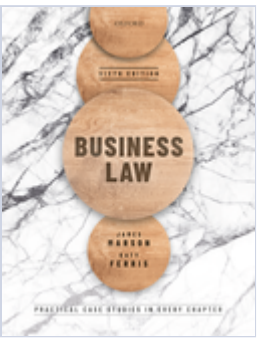

Business Law (6th edn)
James Marson and Katy Ferris

p. 612

23. Statutory and Common Law Regulation of the Conditions of Employment

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Abstract

This chapter continues from the discussion of the obligations on employers to adhere to the Equality Act (EA) 2010 and protect their workers from discrimination and harassment, to a wider consideration of the regulation of conditions of employment. Legislation places many obligations on employers, and they are increasingly subject to statutory controls that provide for a minimum wage to be paid to workers, for regulation as to the maximum number of hours workers may be required to work, and for the protection of workers' health and safety. In the event of an employer's insolvency, the rights of employees are identified, and finally, the mechanisms for employers to protect their business interests in the contract of employment are considered.

Keywords: conditions of employment, statutory controls, minimum wage, maximum number of hours, insolvency, business interests, contract of employment

Legislation places many obligations on employers. Employers are required to protect their workers' health and safety in terms of safe systems of work; safety procedures, and instructions to colleagues regarding their conduct at work; and there are wider protections in terms of the workers' maximum working hours and rest/leave periods, and minimum rates of pay. If these are ignored the employer may face substantial damages claims, and there may also be criminal sanctions against the employer. Further, mechanisms exist to assist workers if the employer becomes insolvent and owes wages or other contractual benefits. The terms and conditions of employment provide the employer with an opportunity to protect their business by incorporating a restraint of trade clause into the contract or using 'garden leave' agreements to prevent unfair

competition or exploitation of the employer's confidential information. Lack of adequate protection of a business's confidential information may be severely damaging hence the necessity of awareness of this area of law.

Business Scenario 23

Jianyu is employed as an estate agent for Top Homes Ltd. Jianyu's contract of employment include the following terms:

- he must work the hours required of him by his line manager;
- his employment duties may vary in respect of the needs of the company;
- he may only take holidays agreed six months in advance by his manager;
- following the termination of his contract, Jianyu may not establish his own business as an estate agent, nor work for another estate agency, within a five-mile radius of Top Homes Ltd's office for a period of one calendar year.

Jianyu is also required to inspect properties in the course of his duties. The (fictitious) Agents, Employees and Safety Act 1970 provides that all estate agents whose role includes property value and assessment must receive health and safety training. The Act does not, however, stipulate the content of the training or outline the regularity of the maintenance of the training.

Learning Outcomes

- Explain the scope of the Working Time Regulations 1998 and its application to the workforce (**23.2–23.2.6**)
- Identify how the maximum working week is calculated and workers' right to paid annual leave (**23.3–23.3.4**)
- Identify the employer's duty to protect workers' and visitors' health and safety, and the duty to maintain liability insurance (**23.4–23.4.2.5**)

p. 613

- Describe the mechanism for incorporating a restraint of trade clause into a contract of employment and the scope of its protection to the confidential information of a business (**23.5–23.5.8**)
- Explain the protections to workers in the event of the insolvency of the employer (**23.6**).

23.1 Introduction

This chapter continues from the discussion of the obligations on employers to protect their workers from discrimination and harassment, to a wider consideration of the regulation of conditions of employment. Employers are increasingly subject to statutory controls that provide for a minimum wage to be paid to workers; for regulation as to the maximum number of hours workers may be required to work; and for the protection of workers' health and safety. In the event of an employer's insolvency, the rights of employees are identified, and finally, the mechanisms for employers to protect their business interests in the contract of employment are considered.

23.2 The Working Time Regulations 1998

Prior to 1998, there was little regulation over working hours in the United Kingdom (UK). Whilst men were allowed to work as many hours as they could physically manage, regardless of the negative impact this may have on their health, women and children had been protected through the Factories Acts. In 1993, the EU passed the Working Time Directive that sought to regulate maximum working hours in the EU, and the UK responded by enacting the Working Time Regulations 1998. The Regulations apply to 'workers' rather than just 'employees'. To qualify as a worker the individual has to perform their work or provide services personally (reg. 1), hence, it does not matter if they are self-employed, an agency worker, or a trainee.

It is important to recognize that whilst this textbook presents legal topics in isolation (where possible), the reality is that a breach of one area of law may lead to breaches of others. For example, a breach of the Working Time Regulations may lead to liability under these Regulations, but it may also negatively impact an employee's stress and mental illness which could also lead to an employer's tortious liability. Insofar as these are reasonably foreseeable, an employer could face liability on each count.

Hone v Six Continents Retail (2005)

Facts:

The claimant pub manager was subject to an excessive workload that, he claimed, led him to suffer stress and this extended to a psychiatric injury. According to records maintained by Hone, he was working between 89–92 hours per week. Whilst the judge referred to planning issues which were in the control of Hone and could have alleviated the negative effects of his work, later in his employment key personnel left the business. This exacerbated his stress and he complained to the Operations Manager who failed to take appropriate action.

p. 614

Authority for:

The meeting where Hone identified his stress levels and need for help established a reasonable foreseeability of harm. This was a plain indicator of impending harm to the claimant for which the employer was responsible.

However, given that reasonable foreseeability is often fact-specific, the decision in *Hone* should be compared with the following case:

Sayers v Cambridgeshire County Council (2006)

Facts:

Sayers was a Senior Operations Manager and working on average 50–60 hours per week. She had been observed at work showing manifest signs of distress (crying and visibly upset) but this was attributed to the nature of her work and the reaction to criticisms, work failures, and so on. She also had time away from work but at no point did Sayers refer to any stress or illness related to her workload. Even though three employees engaged in comparable positions as Sayers had suffered a psychiatric injury it was held that her illness and injury was not reasonably foreseeable.

Authority for:

It was in the claimant's deliberate concealment of her ill health and absences that the employer could not have reasonably foreseen the consequences suffered by Sayers. An understanding of some of the more obvious signs of stress is not necessarily sufficient to hold the employer liable when an employee becomes ill.

Whilst there was a failure to adhere to the Regulations, the employee's illness was not reasonably foreseeable and the employer's actions were reasonable in the circumstances.

Consider

Consider that Jianyu is required to, and regularly does, work in excess of 50–60 hours per week. However, as the business is going through a period of rapid expansion with the boom in the housing market, his employer has informed Jianyu that he needs to put in extra hours to meet demand (as per his contract). As such, Jianyu is currently working 80+ hours per week which is affecting his private life and his health. What regulations are applicable, can Jianyu opt-out of working such hours, and what are the responsibilities on Top Homes Ltd to ensure that it is acting in accordance with the law?

p. 615

23.2.1 The Maximum Working Week

The Regulations provide that in a seven-day-week period, the worker should not exceed 48 working hours (reg. 4), assessed over a 17-week period. As a consequence, the worker may perform substantially longer hours in some weeks as long as the employment over this period averages out to no more than 48 hours per week. The Court of Justice of the European Union identified, in *Maio Marques da Rosa v Varzim Sol*, that workers may be required to work for 12 consecutive days without a weekly rest break. It explained that there was no requirement on the employer in the case to provide a rest break after six consecutive working days as the break can be provided within each seven-day period. Thus, for the purposes of compliance with the Working Time Directive, a working pattern where the rest break is taken at the start of one seven-day period and the other provided at the end of the second seven-day period means a worker can be required to work for 12 consecutive days.

Also, the restriction is on a maximum *working* week, what then is work for the purposes of this calculation?

