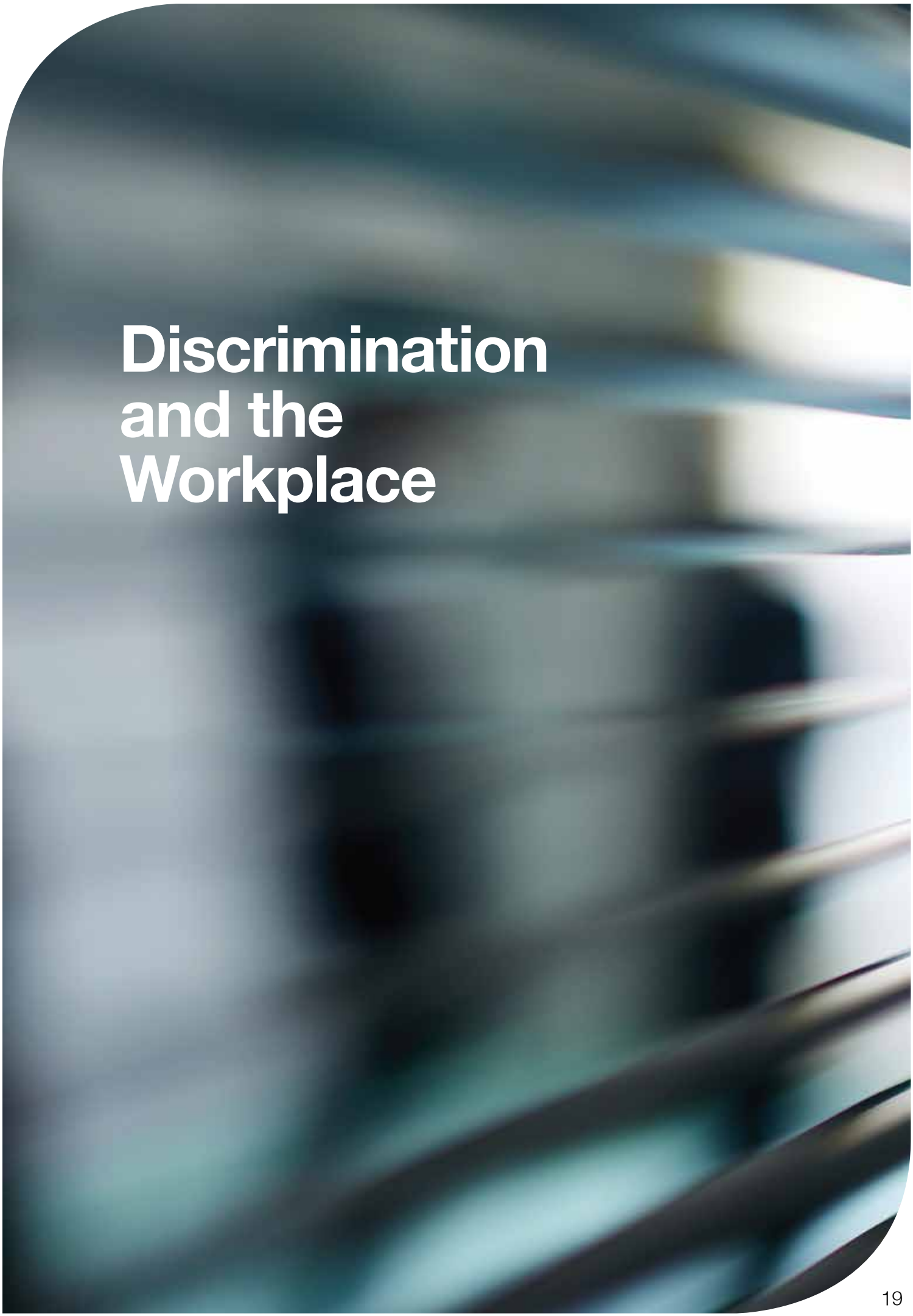
7.5 Statutory adoption pay is also payable for 39 weeks but at the statutory weekly rate.

7.6 Paternity leave of two weeks is given to all employees. If they have six months service they are also entitled to statutory paternity pay at a statutory weekly rate set by the Government, currently £139.58 per week for 2015/2016.

7.7 Instead of the mother taking maternity leave, parents may now share up to 50 weeks of shared parental leave and up to 37 weeks of pay. Pay is at the statutory weekly rate set by the Government, currently £139.58 per week for 2015/2016. Leave may be taken by the parents in continuous or discontinuous periods which can run concurrently or consecutively. During leave, each parent has the right to the benefit of terms and conditions of employment other than remuneration and paid statutory holiday continues to accrue.

7.8 Employees with one year's service are also entitled to take up to 18 weeks unpaid parental leave per child, limited to 4 weeks per year and exercisable whilst the child is under 18 years. Separate provisions apply if the child is disabled.

7.9 All employees, whether they have children or not, have the right to request flexible working but not be granted it. The employer has to consider such requests reasonably, and can only refuse it on statutory grounds which are broad ranging, e.g. the interests of the business cannot accommodate such a request. However a request to work flexibly coming from someone who has been on maternity leave must be considered carefully to avoid a claim of discrimination on the grounds of sex.



Discrimination and the Workplace

8. Discrimination and the Workplace

8.1 Discrimination legislation in the UK is contained in the Equality Act 2010 (EqA), which codified all previous UK legislation on the subject.

8.2 EqA restricts unlawful discrimination, harassment and victimisation in relation to the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Protection applies to job applicants, workers, agency workers, partners, LLP members, self-employed individuals under an obligation to personally provide work and current and former employees. There are limited carve outs for a genuine occupational requirement and positive action.

8.3 Discrimination can be either direct (treating A less favourably than B because of a protected characteristic) or indirect (applying a provision, criterion or practice that puts people with a protected characteristic at a particular disadvantage and which cannot be objectively justified).

8.4 In cases of direct discrimination (other than maternity or pregnancy) the claimant must identify a real or hypothetical comparator who has been treated more favourably than the claimant. An individual can be discriminated against because of their association with someone with a protected characteristic (associative discrimination) or because they are perceived as having a protected characteristic that they do not actually have (e.g. sexual orientation) (perceived discrimination). It is not discrimination to treat a disabled person more favourably or to provide special treatment to women in connection with pregnancy or childbirth.