Landeshauptstadt Kiel v Jaeger (2004)

Facts:

A doctor was employed at a hospital in Germany. He would work at the hospital administering care. He would also undertake on-call duties which required him to be at the hospital although this was offset by granting him leave, providing some additional pay, and giving him a room and bed to rest when his services were not required. German law distinguished between 'readiness for work' and 'stand-by' which led to the doctor's query regarding what was considered work.

Authority for:

The Court of Justice of the European Union clarified the meaning of 'working time' as part of the Directive—and thereby the UK's interpretation of its Regulations. 'Work' means working at the employer's disposal, and carrying out the duties concerned with this work. Hence, those individuals who are on call as part of their working duties have this time included in the assessment if the work is performed at the employer's place of business but not if the 'on-call' duties involve the worker waiting away from the workplace.

Further guidance was provided by the EAT in 2017:

Focus Care Agency v Roberts (2017)

Facts:

Three cases involving individuals and whether their 'sleep-in' time counted as 'time work' for the purposes of the National Minimum Wage. The EAT considered that yes or no answers to this question was often not possible as such cases were very fact specific. However, it did state that merely because an individual was on the employer's premises, provided with accommodation or on-call did not automatically result in them being at 'work'.

p. 616

Authority for:

At para. 44 the EAT identified four factors which will help determine whether an individual is working whilst being present:

1. Where the individual is present due to a regulatory or contractual requirement on the employer;
2. Any restrictions on the individual's activities—such as having to remain on the premises throughout the shift and may face disciplinary action if they leave (and do something else);
3. The degree of responsibility undertaken by the individual. For example, a distinction may be drawn between an individual sleeping at the employer's premises to alert emergency services on the basis of a fire or break-in; at the other end of this scale an individual may have to care for persons with a disability and thus have a heavier personal responsibility throughout the night; and
4. The immediacy of the requirement to provide services if something untoward occurs or an emergency arises. Hence, whether the individual is the person who decides to intervene and then intervenes when necessary, or whether the individual is woken as and when needed by another worker with immediate responsibility for intervening.

23.2.2 Opt-outs

The UK Government, during the negotiations for the Directive, was successful in obtaining an opt-out clause to the effect that individual workers could waive their rights to protection under the law. Workers cannot be forced to agree to the opt-out, but in practice many recognize this may be necessary to obtain employment. If a worker has opted out, they may change their mind and seek protection under the law if the employer is given seven days' notice (and this time is not beyond an agreement established with the employer for a longer period).

23.2.3 Enforcement

Under the Working Time Directive, it is the employer's responsibility to record the hours actually worked by individuals whom they employ. This was determined by the Court of Justice of the European Union in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*. Interestingly, the national Working Time Regulations do not contain a similar requirement and are seemingly in breach of EU law.

The workers who are not in the excluded categories are entitled to protection under the Regulations. If an employer refuses to allow a worker to gain access to these rights, or does not take reasonable steps to ensure compliance with the Regulations, they are guilty of a criminal offence. This is extended to an employer who dismisses or penalizes a worker for exercising, or attempting to exercise, their rights (ERA 1996, ss. 45A and 101A). It should be further noted that whilst there are limited obligations on the employer to hold anything other than 'general' records regarding workers' hours of work and written documentation, the Court of Justice
p. 617 of the European Union (Court of Justice) provided ↵ a strong recommendation that it may be in the employers' interest for employers to hold sufficient records to demonstrate that the opt-out was expressed, rather than implied, and was, along with any other contractual term, entered into freely.

Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (2004)

Facts:

Workers, including Mr Pfeiffer, were engaged by the German Red Cross as emergency staff. They were subject to a collective agreement which set their weekly working hours at 49. This was in breach of the Working Time Directive (although the employer claimed, unsuccessfully, that their work was exempt from the Directive).

Authority for:

The CJEU held that working hours could not be fairly set collectively and that each worker had the right to opt-out on an individual basis. In order to effectively operate a maximum working week a 'worker's consent must be given not only individually but also expressly and freely'.

23.2.4 Rest Breaks

Along with the maximum working week, the Regulations provide that adult workers are entitled to a 20-minute rest break if expected to work more than six hours at a stretch. Further, they are entitled to 11 hours' rest in each 24-hour period, and 12 hours' rest for young workers (reg. 10). For those workers employed on a shift pattern, these Regulations do not apply in this manner. However, they are entitled to an equivalent period of rest and a refusal will amount to a breach of the Regulations.

Grange v Abellio London (2016)

Facts:

The claimant was contracted to work for eight hours and thirty minutes and his shift included a thirty minute lunch break. His employer instructed him, however, that he should not take the lunch break. Rather, Grange was to work straight through and leave work early. He claimed this was a breach of reg. 10 on the basis that he had been refused a rest break.

Authority for:

The employer argued successfully at the tribunal that as Grange had not asked for a rest break he could not have been refused one. However the EAT held that the instruction to work through could be interpreted as a refusal. An explicit request was not needed.

23.2.5 Entitlement to Annual Leave

The Working Time Directive provides that workers are entitled to four weeks' paid leave. The Regulations provided for the introduction of a system of paid annual leave (reg. 13) that has resulted in entitlement to 5.6 weeks (28 days) to reflect 20 days of holidays and ↵ eight days of statutory bank holidays. This was a major increase to workers' rights, as many received less than this minimum when the Regulations were brought into effect. The employer is also obliged to clearly distinguish between 'normal' pay, and pay for leave as provided in lieu of holidays. It was a practice of employers to 'roll up' pay with pay in lieu and hence circumvent the requirement to allow workers to take their holidays (a particular concern of casual workers). The Court of Justice provided this clear identification of how the pay received by the worker was to be declared separately as pay for work, and pay for holiday entitlement.

p. 618

Robinson-Steele v RD Retail Services Ltd (2006)

Facts:

A reference was made to the CJEU regarding the hours of work of the claimant employees and whether this expressly included an amount to cover annual leave (and thus was 'rolled up' holiday pay). The question was therefore: did the employees have an entitlement to leave or had they been issued with additional pay to reflect that they were not taking holidays?

Authority for:

Including holiday pay in the payments to workers often occurs with temporary and casual staff. This simplifies a potentially complex situation for the employer. The CJEU held that rolling up holiday pay is unlawful. It must be clearly identifiable as a separate sum on a worker's pay form to comply with the Directive.

Recent case law from the Court of Justice has clarified the obligations imposed on employers when dealing with annual leave and holiday pay. In *Lock v British Gas Trading Ltd* the claimant, a sales consultant for British Gas, took two weeks' annual leave and was paid his normal (basic) salary without the commission he usually earned being added to this sum (his commission regularly accounted for 60 per cent of his salary). Despite the fact that the commission earned varied from month to month, it was sufficiently permanent and directly linked to his work and the payment of his salary, and there was an intrinsic link between the commission and the performance of the tasks of the worker's job. Hence the Court of Justice required it to be included in his holiday pay. To do otherwise would have been an incentive for the individual not to take annual leave, and the purpose of the Working Time Directive was to enable workers to take rest periods away from work as a health and safety measure. In *Lock and Another v British Gas Trading Ltd (No. 2)* the Court of Appeal, upholding the EAT's decision, found that the Regulations should be interpreted to require employers to include a worker's commission payments in calculations regarding their holiday pay. Of course, this ruling is based on the Working Time Directive (which provides four weeks of paid leave) rather than the additional 1.6 weeks' leave provided in the UK's Regulations. Also, in respect of the recovery of underpayments of holiday pay through unlawful deductions from wages, such claims must be made within a three-month time period of the alleged underpayment.

It is also 'pay' when voluntary overtime, normally worked, is undertaken by the individual. The EAT in *Dudley*
p. 619 *Metropolitan Borough Council v Willetts* held that such work is ↵ considered 'normal remuneration' for the purposes of calculating holiday pay. To do otherwise would effectively disadvantage workers and may deter them from taking annual leave which is a central aim of EU social policy law.

There is a two-year cap on claims for backdated holiday pay, hence, employers will be looking forwards to ensuring they comply with wages and payments in the future.

Consider

If Jianyu had to give six months' notice to take paid annual leave, what would be the effect if he was too ill to take his holiday at the date when arranged? What would happen to his holiday entitlement if he died in service and was unable to have his holiday? Recent case authority from both national courts and the CJEU have helped to answer those questions.

In *ANGED v FASGA* the Court of Justice established that a worker who is sick during the year in which holiday entitlement accrues and cannot take leave is entitled for the leave to continue into the next year (of annual leave entitlement). This right to paid annual leave continues to accrue when the illness which has prevented the worker from taking the leave leads to their death.

Bollacke v Klass & Kock B.V. (2014)

Facts:

Mr Bollacke had been engaged by the employer for a period of 10 years before his health began to deteriorate. This led to absences in 2009 of eight months' leave, some absences in the first part of 2010, and then later in 2010 whilst on sick leave he died. His wife was his sole beneficiary and claimed for the holiday pay which her husband was unable to take whilst ill. In total, it transpires Mr Bollacke had accrued 140.5 days of unpaid leave.

Authority for:

The employer claimed that, in accordance with German law, an employee's contract died with them and therefore the employee cannot take any unused holiday leave whether entitled to it or not. The CJEU had already distinguished between holiday leave and sick leave in *ANGED*. It went further by confirming that the Directive was not to be interpreted so that the death of a worker relieves the employer of the duty to pay any outstanding leave. Nor could allowance for the leave be restricted to a prior application.

23.2.6 Night-shift Workers

The Regulations are applicable to those who work during the day, but are also applicable to, and perhaps even greater protection is required for, those workers employed on shift patterns and night work. This assessment is concerned with the regularity of the period of night work rather than whether it involves the majority of the work. Regulation 6 provides that night workers should not exceed eight hours in any 24-hour period
p. 620 (albeit that this ↵ is assessed over an average of 17 weeks). Night work is defined as work, under the normal course of the employment, of which at least three hours of the daily employment is performed during the night.

23.3 The National Minimum Wage and National Living Wage

Workers have the right to be paid, and their pay must be at least at the level established in the National Minimum Wage Act 1998 (NMW 1998) or the National Living Wage (The National Minimum Wage (Amendment) Regulations 2016). Since 1 April 2016 workers aged 25 or over (and not in the first year of an apprenticeship) are legally entitled to be paid at least the National Living Wage.

This is regardless of the size of the employer, and regardless of whether the worker is employed full or part time, paid on commission, or is a casual or agency worker. Employees are also entitled to an individual, written pay statement that identifies the gross pay, the deductions made, and the net pay provided to the worker. There are strict rules on the deductions that an employer may make to an employee's pay. The most obvious reason for a deduction involves those that are required by legislation (National Insurance Contributions and income tax for those subject to Pay As You Earn taxation). Deductions may also be identified in writing in the worker's contract and authorized by the worker or the relevant negotiating body. Finally, an employer, under certain circumstances, may be able to deduct up to 10 per cent of the gross pay of workers in the retail sector to reflect cash shortages or stock deficiencies. This last category is reviewable by an Employment Tribunal if the employee argues it has been applied unfairly.

NMW 1998 provided most workers over compulsory school age with the right to be paid the minimum wage established by that legislation and the subsequent increases as established under the Act. The Government takes recommendations from the Low Pay Commission with regard to the increases in the rate of the minimum wage. As of 1 April 2019 the rates were as follows:

- for adults aged 25 and over the National Living Wage is applicable: £8.21 per hour;
- for workers aged 21–24 and over: £7.70 per hour;
- for workers aged 18–20: £6.15 per hour;
- for young workers (16-17): £4.35 per hour;
- for apprentices (under 19 years old or 19 and over in the first year of their apprenticeship): £3.90 per hour.

From 6 April 2019 the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 came into force. The Order requires that pay slips identify the hours of work being paid where the wages vary according to when those hours were worked. This can be achieved either as an aggregate of the total number of worked hours or as a separate figure for the different types of work completed.

23.3.1 Worker

The term 'worker' is defined in s. 54 as someone employed under a contract of employment or any other contract where the person performs the work or provides their services personally. This does not, however, include someone who is genuinely in business on their ↵ own account. Examples of workers who qualify include: agency workers; apprentices; foreign workers; piece workers; commission workers; and homeworkers. Examples of workers who do not qualify include: self-employed workers; volunteers; company directors; and those working for friends and family.

p. 621

23.3.2 Calculating the Pay

As the legislation provides for a minimum level of hourly pay, and many workers are paid on a monthly or weekly basis, establishing that the minimum level of pay is being received requires a mechanism for calculation.

NMW 1998 provides that the minimum wage is based on the gross pay provided to the worker, but it does not include pension payments, redundancy pay, overtime pay (to ensure that workers do not have to work overtime in order to achieve the minimum wage), expenses, and so on. However, note the distinction in the following case:

Esparon t/a Middle West Residential Care Home v Slavikovska (2014)

Facts:

The claimant was a care worker engaged at the employer's residential care home. She was required to stay at the care home on night shifts for emergency purposes and as required by law. She claimed this was 'work' for the purposes of the NMW and she should be paid accordingly.

Authority for:

The EAT distinguished between an individual who undertakes a shift pattern involving sleeping at the employer's premises as required as part of the employer's legal obligations and staff generally being on call. The former will be entitled to pay for these hours under 'time work'. This applies even though the worker may essentially be doing no 'real' work during that period. Per HHJ Serota QC: 'An important consideration in determining whether an employee is carrying out time work by reason of presence at the respondent's premises "just in case" must be why the employer requires the employee to be on the premises. If he requires the employee to be on the premises pursuant to a statutory requirement & that would be a powerful indicator that the employee is & working regardless of whether work is actually carried out.'

The employer may include accommodation provided to the worker as part of their hourly pay (which would be offset against the minimum wage payments), but this is limited to a maximum of £7.55 per day. Bonuses paid by the employer and tips received due to service may be counted by the employer in calculating the minimum wage, as are any performance-related pay awards.

The period of work that is used in the calculation of the averaged hourly pay must not be more than one month. However, if the pay is provided on a weekly or monthly basis, this assessment (reference) period will be reduced (reg. 10). There are various forms of working practices that establish the calculation of the hours,
p. 622 and then a reduction ↵ of these hours down to the pay received (and hence the pay per hour) is possible. The methods available are:

- *Time work:* Here the work is paid according to the number of hours worked. The calculation simply consists of dividing the pay received by the worker by the number of hours worked to establish the hourly rate (reg. 3).

- *Salaried work:* Here the worker is paid an annual salary and the work is then reduced to a number of (basic) hours worked, with the pay reduced from this annual amount to a weekly (divided by 52) or monthly (divided by 12) rate (reg. 4).
- *Output work:* Here the work is paid when a task is completed (such as piecework or work on commission)—it depends upon the speed of the work by the worker that would determine how many hours were worked, and therefore the pay per hour (reg. 5).
- *Unmeasured work:* If the work does not fit into the above categories then it will be calculated under this measure. The minimum wage must be paid for each hour worked, or the pay must be determined according to a daily average.

23.3.3 Obligation to Maintain Records

Due to the nature of the minimum wage, an employer is obliged to maintain records of payments to their workers, and the hours worked, to ensure that evidence is produced and can be inspected. Her Majesty's Revenue & Customs (HMRC) may access these records to ensure compliance, but there is also a right for the workers to view their own records, and to obtain copies. Falsifying records is a criminal offence and may lead to an enforcement order against the employer.