8.5 Direct age discrimination and indirect discrimination will not be unlawful if they can be objectively justified as a proportionate means of achieving a legitimate aim. An example of objective justification would be a requirement to work full time which is indirectly discriminatory against women (since women in society as a whole bear a greater part of domestic and childcare responsibilities than men and are more likely to want (or need) to work part time) but may be justified in certain circumstances for example due to the need to provide a high level of continuity when dealing with clients.

8.6 Harassment means either: (i) conduct of a sexual nature; (ii) less favourable treatment because of rejection of or submission to harassment of a sexual nature; or (iii) unwanted conduct related to a protected characteristic which has the purpose or effect of either violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. As with direct discrimination, harassment can be related to associative and perceived discrimination. Discrimination can arise due to the effect of someone's actions, regardless of whether their intention was to harass. However, a tribunal must consider whether it was reasonable for the conduct to have that effect.

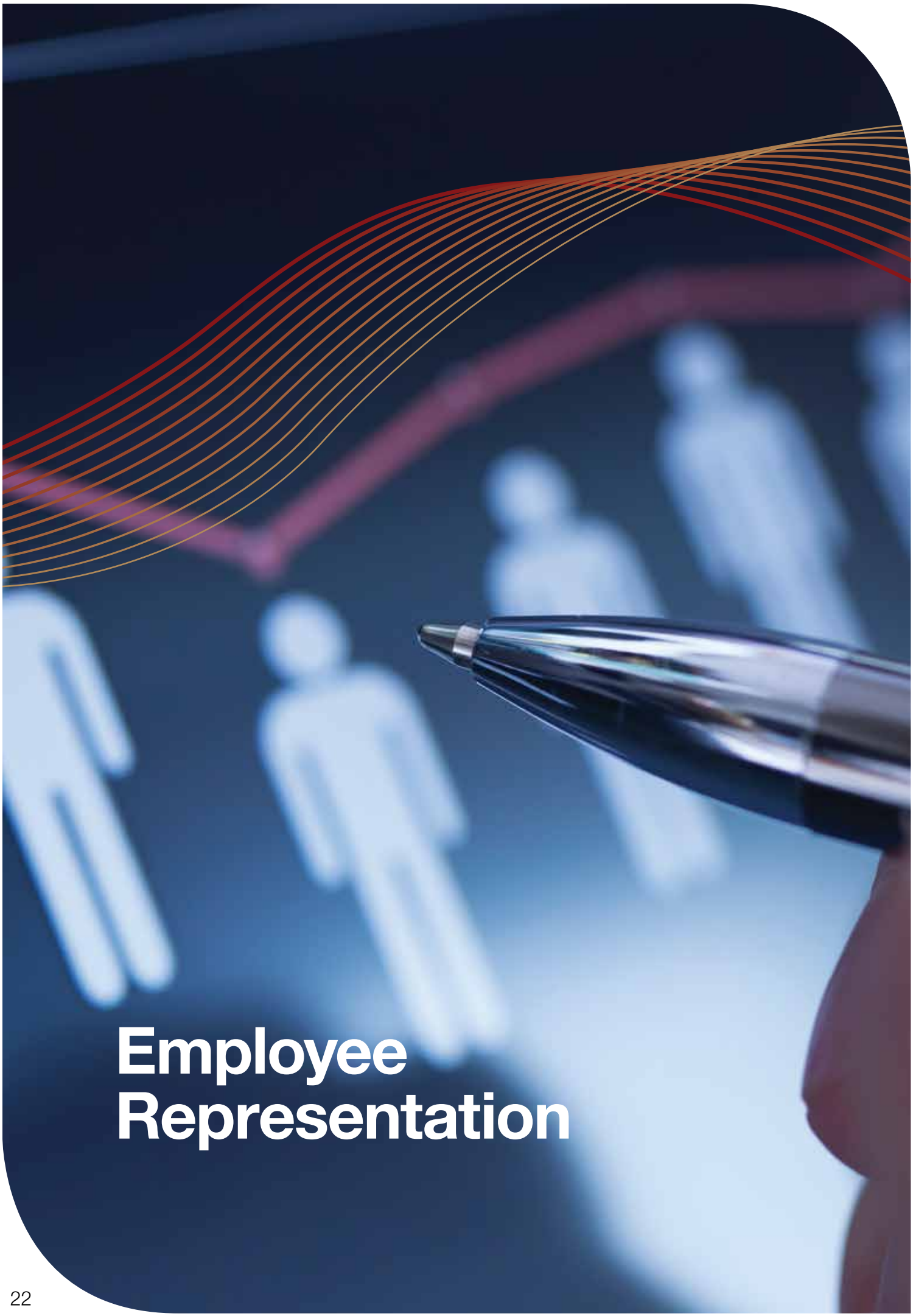
8.7 Victimisation provisions protect employees who are subjected to a detriment for bringing discrimination a complaint or becoming involved in another employee's discrimination complaint (e.g. as a witness).

8.8 EqA imposes a duty on employers to make reasonable adjustments to help disabled job applicants, employees and former employees where the employer knows or ought reasonably to know that the individual in question is disabled and they are placed at a substantial disadvantage by a provision, criterion or practice, a physical feature of the employer's premises or the failure to provide an auxiliary aid.

8.9 Employers are vicariously liable for the acts of their employees. Claims are often brought against both individuals and their employers. However, there is a defence available to an employer if it can show that it took all reasonable steps to prevent the employee from doing the discriminatory act or from doing anything of that description. The EqA also makes it unlawful to instruct, cause, induce or help someone to discriminate against, harass or victimise another person, or to attempt to do so.

8.10 Workplace discrimination claims by individuals are bought in the Employment Tribunal. Claims must normally be submitted to an employment tribunal within three months of the act complained of. Where an act or acts of discrimination extend over a period time runs from the end of the period. Compensation in discrimination claims is in theory uncapped. Compensation is largely linked to financial loss (and subject to the claimant's duty to mitigate losses). However, Tribunals can include an award for injury to feelings.

8.11 The task of proving a discrimination case lies initially on the claimant. However if a claimant can show facts which, in the absence of any other explanation, show that a person committed discrimination the Tribunal will consider discrimination has happened unless the respondent can provide a satisfactory explanation showing no discrimination took place.