23.3.4 Enforcement Proceedings

As the minimum wage is a right that ensures workers receive the minimum amount established by the legislation, it is only effective if it is enforceable. An aggrieved worker may bring an action to an Employment Tribunal to claim owed wages (and if they suffer any detrimental treatment such as a dismissal for bringing a claim they have an additional action for unfair dismissal). Here the worker establishes their claim, and as the employer is obliged to maintain adequate records, the burden is on the employer to demonstrate that the worker's claim is incorrect. The Government also established a penalty notice policy designed to further 'encourage' recalcitrant employers to fulfil their obligations. It provides HMRC with the authority to enforce NMW 1998 and as such a compliance officer may serve an enforcement notice on an employer which specifies the amount of money owed to the worker(s); the time limit in which the employer has to pay this sum; and the time limit in which payment has to be provided. A penalty of 200 per cent of the amount owed will be levied unless the arrears are paid within 14 days. A fine of up to a maximum of £20,000 may be imposed on an employer guilty of breaching the Regulations and an employer who fails to satisfy the fine will be disqualified from holding the office of a company director for a period of up to 15 years.

23.4 Health and safety

Every employer owes their workers and visitors to their premises a duty to take reasonable care for their health and safety. The obligations on the employer apply to all workers and this primary responsibility for
p. 623 safety rests with the employer, even though the workers ↵ are legally obliged to assist in these matters. Health and safety requirements have bases in both the common law and through increasing legislative action,

both domestically and from the EU. The Health and Safety Executive (HSE) provide statistics each year regarding injuries and deaths at workplaces. In 2016/17, 137 workers were killed at work and there were, according to the Labour Force Survey, 609,000 injuries at work. These reports highlight the dangers at work and seek to raise awareness (particularly of employers) of the need for appropriate actions, mechanisms, and policies to reduce incidence of accidents and to prevent injuries and illnesses.

The law regulates health and safety through legislative provisions and the common law (including criminal and civil law jurisdictions). They have different aims, and both may be used against an employer where an employee has suffered an injury or illness due to a negligent act or omission of the employer.

Consider

Could working 80+ hours per week adversely affect Jianyu's health? Assume that Jianyu had been a cooperative colleague with a pleasant demeanor who recently, following his working the extra hours required by Top Homes Ltd, has become withdrawn, aggressive, and exhibits other signs of stress. What obligations are imposed on Top Homes Ltd to protect Jianyu?

23.4.1 The Common Law

The health and safety of employees is a non-delegable duty on the employer. The employer may delegate the duty (in theory) but the presumption by the courts is that the employer may not escape responsibility if the duty has been delegated and then not performed correctly or as required.

McDermid v Nash Dredging & Reclamation (1986)

Facts:

A ship-hand was injured as a result of the captain's disregard of adhering to relevant safe systems of working. A question of vicarious liability was raised but ultimately rejected.

Authority for:

The House of Lords held that the duty to operate a safe system of work was nondelegable. Employers had a duty to devise the system and also had a responsibility to fulfil its application—it cannot be delegated to an employee for example.

In terms of health and safety, the duty of care has to be established specific to the employer's responsibility, rather than the broad test as outlined in the discussion of negligence. Workplaces may often involve
p. 624 dangerous machinery (e.g. in factories) or activities that ↵ place workers in circumstances where injury

may occur. The test of establishing a duty of care involves the employer taking reasonable precautions and safety initiatives that are relevant and not unduly oppressive.

Paris v Stepney BC (1951)

Facts:

The full facts of this case are covered at **11.5.2.2**. Mr Paris was blinded in the course of his work for the Council. The employer did not consider the job to be sufficiently serious to warrant the use of safety goggles.

Authority for:

The House of Lords held that due to the potential for injury, the employer did owe Mr Paris a duty of care to provide the correct safety equipment, and due to this failure, he was entitled to claim damages for his injury.

Breach of the duty to take care involves a cost/benefit analysis to be considered.

Watt v Hertfordshire CC (1954)

This case is also discussed at **11.5.2.2**.

Facts:

An emergency call was made to a fire station regarding a woman trapped under a lorry. The accident occurred approximately 200–300 yards from the fire station and the fire crew were requested to attend. A heavy lorry jack was required to be transported to the scene quickly and the usual vehicle for this purpose was unavailable. The chief ordered the claimant and his colleagues to use the fire engine to take the jack to its destination and to hold it secure during its journey. On route, when the fire engine had to brake, the jack fell onto the claimant and severely injured his leg.

Authority for:

There was no way to securely hold the jack in place during its transportation and this was an emergency situation involving life and death. Given the circumstances, the need for very prompt action and a balance between the benefit of the action compared with the need to take precautions, there was no breach of the duty of care. Denning LJ stated: ‘It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition

there ought to be added this: you must balance the risk against the end to be achieved.' This is a balancing act between ensuring the employer takes precautions to prevent injury, and ensuring the preventative measures are reasonable and not excessive.

p. 625 Therefore, a common-sense approach is adopted. ↵

Latimer v AEC (1953)

Facts:

The full facts of this case are covered at **11.5.2.2**.

A storm flooded the factory where Mr Latimer worked. Though the employer spread sawdust to prevent workers from slipping, Mr Latimer fell in an unprotected area.

Authority for:

It was held that the employer did owe Mr Latimer a duty of care, but had not breached this and had done all that was reasonable. It was not reasonable for AEC to close the factory, but it should have attempted to prevent injuries through preventative actions, including the sawdust and instructions to workers. As this had been achieved, the claim for damages must fail.

The requirements under the common law attributable to employers, follows the House of Lords decision in *Wilsons and Clyde Coal Co. Ltd v English* (see **13.6.2**). Essentially employers are required to provide competent employees for the claimant, a safe system of work, safe equipment at work, and a safe workplace.

Consider

Today, Jianyu is visiting a dilapidated building to provide an assessment of the property and a valuation. This is the first property in such a condition that Jianyu has visited and he is doing so unaccompanied. Jianyu has not been provided with any health and safety instructions or training (as required per the Business Scenario at the start of this chapter). He therefore has not taken a flashlight/torch with him, he only has his office shoes to wear (rather than safety boots), and he has only informed the staff in the office that he is visiting the property at some point in the day rather than providing any details.

On entering the property Jianyu falls through a hole in the floorboards and breaks his arm. He is unable to move and, in the course of falling, he drops his briefcase which contains his mobile phone. In relation to the following sections, identify any potential breaches of health and safety law by Top

Homes Ltd Further. Do you think Jianyu had any responsibility towards maintaining his own health and safety?

23.4.1.1 Competent employees

The employer is required to ensure that the colleagues of the claimant are competent and do not endanger other workers. Establishing mechanisms to avoid dangerous colleagues ensures that a policy of acceptable behaviour at work is created and applied. They are used to identify (and minimize) risks; and to facilitate necessary training and supervision of workers in matters of health and safety. Where the employer has
p. 626 employed someone ↵ who is not sufficiently competent to perform the tasks required of the position, the employer may be liable for any damages suffered as a result of this employee. For example in *Hawkins v Ian Ross (Castings) Ltd*, a worker was injured as a result of a 17 year old, who had only a rudimentary understanding of English, making an error and spilling molten steel.

The incompetence has to be foreseeable, but where the injury is due to the colleague being involved in practical jokes, if the employer is aware of such actions and has done nothing to prevent them, then consequent injuries may have to be compensated.

Hudson v Ridge Manufacturing Co Ltd (1957)

Facts:

The claimant was injured at work by a colleague who had a history and reputation of horseplay and engaging in pranks at work. Whilst the employer was aware of this and had reprimanded the colleague on several occasions, they did not take any formal action and it, evidently, did not prevent his continued actions.

Authority for:

The employer was liable for the injury to the claimant. The employer was aware of the source of danger and had failed to take adequate steps to prevent it.

However, where such action involves an unauthorized act that the employer could not have foreseen, the employer will not be liable.

Aldred v Nacanco (1987)

Facts:

The claimant was injured when a colleague tried to startle her by pushing an insecure washbasin in her direction. However, this action caused the claimant injury and she sought damages.