Employee Representation

9. Employee Representation

9.1 Trade Unions

All UK employees have the right to join or not join a trade union. If the union is recognised by the employer then union members may benefit from the collective bargaining rights. If a trade union or its members wish to be recognised by the employer and the employer does not agree, there is a statutory recognition procedure which can result in the right to bargain on basic rights such as hours, holiday and pay. Generally, collective agreements are not legally enforceable. Trade union members have certain protections and workplace trade union representatives have certain rights to time off, training and access to facilities. In the UK, there is no legal right to strike but in some cases there is limited protection from dismissal if the action meets the legal requirements.

9.2 Works Councils

National works councils are not that common in the UK. Certain employers with at least 50 employees in the UK who have an information and consultation body set up under the Information and Consultation of Employees (ICE) Regulations may be required to inform and consult on the items covered by the relevant ICE agreement.

9.3 European Works Councils

The European Works Councils are derived from a European Directive which was originally implemented in the UK in 2000 under the Transnational Information and Consultation of Employees Regulations 1999. The Regulations require large EU multinationals to set up appropriate information and consultation mechanisms. An employer will need to comply if has at least 1000 employees in the European Economic Area (all 28 EU member states and Norway, Iceland and Liechtenstein) with at least 150 employees in each of two or more of those EEA member states.

9.4 Other Bodies

An employer must inform and consult a trade union or elected representatives in certain circumstances such as a collective redundancy situation, a business transfer, health and safety, occupational pension scheme changes and takeovers.

Changing Employment Terms and Conditions

10. Changing Employment Terms and Conditions

10.1 There is no employment at will in the UK. All employees have a contract of employment and written terms are required by law. Employees have vested contractual rights.

10.2 The terms of a contract cannot be unilaterally varied. So for example, unlike in the US, an employer cannot impose a wage cut or a change in role.

10.3 Imposing changes without consent can mean the changes are ineffective, the employee has a claim or both. The employee has legal protections that can nullify the changes or give rise to a financial compensation claim. In some cases, an employee can resign, walk away from their post termination restrictions and claim compensation.

10.4 Various strategies have evolved in the UK to introduce some flexibility into the employment relationship:

(a) Day to day organisational rules and practices are contained in an employee policy handbook not the contract. Properly worded, the employer retains the right to change the policies which are not contractually binding.

(b) Employment contracts can contain flexibility and mobility clauses. A flexibility clause will allow the employer to change job roles within reason without breaching the contract. A mobility clause allows the employer to move the employee within a set range, usually a radius from the existing workplace, without being in breach of contract. However these clauses must be operated with care so as not to breach the term of trust and confidence that is implied into all UK employment relationships. For example, a flexibility clause could not be used to demote a CEO to a cleaner.

(c) Employment contracts can contain a clause allowing the employer to make minor non-material changes to the contract.

(d) Provided the employee does not object to the change then after a time their continued working and acceptance of wages will mean consent to the change, provided that the change is one that has immediate practical effect.

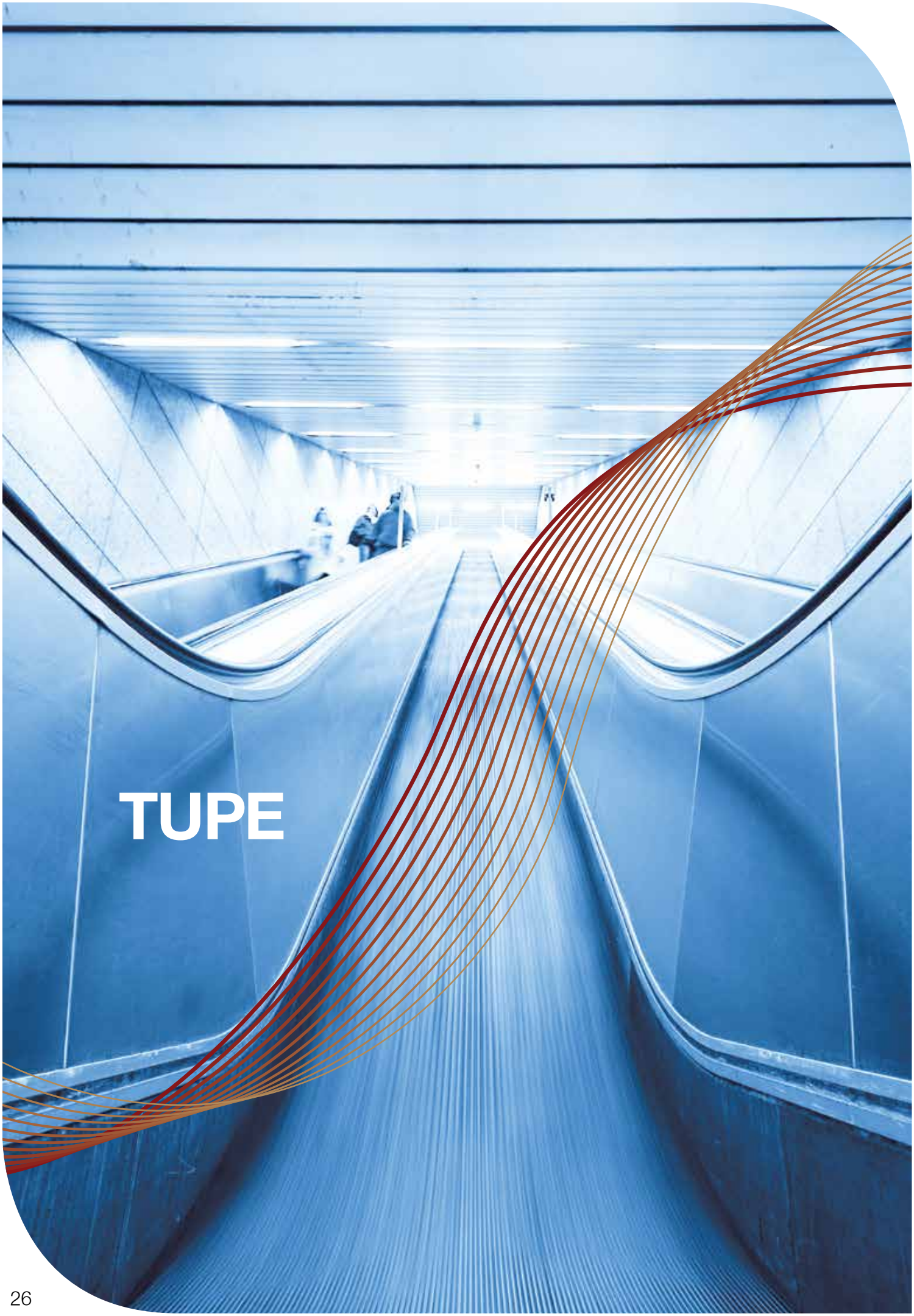
10.5 In the absence of express agreement to the change, there are the following options but neither are without risk of employee litigation:

(a) Impose the change and see if the employee objects, provided that the change has immediate practical effect. If the employee continues in role without objection then they are considered to have accepted the change in contract. However the employee may object and still sue for breach of contract, or resign and claim unfair dismissal, or refuse to work according to the new terms;

(b) Dismiss the employee and re-hire on the new terms. However the employee can then sue for notice and unfair dismissal. Provided that proper consultation takes place (including collective consultation where necessary) and there is a sound business reason for the change then the employer stands a reasonable chance of defeating an unfair dismissal claim but, as always, the decision will be in the hands of the Employment Tribunal and it is not certain.

10.6 A change involving relocation will usually be a redundancy situation. There will be an obligation to consult with the employees, and to pay them severance payments if they do not want to relocate.

10.7 Changes due to a TUPE transfer are void. If a buyer has become an employer through an asset transfer governed by TUPE then any changes to working conditions will be potentially unenforceable.


TUPE

11. TUPE

11.1 TUPE stands for Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended. These regulations are the method by which the UK has implemented the EU Acquired Rights Directive and similar framework legislation exists in all EU countries.

11.2 TUPE protects employees on “transfers” of “undertakings”. This includes a service provision change i.e. outsourcing, insourcing.

11.3 If it applies employees who are assigned to the business or service which is moving automatically have their contracts of employment moved to the buyer or new provider. This transfer happens automatically by operation of law. It is possible for an employee to refuse to transfer but if they do so this has the effect of a dismissal.

11.4 The new employer takes the contracts of employment on the same terms and conditions, with full length of service intact and bears all responsibility for any claims the employees had against their old employers. However it is customary where there is a direct commercial relationship between the old and new employer for the old employer to indemnify the new employer for acts and omissions prior to the transfer and vice versa.

11.5 No changes can be made to the terms and conditions of employment unless there is: (a) an unrelated non-transfer reason for the change; or (b) an economic, technical or organisational reason involving changes to the workforce numbers or function. There are therefore considerable difficulties in harmonization of terms post transfer with particular problems with post-termination covenants.

11.6 Employees are protected against dismissal by either the old or new employer and special rules apply, making dismissals relating to the transfer automatically unfair. An “unfair dismissal” claim is a statutory claim made by the employees and is currently capped at the lower of 52 times the employee’s actual week’s gross pay or £78,335. There is also an additional amount based on length of service currently capped at £14,250. These figures increase each year.

11.7 Both old and new employer have to inform the affected staff about the transfer and consult with them about any implications about the transfer, including any proposed changes to terms and conditions, redundancies or relocation. The information and consultation exercise has to be with elected representatives of the affected staff and there is an obligation to actively facilitate such election of representatives if there is no existing collective consultation forum. Failure to carry out the consultation and information exercise carries the possibility of a claim for 13 weeks’ gross salary per employee affected (which may be a bigger population than just the transferring employees). The obligation to elect representatives is dis-applied for those entities with less than 10 employees though there is still an obligation to inform and consult with them.

11.8 The old employer has to provide certain information to the new employer 28 days before the transfer relating to the transferring workforce. This is known as “employee liability information”.

Restrictive Covenants / Trade Secrets

12. Restrictive Covenants / Trade Secrets

12.1 Employers in the UK are able to include restrictive covenants in employees' contracts to apply after termination of employment. In order to be enforceable, these must go no further than is necessary to protect a legitimate business interest. If the employer has no legitimate interest to protect or the restriction goes further than is necessary the restriction will be unenforceable on the basis that it is in restraint of trade.

12.2 Unlike in certain other European jurisdictions, there is no requirement that the employee is paid for the period of restriction.

12.3 Certain restrictions can be unlimited in length (for example preventing the disclosure of confidential information or preventing an individual from asserting a connection with their former employer). However, the majority of post-termination restrictions must be closely limited in terms of both scope and length in order to be enforceable.

12.4 The most common post-termination restrictive covenants are: (i) preventing an employee being employed or engaged by a competitor; (ii) preventing an employee soliciting or dealing with clients or prospective customers; (iii) preventing employees soliciting or engaging former colleagues; and (iv) preventing an employee interfering with relationships with suppliers.