Authority for:

The claim failed as the colleague's action was not connected with her employment. Employers may be liable for authorized acts and the wrongful ways in which they are carried out. Where it is not reasonably foreseeable that injury would occur due to the actions of employees, the employer will not be in breach of their duty.

23.4.1.2 Safe system of work

The employer must ensure that their employees have systems in place to allow tasks to be conducted without any unreasonable risk of injury or illness attributable to carrying out this function. This requires the employer to provide adequate training, suitable equipment, and information and warning signs where appropriate. An employer has to inform the employee as to potential dangers when using equipment and how and when
p. 627 safety procedures have to be used. This is a requirement on the employer and they are obliged ↵ to ensure that safety systems are used, rather than simply to raise the issue of safety and allow employees' discretion as to when they wish to follow the instructions. This does not remove the employee's own use of common sense or their own duty to protect themselves, especially in minor matters.

O'Reilly v National Rail (1966)

Facts:

Workers employed in a scrap yard discovered an unexploded bomb and challenged Mr O'Reilly to hit the bomb with a hammer to see what would happen. The bomb exploded, injuring Mr O'Reilly. He claimed for damages against his employer.

Authority for:

The court held that there was no liability as the common sense of the employee was not to hit the unexploded bomb. The employer had not breached the duty to provide a safe system of work by failing to instruct the employee not to take the action.

Whilst physical injury is most commonly associated with ensuring a safe system of work, the employer is also responsible for ensuring the wellbeing of their employees, and in particular this has manifested itself in issues of stress and other psychological pressures. This has been raised in **13.4**, but in relation to an employer's duty to their employees, the employer must take positive action to reduce the stress placed on workers where this would have a *foreseeable* negative impact on health (*Walker v Northumberland CC*). Figures awarded for stress at work can be substantial, and employers are increasingly settling the claim out of court in an attempt to avoid the admission of liability (although financial liabilities remain). In *McLeod v Test Valley BC* the claim was settled with a payment to the claimant of £200,000. Employers are entitled to assume that employees can reasonably withstand the 'normal' pressures of the job but it is where the employee asks for help or shows obvious signs of stress (e.g. the court will require expert evidence on what is an obvious sign of stress but there are behavioural and physical signs that may demonstrate that the employee is suffering and is in need of assistance) that the employer will be under a duty to act.

23.4.1.3 Safe equipment

The equipment that is provided to employees must be fit for its purpose and safe to use. This may involve ensuring the correct guards or protective screens are used on the equipment; ensuring that electrical equipment is subjected to regular safety checks; ensuring that appropriate safety apparel (goggles, clothes, footwear) is used; and so on. Each of these requirements will depend on the nature of the employer's business, the hazards that are faced by the employees, and the equipment that the employees are using or are exposed to.

23.4.1.4 Safe workplace

Employers have a duty to ensure that the correct heating, lighting, and ventilation are available in the workplace. The employer must provide washing and toilet facilities for employees. The employer must also
p. 628 ensure that the entrances and safety exits are ↵ correctly maintained, as are corridors and walkways. The employer is also required to ensure a safe workplace through maintenance of the property to a sufficiently safe standard (*Latimer v AEC*—see **11.5.2.2**), to maintain records for the reporting of accidents, to provide the appropriate first aid facilities, and to undertake appropriate risk assessments. Materials used at the workplace must be handled, stored, and used safely, and any potential hazards (chemicals, explosive, or flammable materials) should be brought to the attention of the employees.

Kennedy v Cordia (Services) LLP (2016)

Facts:

The claimant, a carer, slipped on an icy and snow-covered footpath whilst visiting a house-bound individual. She sought damages from her employer for injuries sustained to her wrist in the course of her employment.

Authority for:

The Supreme Court found that the employer had breached the EU health and safety directives (among other failures) regarding adequate risk assessments. The Supreme Court went further and considered that an employer's duty is not confined to taking precautions as commonly undertaken and an employer can be guilty of a negligent omission from a failure to seek knowledge of risks which are, of themselves, not obvious. This places a greater responsibility on employers to be proactive in their protection of individuals at work.

23.4.1.5 Defences

The employer may raise absolute and partial defences to a claim for damages due to an alleged breach of health and safety under negligence. These were identified in **11.6** and are applicable here.

23.4.2 Statutory Provisions

The main legislative provision covering health and safety in the workplace is the Health and Safety at Work etc. Act (HSWA) 1974, which identifies the requirements imposed on employers, and it also provides for the enactment of Regulations that 'flesh out' or extend the Act. Breach of the statute, as opposed to the common law route that involves an action for damages for the employer's breach of duty, may lead to a criminal act being committed and the employer being prosecuted for this infringement. Therefore a disregard for health and safety matters may lead to a criminal record and imprisonment.

23.4.2.1 The Health and Safety at Work etc. Act 1974

The Act places duties on employers, workers (employees and other workers such as independent contractors), and those with responsibilities in the workplace for ensuring that the required standards are maintained. Whereas the common law route allows an employee to seek compensation for their losses and enables them
p. 629 to initiate a claim, ↵ the employee is not entitled to bring an action against the employer for contravention of HSWA 1974, rather this is the task of the Health and Safety Executive (HSE).

The employer has an obligation to ensure, as far as is reasonably practicable, the health, safety, and welfare of all of the employees (s. 2(1)). Whilst this is a general duty, s. 2(2) extends this in the following ways:

1. the provision and maintenance of safe plant and systems of work that are safe and without risk to health;
2. arrangements for ensuring the safe use, handling, storage, and transport of articles and substances;
3. providing the necessary information, training, and supervision to ensure the health and safety of the employees;
4. in places of work under the control of the employer, maintaining the workplace to a standard that is safe and without risks to health, and maintaining the entrances and exits to the workplace;

5. providing the facilities for a safe working environment for their employees, and maintaining these.

The employer has an obligation to adhere to the above duties, with the proviso that this obligation extends to what is 'reasonably practicable' for the employer. Consequently, where to exercise the duty would not be reasonably practicable, the employer is permitted to make this defence (albeit that the burden of proof of it not being reasonable rests with them).

Associated Dairies v Hartley (1979)

Facts:

The dairy supplied its workers with safety shoes but charged them £1 per week for their use. The claimant argued that this was in contravention of the employer's duty to provide safety equipment.

Authority for:

The Court of Appeal held the obligation to provide the shoes for free was not reasonably practicable and the cost to the workers was fair. The costs of providing the shoes, in relation to the benefit provided to the worker, and the relative low risk of minor injury to the worker, did not place the obligation on the employer to provide free shoes.

23.4.2.2 Responsibilities on the employer

Employers are also obliged, under HSWA 1974, s. 3(1), to conduct their undertaking in such a way as to ensure that non-employees (such as independent contractors) who may be affected by their actions, are not exposed to risk of their health and safety. The employer, further, is required to inform any non-employees of any
p. 630 potential risks to health and safety at the workplace. ↵

R v Swan Hunter Shipbuilders (1982)

Facts:

Work was being carried out on the ship *HMS Glasgow*. A fire started in the ship during welding operations conducted by a sub-contractor, and this fire was exacerbated due to there being too much oxygen in the ship. The fire led to several deaths. It was discovered that Swan Hunter Shipbuilders had informed its employees of the dangers of working with oxygen in confined spaces with poor ventilation, but this information had not been provided to the sub-contractor. The Court of Appeal held that the company was in breach of its obligation under HSWA 1974, s. 3(1).

Authority for:

HSWA 1974, s. 3(1) imposes a duty on employers to inform non-employees of dangers present in the workplace.