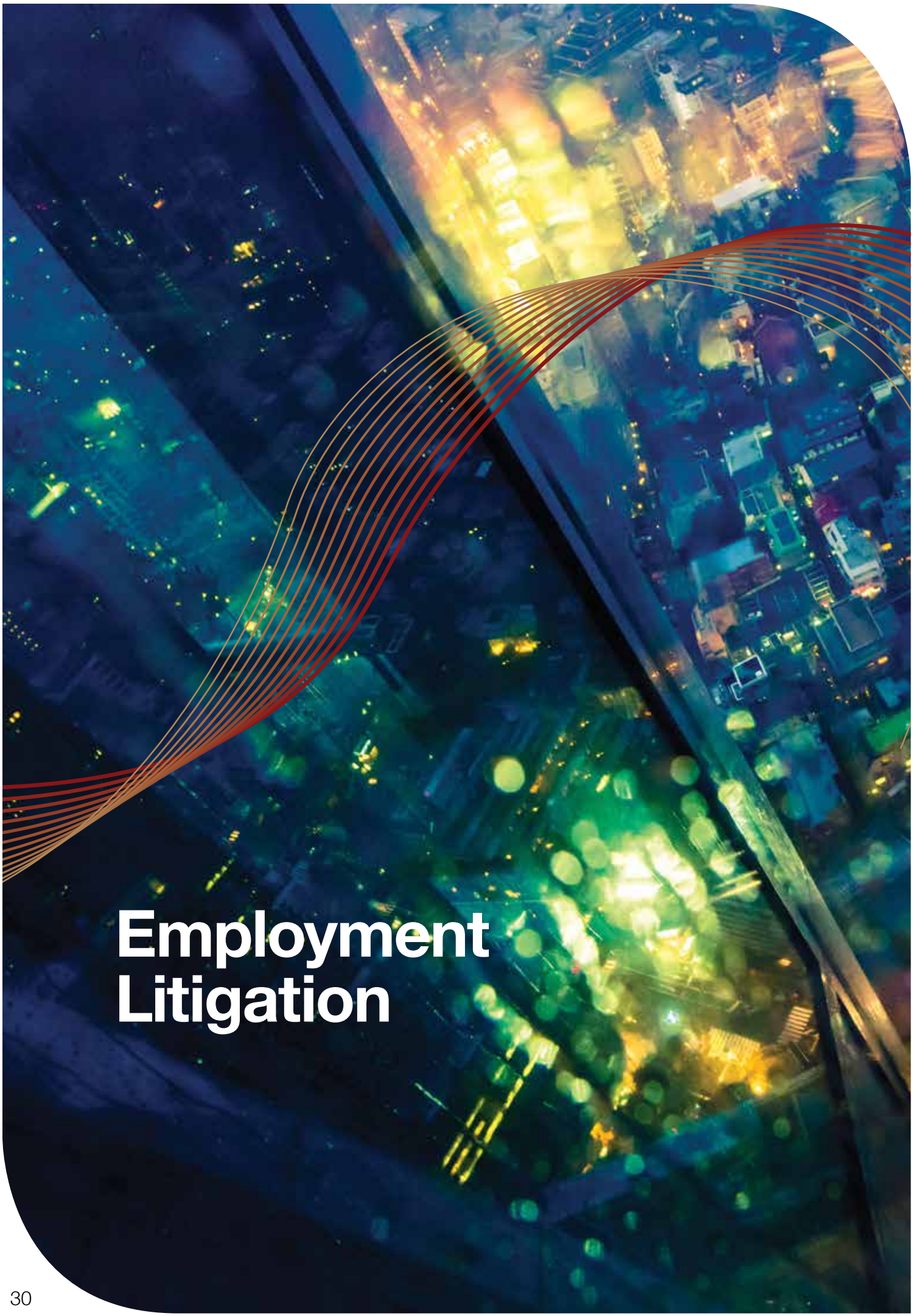
12.5 When drafting restrictive covenants it is important to consider what legitimate interest the company is looking to protect. Generally protectable interests are: (i) confidential information; (ii) client or supplier relationships; and (iii) the stability of the workforce. A key part of drafting enforceable restrictions is correctly identifying which parts of the employer's business the employee possesses confidential information about, as well as which employees, clients and suppliers he or she has influence over. This then needs to be reflected in the restrictions.

12.6 Employers should ask practical questions specific to the individual's situation to decide on the appropriate length of those restrictions. These include: (i) how much access does the individual have to confidential information and clients; (ii) how long will that confidential information remain sensitive; (iii) how long will it take for a replacement to establish relationships with key contacts at clients and suppliers; and (iv) does the individual exercise significant influence over co-workers?

12.7 When asked to enforce a restriction, a court will consider its scope at the time it was entered into. Therefore restrictions should not be drafted to anticipate future promotions. Rather, restrictions should be reviewed and updated regularly to reflect promotions and career progression. Accepting updated restrictions should be a condition of receipt of a payrise or bonus.

12.8 It is important to remember that placing a departing employee on garden leave in accordance with their contract of employment can be a very effective form of restriction. The employee owes an obligation of fidelity during garden leave which they do not whilst subject to a post-termination restriction. Time spent on garden leave is commonly deducted from the length of post-termination restrictions.

12.9 Restrictive covenants can be enforced in a number of ways with the ultimate recourse being to apply to the High Court for an injunction to prevent a breach of restrictive covenant. In dealing with potential breach of restrictive covenants, there are a number of tactical considerations to take into account, including costs. Speed is always of the essence as even relatively minor delays can undermine an employer's attempt to enforce restrictive covenants.



Employment Litigation

13. Employment Litigation

13.1 Employment rights are generally enforced in the UK via the Employment Tribunal system. The tribunal system has exclusive jurisdiction over the majority of statutory rights including unfair dismissal and employment discrimination claims.

13.2 Contractual disputes that arise or are in existence on termination of employment are also often heard in the Employment Tribunal. However, there is a cap of £25,000 on breach of contract claims in the Employment Tribunal. Contractual claims in excess of £25,000 and applications for injunctions in relation to restrictive covenants are pursued in the High Court.

13.3 Claims generally have to be brought within three months of the cause of action occurring (for most claims including unfair dismissal this is from termination of employment, for discrimination claims it is from the last act of discrimination and for unlawful deduction from wages claims it is the date of the last deduction). Equal pay claims and claims for statutory redundancy payments must be brought within six months of termination of employment.

13.4 Potential Tribunal claimants are now required to go through a process of pre-claim conciliation with ACAS, the UK government conciliation service. The deadline for submitting a Tribunal claim is extended by the amount of time between the date ACAS are contacted by the claimant and the date ACAS issue an early conciliation certificate confirming that settlement has not been possible.

13.5 Claims are issued in the Employment Tribunal using **form ET1**. The claimant generally now has to pay a fee of either £160 or £250 depending on the type of claim. The claim form is sent to the respondent(s) by the Tribunal.

13.6 The respondent has 28 days from the date the Tribunal sends out the claim to respond using **form ET3**.

13.7 Once the claim has been issued and a response submitted, a case management hearing will be scheduled for complicated cases to agree a timeline for the various stages of the litigation. Alternatively, for straightforward cases the Tribunal may simply send out a set of directions that the parties must comply with. Parties can apply to the Tribunal for an order in relation to a specific issue (such as specific disclosure of a particular document or a witness order to require attendance at a hearing). Some cases will require several case management discussions to deal with discrete legal issues in advance of a main hearing. Applications to strike out weak claims are also dealt with at such hearings.

13.8 The three key stages of preparation for a main Tribunal hearing are: (i) disclosure of lists of relevant documents; (ii) inspection of documents on those lists to produce an agreed bundle and (iii) exchange of witness statements. The parties are under an obligation to disclose all documents upon which they intend to rely or which support or undermine any party's case.

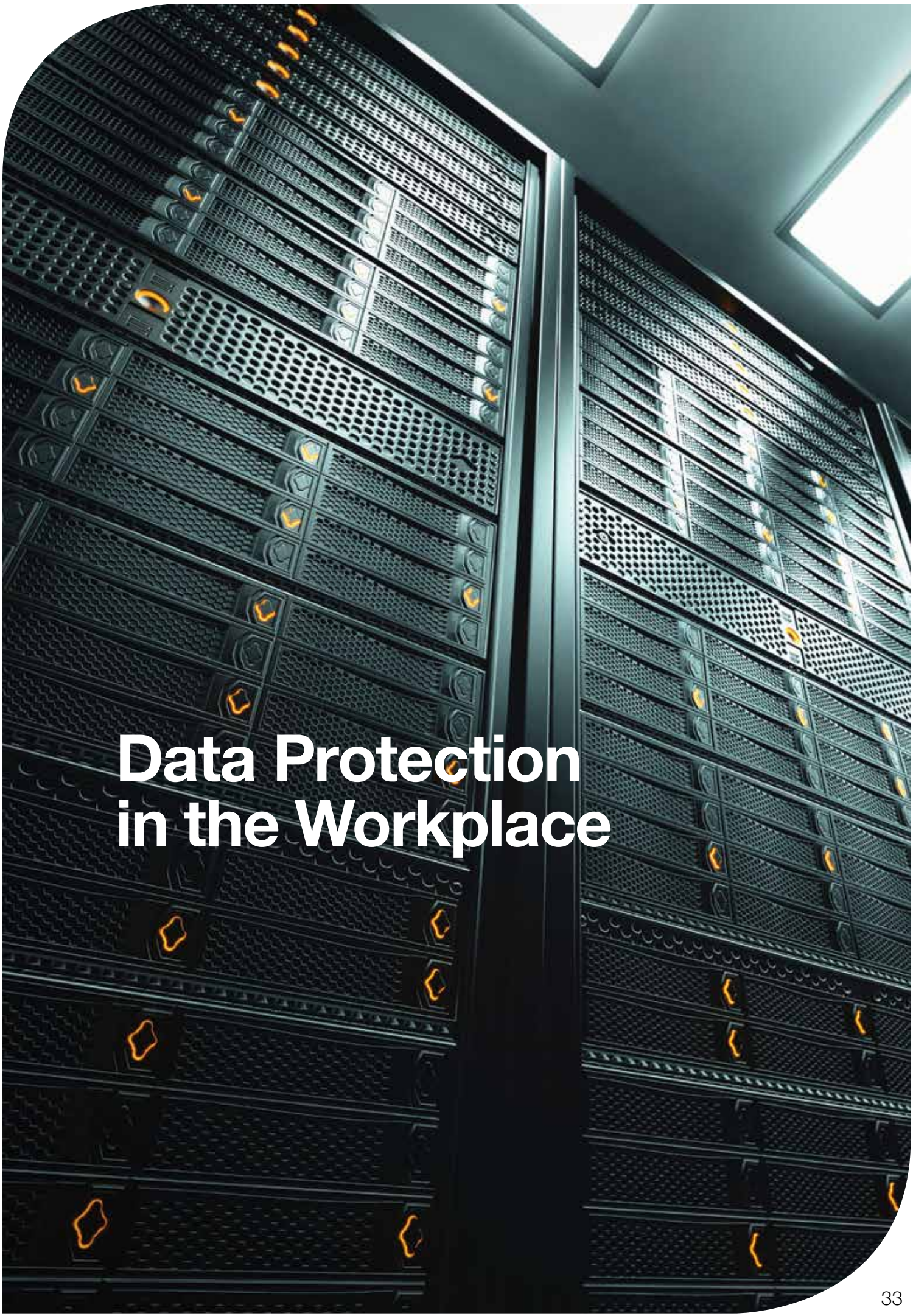
13.9 The claimant generally has to **pay a fee** of either £230 or £950 for a final hearing. The final hearing will be heard before an Employment Tribunal judge (with two lay wing members in discrimination cases). Witnesses are cross-examined on their witness statements by the other side (sometimes with additional questions from the Tribunal panel) with reference to the agreed bundle. Closing submissions are made and a judgment is either given at the end of the hearing for shorter simple cases or deferred and provided in writing for longer and more complicated hearings.

13.10 Appeals from the Employment Tribunal go to the Employment Appeal Tribunal then the Court of Appeal, UK Supreme Court and, in some instances, the European Court of Justice.

13.11 Generally in Tribunal cases each party is responsible for their own costs whether or not their case is successful. However, costs awards can be made against parties who have conducted litigation in an unreasonable, vexatious, disruptive or abusive way or against representatives who cause parties to incur costs by improper, unreasonable or negligent conduct. Such awards are becoming increasingly common. The Tribunal can award costs of up to £20,000 without detailed assessment and can award costs in excess of £20,000 but subject to detailed assessment in the County Court.

13.12 High Court Litigation

Contractual claims in excess of £25,000 and applications for injunctions in relation to restrictive covenants are pursued in the High Court. Litigation in this court is governed by the Civil Procedure Rules and is more formal than in the Employment Tribunal. The normal rule in the High Court is that the unsuccessful party is responsible for the legal costs of the successful party.



Data Protection in the Workplace

14. Data Protection in the Workplace

14.1 The UK is subject to EU law concerning the processing of personal data, which is '**any information related to an identified or identifiable person**'.

14.2 In the UK the processing of personal data is regulated by the Data Protection Act 1998 (DPA) and must be fair and lawful, for limited purposes, adequate, relevant and not excessive, accurate and up-to-date, in accordance with the data subject's rights, appropriately secure and not transferred outside of the EEA without adequate protection.

14.3 Generally to be fair and lawful, processing requires consent from the data subject. Consent is only valid if freely given, specific and informed. In an employment context this is normally done via a clause in the employment contract but there are arguments about whether this is actually valid consent. Consent may not be required in certain limited circumstances.

14.4 Employers should ensure that they have processes and time limits in place for the retention, storage and destruction of employees' personal data, and that of unsuccessful applicants. Retained information should be kept up to date and employees should be asked to update the information held by their employer. Employers should ensure people with access to personal data have the requisite data protection training.

14.5 Extra requirements are imposed upon an employer in relation to the processing of 'sensitive personal data' such as medical information, racial or ethnic origin, political opinions, religious beliefs and trade union membership, for which express consent is always required. Examples include maintaining records of statutory sick pay and maternity, paternity and adoption pay records.