Not only do employers have obligations to protect their employees and non-employees at work, s. 6 of HSWA 1974 imposes a duty on anyone who designs, manufactures, imports, or supplies any article that is used at work. This involves things done in the course of business or the particular trade, and it must relate to matters that are within the control of the individual on whom the duty is imposed. They must:

1. as far as is reasonably practicable, ensure the article is designed and constructed so as to be safe when it is being set, used, cleaned, and maintained by a person at work;
2. conduct, or make arrangements for there to be carried out, tests that are necessary to ensure adherence with 1;
3. ensure that the person supplied with an article is provided with the necessary information regarding the use for which it has been designed, and any information required to make its use safe;
4. where it is reasonably practicable, provide any revisions to information that are necessary to ensure adherence with the requirement in 3.

These duties are also replicated for the import or supply of any substance (s. 6(4)). HSWA 1974 also imposes an obligation on designers and manufacturers to conduct research and investigations with the aim of discovering any risks to health and safety and to implement procedures to remove any such risks (s. 6(2)). Section 6(3) imposes a duty on those who erect and install equipment at work to ensure that the manner in which this is achieved should not make the article unsafe or a risk to health and safety. This requirement is subject to the limitation of 'reasonable practicability'.

HSWA 1974 imposes many duties on the employer, as presented in this section of the chapter, but it also requires employees to ensure that they take care for their own safety and for others in the workplace (s. 7). In this respect, they must cooperate with their employer (and any other person) to enable them to comply with their duties (such as using the correct and supplied safety equipment). Section 8 provides a duty on every person in the workplace not to interfere or damage items provided as an aid to protecting health and safety (such as fire extinguishers)—whether this is intentional or reckless action.

p. 631

23.4.2.3 Potential consequences for employers

If a person commits an offence under HSWA 1974 due to an act or default of some other individual, the other individual will be guilty of the offence (s. 36). This individual may be prosecuted even if the person who actually committed the offence has not faced legal proceedings. If a health and safety offence is committed with the consent of an employer (such as a director, manager, and so on), or with their connivance, or is due to their neglect, then the organization and that individual may be liable for prosecution under HSWA 1974, s. 37. Further, it is no defence for the employer to organize their business so as to leave themselves ignorant of any risks or attempt to remove their obligations for the health and safety at the workplace.

If the employer is found guilty of any offence, they may face a fine or, in terms of gross negligence manslaughter, a sentence of life imprisonment. They may also be subject to disqualification from acting as the director of a company under the Company Directors Disqualification Act 1986, s. 2(1). Remember, these offences and punishments affect the individual employer and their business, so the employer cannot hide behind the corporate veil of the limited company. See the online resources for an extra chapter on corporate manslaughter.

23.4.2.4 Advancement of protection through the EU

Membership of the EU has led to the UK transposing Directives established under Art. 137 EC (now Art. 153 TFEU). The UK responded by enacting six sets of Regulations in 1992 (and subsequently amended) to protect health and safety at work. Whilst the reality is that they have not radically extended the protection afforded to those at work (perhaps merely codifying existing obligations), they ensure the employer is proactive in protecting their employees:

- *The Management of Health and Safety at Work Regulations 1999 (as amended 2006):* These impose requirements in relation to the cleanliness and maintenance of the workplace. This legislation requires the employer to conduct a risk assessment of dangers facing employees and others likely to be affected by their work. If there are five or more employees in the organization then the employer must provide a written health and safety policy (s. 2(3)). This statement must also identify the periods in which inspections will be held, and which member of staff has responsibility for health and safety in the workplace. The employer further has an obligation to bring this information to the attention of the employees and to inform them of any changes to the document(s). The employer has a duty to consult with their employees over health and safety matters (Health and Safety (Consultation with Employees) Regulations 1996).
- *The Workplace (Health, Safety and Welfare) Regulations 1992:* The obligations required under ss. 2 and 4 of HSWA 1974 are extended through these Regulations to employers and occupiers of premises. The Regulations place a duty for the maintenance of the workplace, and its environment, in relation to lighting, heating, entrances, and exits, and to ensure that workplace equipment is in good working order. The employer has to identify any dangers to the employees, and mark any hazards.
- *The Provision and Use of Work Equipment Regulations 1998:* Machinery and other equipment used must be maintained and be in good working order. The Regulations reinforce s. 6 of HSWA 1974. The equipment must be safe to use and be routinely checked.
- *The Personal Protective Equipment at Work Regulations 2002:* Personal protective equipment must be supplied to employees where it is necessary. The employees must have training on the use of the equipment and the employer must maintain the equipment.

p. 632

- *Manual Handling Operations Regulations 1992:* These require the protection of employees when handling items that may cause injury. The employee may have to lift or transport items as part of their duties, and could consequently sustain injury or be subject to an accident. As such, the employer should consider training, reducing the size/bulk of items, and other remedial action that is appropriate.

- *Health and Safety Display Screen Equipment Regulations 1992:* Training is required for employees who use such materials on its safe use, and regular eye tests must be provided if requested. Employees must also be given breaks (although this may be a change to the work conducted by the employee rather than a 'rest break'). Employees may suffer if their workstation is not correctly fitted (poor posture leads to back problems and so on). These risks must be effectively managed.

In additional to the many regulations that are passed to protect employees' health and safety, the Health and Safety Commission issue codes of practice that provide guidance as to how the regulations should be put into practice. This includes the Health and Safety (First Aid) Regulations 1981; Control of Substances Hazardous to Health Regulations 2002; Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995; and so on. These codes are not 'law' but they will be used in the courts, and the employer will be asked whether they adhered to the provisions. If they have not, it is likely a criminal offence will have been committed.

23.4.2.5 Compulsory insurance

As part of their protection of workers' safety, most employers are obliged to carry appropriate insurance to protect against any injury or disease that may befall an employee in the course of their employment (employers in the nationalized industries; local authorities; the health services; family-only employers; and so on do not require employers' liability insurance). 'Course of employment' involves injuries or illness caused both at the employer's premises and off-site (although injuries caused through motoring accidents may be covered by the employer's or employee's own car insurance). The protection is also limited to those workers with 'employee' status.

The requirement is established through the Employers' Liability (Compulsory Insurance) Act 1969. The insurance company that provides the cover will issue a certificate establishing the relevant information regarding the coverage, and it is the employer's responsibility to display the certificate (who may be fined if they do not comply with this requirement). The certificate will identify the cover provided (a minimum of £5 million); which company/business is included in the policy; and the insurance company's details (that may be checked through the Prudential Regulation Authority and the Financial Conduct Authority (FCA) under the terms of the Financial Services Act 2012). Employers are also required to retain copies of their insurance certificates for at least 40 years (and these policies are generally renewed annually) to enable employees whose injury or illness was caused at work, but the symptoms or effects were not identified until sometime later, to establish the relevant insurer.

23.5 Restraint of trade clauses

An employee is restricted from certain activities, either through implied terms or those expressed in their contract of employment, such as working in competition with the employer (the implied duty of fidelity).
p. 633 Once the employee has left the employment, they ↵ are, generally, free to work for whomever they wish, or to establish a business and work in competition against the former employer. In order to protect the employer from having an employee (or former employee) use information or knowledge of the employer's business against them, a **restraint of trade clause** may be included in the contract.

A restraint of trade clause is a post-contractual agreement that restricts the employee from working in competition with their previous employer for a certain duration and within a defined geographical/industrial distance. It must be remembered that this agreement limits the employee's right to undertake employment, or to trade in their own business, following termination of the employment relationship. For the employer, there are valid and economically necessary reasons and justifications for this contractual clause. Employers trust employees with significant access to information including (potentially) customers, suppliers, price lists, and trade secrets that could be of great value to a rival, or they may give an unfair advantage to an employee who 'abuses' this trust and sets up in competition with the employer. It is also against public policy for an employer to require agreement to a clause that restrains an employee after the contract of employment has ceased. Restricting employees from working in the area of their expertise, or in industries where they have skills, is not necessarily conducive to an enterprising economy.