14.6 The misuse of private information may lead to claims under the DPA in which claimants may recover damages for distress without the need to prove financial loss.

14.7 It is a key provision of the DPA that data subjects (including employees) have the right to access their data. Employees receiving this type of request need to comply at the latest within 40 days of the request.

14.8 To assist with the application of the DPA to employers and the employment cycle, the UK's Information Commissioner has published an **Employment Practices Data Protection Code**.

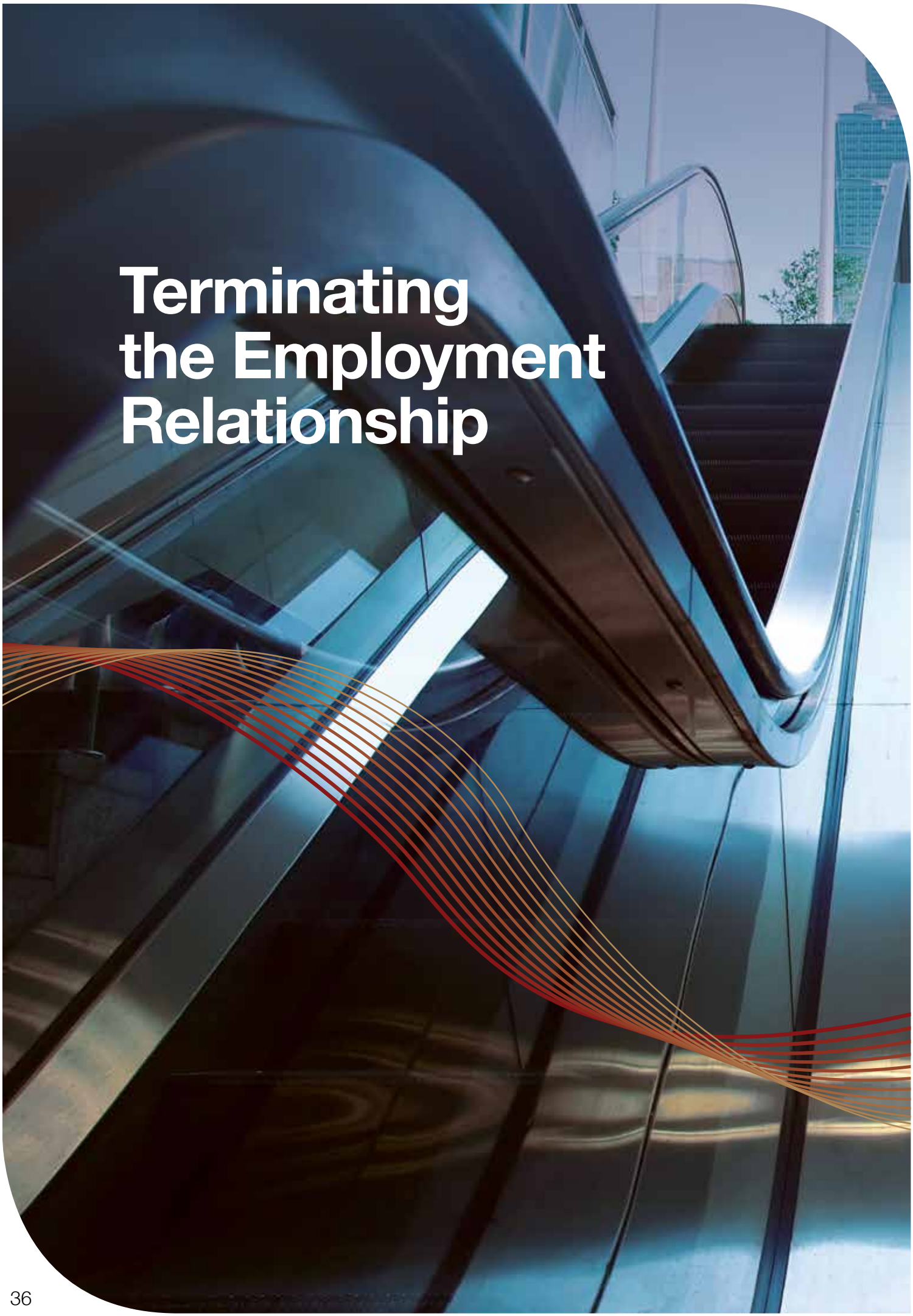
14.9 **Background checks** - Employers should only vet applicants by actively making its own enquiries from third parties about their background if they are applying for roles with particular and significant risks attached to them. This should be carried out as late in the recruitment process as practicable. Checking that details supplied by applicants are accurate and complete is fine. Specific additional rules can apply to the disclosure of criminal records.

14.10 **Business sales** – Under TUPE the seller of a business must provide the identity of transferring employees to the transferee at least 28 days before completion. Employee data which is disclosed as part of a proposed transaction should be anonymised for as long as possible before this date and both parties must take care to comply with the data protection principles in the transfer of this personal data.

14.11 **References** – Employers should confirm whether employees want them to provide references on a case by case basis and should keep a record of this authorisation. Employers should confirm the identity of the recipients of references before disclosing any personal data. References should be true, accurate and fair.

14.12 **Future Legislation** – A new data protection regulation is to come into force in 2018. This will put in place a single set of rules across all 28 EU Member States (although each Member State will be able to have in place rules to govern processing in an employment context and

in the public sector). The Regulation aims to, amongst other things, increase the power of the authorities for dealing with non-compliance with fines of up to €20 million or 4% of global annual turnover. Companies outside of the EU would be required to apply the Regulation when offering goods and services within the EU.



Terminating the Employment Relationship

15. Terminating the Employment Relationship

15.1 There is no employment at will in the UK. All employees have a number of statutory and contractual rights that protect them against unlawful termination. Failure to follow procedures or have lawful reasons on termination may result in a financial claim of up to £92,585, (subject to annual change) a claim for contractual or statutory notice (whichever is longer) and the loss of post termination restrictions. Reinstatement or re-engagement is a possibility but they are rarely ordered.

15.2 It is important to find out how long the employment has lasted. After two years' service an employee has the right not to be "unfairly" dismissed. For a dismissal to be fair there must be both a permitted reason to dismiss and the employer must have followed a fair process.

15.3 Even if the employee has less than two years' service it is prudent to follow a fair process, and give the reason for dismissal, in order to protect against any claims such as for discrimination or whistleblowing, which are day one rights. **Click here** for the ACAS Code.

15.4 Damages for discriminatory behaviour are unlimited but are compensatory and not punitive. They will reflect loss of wages and there is also an amount for injury to feelings, currently calibrated between £660-33,000 and aggravated damages. There are no jury trials for discrimination damages in the UK.

15.5 To advise, we would need to see a copy of the signed employment contract between the employer and the employee. This document should contain the terms relating to the notice required to end the relationship. It may also contain a payment in lieu of notice clause (PILON). If there is no such clause then there may be difficulties in bringing the employment to an end quickly. It may also contain other terms relevant to termination.

15.6 An employee whose employment is terminated in breach of its contractual obligation to give notice will usually have a claim of wrongful dismissal unless the employee has for example committed an act of gross misconduct. The employee can claim damages to be put in the position he would have been in had the contract been properly terminated.

15.7 If an employee believes the employer has committed a fundamental breach then the employee can resign and claim constructive dismissal.

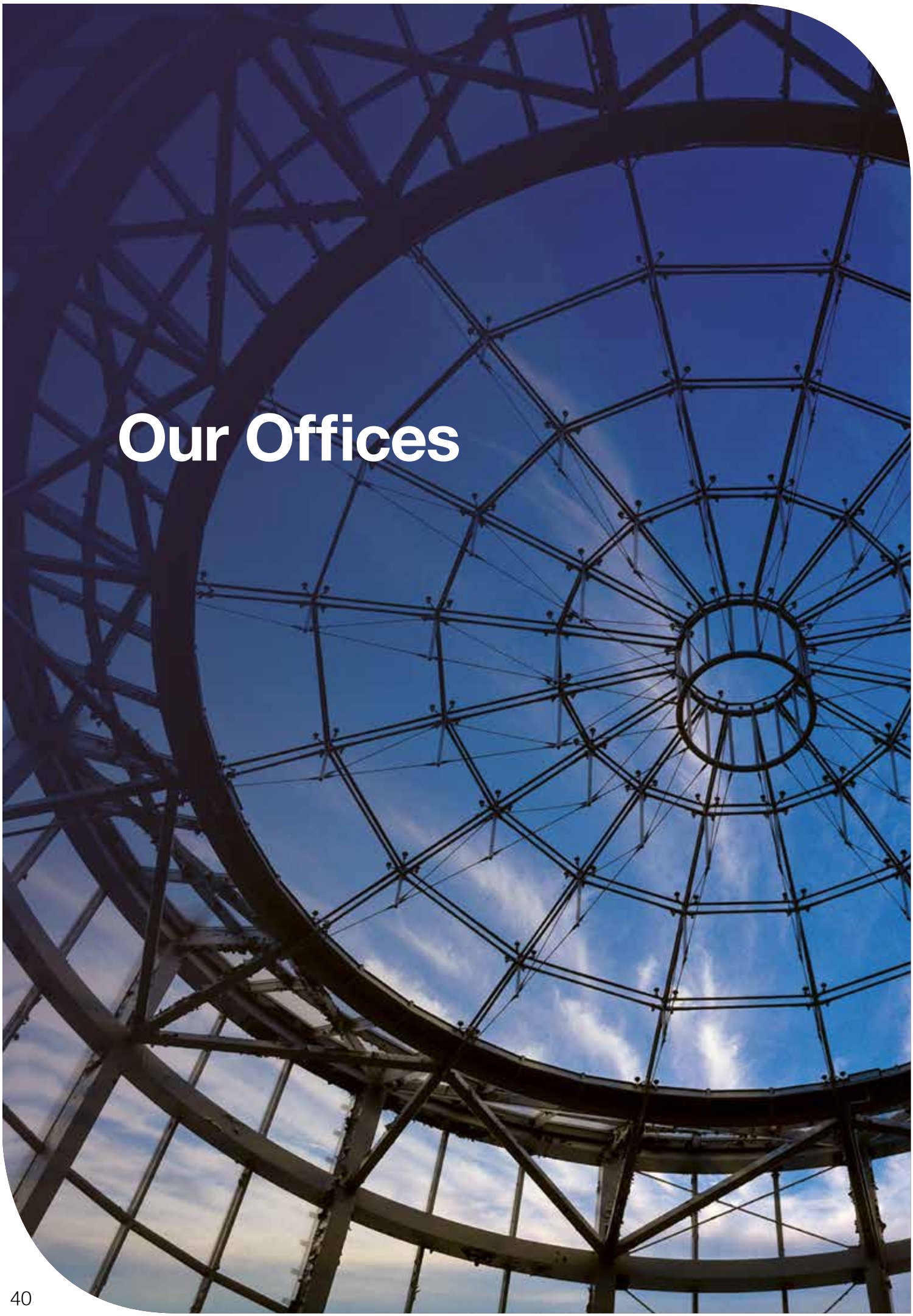
15.8 It is possible to have a "protected conversation" with an employee about their leaving, with compensation. The fact of that conversation cannot then be used against the employee in any later unfair dismissal proceedings (but not discrimination proceedings). Conversations with the employee about their leaving need to be handled with great care, as the mere fact of such discussions may entitle the employee to resign and claim constructive dismissal.

15.9 It is common for an employee to sign a settlement agreement waiving all claims in return for an ex gratia amount. A payment of just the amount the employee is entitled to under the contract will not usually be sufficient. Such an agreement has to be signed by an independent lawyer to be valid and it is usual to offer a sum for legal fees of between £250-750 in an agreed termination. Generally, an ex gratia sum of £30,000 can be paid tax free and is a useful incentive to reach an agreement on termination but you would need specific tax advice.

15.10 If 20 or more employees are being terminated at the establishment then there is an obligation to collectively inform and consult the recognised trade union or elect representatives and in essence consult on ways of mitigating the terminations between 30-45 days before the proposed date of termination. There is also an obligation to notify the Secretary of State and a failure to comply with the information and consultation obligation can result in an award of up to 90 days' uncapped pay per affected employer.

15.11 If redundancy is the reason for the dismissal then the employee may be entitled to a statutory redundancy payment in addition to notice. There may also be an additional contractual right to a greater redundancy payment and you should carry out due diligence on this point.

15.12 The treatment of any stock options or other employee benefits may be a useful way to leverage an agreed termination.



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