Consider

Jianyu's contract prevents him from setting up his own business or working for a competitor for a period of one year and within a five-mile radius of the office of his employment. Assuming this clause has been incorporated to protect the legitimate valuable customer information held by Top Homes Ltd, would you consider this to be protection of an employer's legitimate proprietary interest? Further, given that the other estate agency firms are located within the five-mile radius, how do you think the courts would assess its reasonableness between the parties and in the public interest?

23.5.1 The Application of a Restraint of Trade

The following case established when a restraint of trade clause will be enforceable.

Herbert Morris v Saxelby (1916)

Facts:

A clause in Saxelby's contract prevented him from working in the same trade following the termination of employment. When his contract came to an end Saxelby pursued the same trade in France and his former employer sought to enforce the contract.

Authority for:

The employer's action for the clause to be enforced failed. It went beyond that what was required to protect their legitimate business interests and was held as unreasonable.

↵ A clause will only be applicable if:

p. 634

1. it seeks to protect the employer's legitimate proprietary interests (such as trade secrets and customer information);
2. it is reasonable between the parties and is in the public interest.

23.5.2 The Protection Afforded by the Clause

An employer may legitimately claim protection where an employee has acquired specialist knowledge such as the details of customers of the employer's business or confidential information. This is often referred to as a 'proprietary interest' rather than general know-how, which the courts would not allow to be included in a restraint of trade clause.

Examples of clauses restricting ex-employees from soliciting customers and clients have been demonstrated in *Allied Dunbar v Frank Weisinger* (involving a firm of solicitors) and in *AM Schoeder v Maccaulay* (involving hairdressing assistants). It is also contrary to a restraint of trade clause to copy an index of customer's names when the ex-employee enters into competition with the employer.

Roger Bullivant Ltd v Ellis (1987)

Facts:

Ellis was subject to a restraint of trade clause preventing him contacting any person with whom he had previous dealings and whose name was included on the employer's customer card index. The restraining clause applied for a limited period.

Authority for:

Ellis had removed the details on the customer index card when he established a business in competition with his former employer. This information did not warrant a trade secret, but his actions were in breach of his duty of good faith.

23.5.3 A Legitimate Proprietary Interest

Consider

The restraint of trade clause affecting Jianyu must protect the employer's legitimate proprietary interests, not restrict the general know-how he has picked up during his employment. However, what are proprietary interests that the courts will enable the employer to legitimately protect?

The identification of what amounts to a legitimate proprietary interest justifying the post-contractual
p. 635 restraint of trade was summed up by Lord Wilberforce in the following case: ↵

Stenhouse Australia v Phillips (1974)

Facts:

A five-year post contractual restriction on competition was included in the contract of the managing director of an insurance broking company.

Authority for:

The court upheld the application. 'The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.' (Per Lord Wilberforce).

Therefore, confidential information (client lists, suppliers' details, and so on) and trade secrets (secret formulas and so on) will be included in the court's assessment of a proprietary interest. However, general information regarding the employer's business, or skills that have been gained whilst working for the employer, are not subject to protection.

23.5.4 Reasonableness

In order for the employer to be successful in arguing for the clause to be upheld, they must satisfy the court that the restrictions included are no greater than is 'reasonably' necessary for the protection of the employer's business. In assessing reasonableness, the court will consider the duration of the restraint, the geographical distance covered, the type of business the employer operates, and whether allowing a restraint is fair according to public policy. A clause may fail the reasonableness test if its terms are not sufficiently precise:

Commercial Plastics v Vincent (1964)

Facts:

Mr Vincent was the research and development coordinator for the firm. The firm had recently spent a large sum of money on producing plastic sheeting and had taken great precautions in ensuring this information remained secret. The bulk of the company's competitors and its sales were in the UK. A

restraint of trade was included in Vincent's contract and this restricted his future employment with any of the employer's customers for a period of one year after leaving employment. Vincent did leave Commercial Plastics and began working with a competitor within this time period.

Authority for:

The clause was considered unreasonable. It was too broad to incorporate all the technical details needed to reproduce, and thereby breach, the employer's proprietary interests. Further, as it applied for a one-year period to all of the competitors, it was unenforceable as this went beyond what was required to protect the employer.

p. 636 ↵ or where the clause is contrary to public policy:

Bull v Pitney Bowes (1967)

Facts:

Mr Bull had worked for the employer for 26 years and then left to work for a competitor. The defendant had a rule included in its pension scheme that employees would lose their pension rights if they left the employment for a rival firm.

Authority for:

The employer attempted to impose a restraint of trade through indirect means and this was held as against public policy. The rule was held void against Bull.

Where the extent of the restriction and its duration are excessive to the protection required, the clause also will unlikely be upheld (*Mason v Providence Clothing and Supply Co. Ltd*). Therefore, as a 'rule of thumb', the duration of the restriction and the area of its application are inversely proportional. The wider the area of the restriction, the shorter should be the duration; the smaller the area, a longer duration will be considered reasonable.

Fitch v Dewes (1921)

Facts:

A solicitor (27 years old) who had been working for his employer for a number of years, signed a contract which restricted his acting in competition with the employer within seven miles of Tamworth Town Hall for an unlimited time.

Authority for:

The employee complained of the nature and extent of the clause. It was held as reasonable given that the employer had taken him into their employment when he was 14 years old, they had trained him to be skilled in the position he held, and he was privy to their confidential information.

23.5.5 Repudiation of the Contract by the Employer

It should also be noted that the clause will only continue to have effect (as a postcontractual agreement) whilst the parties behaved reasonably with each other. If the employer repudiates the contract, for example by wrongfully dismissing the employee, then any restraint of trade clause becomes unenforceable.

General Billposting Co. Ltd v Atkinson (1909)

Facts:

The employers dismissed the employee who had been engaged as a manager. The manager had
p. 637 successfully won an action for wrongful dismissal and then set up his own ↵ business. His contract of employment included a restraint of trade clause for a two-year period after his engagement with the company ended and the company attempted to enforce that clause.

Authority for:

The action for enforcement failed as the company's repudiation through the wrongful dismissal absolved the employee from any further performance on his part. Therefore he was no longer bound by the covenant and was free to act in competition with his former employers.

This authority continues despite the fact that some employers attempt to draft contracts that provided for the continuation of restraint of trade clauses even if the employer breached the contract of employment.

Rock Refrigeration v Jones (1996)

Facts:

Following the promotion of the defendant from general engineering manager to industrial sales director a new restraint of trade clause was included in the contract. This sought to enforce the clause following the termination of the contract 'however so arising or occasioned'. Following his resignation and serving out his contract, the defendant took up work with the new employer. The previous employer attempted to enforce the clause.

Authority for:

It was held that the nature of the clause, in attempting to have application even if the employer repudiated the contract, was by its nature unlawful and therefore unenforceable. Phrases in a restraint of trade clause such as 'for any reason' or similar would be fatal to their enforceability.

Consider

If, on the assessment of the clause, the court considered either that the five-mile radius was too broad or that the one-year duration was too long, what options are available to amend such a cause?

23.5.6 Blue Penciling

This term is used to describe the options available to the courts when faced with a restraint of trade clause that goes beyond the necessary aims of protecting the employer's business. It enables the court to remove an
p. 638 offending passage or term of the clause, and if ↵ it still leaves the remainder making grammatical sense, and it is supported by consideration, then it may be held to be valid and enforceable. If the clause and its terms are part of an indivisible agreement, then even if it would be grammatically possible to separate or remove a passage or word(s), the court will refuse to do so.

Attwood v Lamont (1920)

Facts:

The employee had been employed as a tailor and was subject to a restraint of trade clause that prevented him from working as a tailor, dressmaker, milliner, hatter, haberdasher, or men's, women's or children's outfitter. This restriction was to apply within a 10-mile radius of the employer's premises.

Authority for:

The geographical area of the restriction was lawful but the noncompetition clause and its extent beyond that of a tailor (the employee's previous role with the employer) was unreasonable. The court further held that the clause must be read as one single restriction and therefore those parts of it which were unreasonable could not be severed.

The courts, as with any contractual term, will not rewrite a poorly drafted contract, and any clauses that are ambiguous will be subject to the *contra proferentem* rule (see **8.5.3**). The correct drafting and the arguments regarding the necessity for the clause remain the obligation of the employer. The tests were defined in *Sadler v*

Imperial Life Assurance of Canada as requiring:

- the ability to remove the words without requiring the addition or alteration of the remaining aspects of the clause;
- the remaining clause continuing to make grammatical sense;
- the removal of the words not altering the nature of the original clause.

Consider

Given the power of blue penciling and, indeed, its limitations, what strategies would you devise in establishing a contractual restraint of trade which could be amended latterly by a court to at least preserve some of its features? Ultimately, compare the effectiveness of the restraint of trade clause with the greater certainty, albeit greater costs, of a garden leave arrangement.

23.5.7 Remedies

The claimant, if successful in convincing the court of the necessity of the restraint of trade, may seek damages to compensate for any losses incurred (such as the ex-employee having solicited clients away from the
p. 639 business) and they may seek an injunction to ↵ prevent any further activities that may be in contravention of the clause for its duration. An interim injunction may be granted to prevent the employee breaching the restraint of trade clause until the case is heard in court, where a final injunction may be granted following the conclusion of the hearing. In determining the grant of an interim injunction the court will consider the clause; whether damages are an appropriate remedy; and whether the employer's claim is likely to succeed at the full hearing.

23.5.8 Garden Leave Agreements

Due to potential problems of the courts refusing to uphold a restraint of trade clause, or if the employer has to terminate the employee's contract in advance of any agreed date, the employer may obtain the protection required if they are prepared to pay the employee's salary. The employer may include a long period of notice and in the event that the employee wishes to leave the employment, the employer simply enforces the notice period. Whilst an employee cannot be forced to work, they can be paid a salary with the employer knowing that the employee cannot start a business in competition or take up employment with a rival. This may be a more expensive proposition than relying on a restraint of trade clause, but it provides greater certainty of protection, and ensures that an employee cannot take important secrets or knowledge of the employer's business and use it in competition. Note that the courts will not allow an unusually long **garden leave** clause, and in *GFI Group Inc. v Eaglestone* a notice period of 20 weeks was reduced to 13 weeks as this was considered sufficient in order to protect the employer's proprietary interests.

23.6 The insolvency of the employer

Insolvency can affect an employer who is acting as an individual (in which circumstances the person becomes bankrupt or has entered into a voluntary agreement with creditors) or, for situations where the employer is a company (such as a private limited company or limited liability partnership). Insolvency includes administration, liquidation, receivership, or an agreement that has been entered into voluntarily with the creditors.

Insolvency occurs where the business does not have adequate funds to continue trading or to settle its debts (including, e.g., owed wages to employees). In such a situation, the employee may require assistance to claim what is owed to them, but there are limits to what may be claimed (from the National Insurance Fund—ERA 1996, s. 182), and the employer must be insolvent as defined under the legislation. Employees may recover arrears in pay for a period of at least one week, but this may not exceed eight weeks in total. Holiday pay for up to six weeks in the previous 12 months may be claimed. A failure by the employer to provide the correct statutory entitlement to notice (ERA 1996, s. 86), and the basic award granted under an unfair dismissal claim can also be claimed (including the basic amount of an award by an ACAS arbitrator under the ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753)). The term ‘pay’ includes contractual payments and statutory payments such as maternity pay or payments ordered through an Employment Tribunal (such as under the information and **consultation** requirements). Payments are determined, for holiday pay and wages, from the date of insolvency, whereas redundancy and statutory notice pay are determined from either
p. 640 the date when the employer became officially insolvent or when the employment ↵ ended (whichever is later). To qualify for redundancy payments the claimant must have employee status; have been continuously employed by the employer for at least two years; and have made a written application to the employer or a tribunal within six months of the employment ending.

Upon insolvency, an insolvency practitioner such as a liquidator, receiver, administrator, supervisor (in voluntary agreements), or trustee (in bankruptcy) will take control over the business and the employee should apply to this person for the relevant forms. Once completed, these are forwarded on to the Redundancy Payments Office. Debts that remain following the payments from the National Insurance Fund are only available if there are sufficient funds in the employer’s assets, but holiday pay and wages (to a current maximum, as of 6 April 2019, of £525 per week) are assigned ‘preferential debt’ status and may be paid out of the employer’s remaining assets ahead of other debts. From 2017 the Insolvency Service, the body that pays holiday, owed notice, and redundancy pay to employees where their employer is insolvent announced that it would be including contractual-based commission in its calculation of holiday pay.

Conclusion

This chapter has identified further obligations placed on employers to protect their employees’ health and safety at work through offering a safe system of work; regulating their hours of work; and ensuring they have access to paid leave. Workers have the right to be paid at least the minimum wage and have the ability to seek owed pay if the employer becomes insolvent. Further, employers may seek to protect their legitimate proprietary interests through the insertion of restraint of trade clauses in the contracts of employment. Each of these elements offer protections and

establish obligations on employers, and in many cases, compliance is not only necessary in the interests of the business, but necessary to comply with the law. Therefore, they are essential elements for a business employing labour.

Summary of main points

Working Time Regulations

- The Regulations were enacted to transpose the EU's Acquired Rights Directive.
- 'Workers' not just 'employees' are protected.
- The Regulations provide (in most circumstances) for a maximum working week of 48 hours, averaged over a 17-week period.
- Workers may opt out of the Regulations, although no worker can be forced to opt out, and the worker may opt in to gain protection from the Regulations if they choose.
- Workers are entitled to 11 hours' rest (12 hours for young workers) in each 24-hour period.
- Workers are entitled to 5.6 weeks' paid holiday leave.
- Employers must include commission payments in the calculation of the four weeks of paid leave.
- Night workers should not exceed eight hours' work in any 24-hour period (averaged over 17 weeks).

p. 641

National Minimum Wage

- The National Minimum Wage Act 1998 (NMW 1998) and the National Living Wage (NLW) are applicable to workers, not just 'employees'.
- There are four levels of NMW and NLW depending on the age of the worker and these figures are regularly reviewed (each October) by the Government following recommendations from the Low Pay Commission.
- 'Pay' is the gross pay of the worker but this does not include pension payments, redundancy pay, overtime, or expenses.
- The employer is obliged to maintain records of the hours worked and payments made to workers.
- Workers can enforce the NMW and the NLW through Employment Tribunals and Her Majesty's Revenue & Customs can enforce the law against a recalcitrant employer.

Health and safety

- Employers owe a duty to take reasonable care of the health and safety of all workers.

- The common law obligations on employers enable an employee to claim for any injuries or damage suffered due to the employer's negligence.
- The statutory measures are largely covered by the Health and Safety at Work Act (HSWA) 1974 and the Regulations enacted following 1992.
- The general duties on employers include: providing safe plant and systems of work; the safe handling and use of articles and substances; providing the relevant and necessary information on health and safety matters to employees; and maintaining a safe working environment.
- A breach of HSWA 1974 may lead to an employer (director, manager, and so on) facing a fine or imprisonment.

Restraint of trade clauses

- Such a clause is a post-contractual agreement restraining the employee from working in competition with the employer for a defined duration and a defined geographical/industrial region.
- The clause must protect the employer's legitimate proprietary interests; it must be reasonable between the parties and be in the public interest.
- A wrongful dismissal/repudiation of the contract by the employer will prevent the application of a restraining clause.
- The courts may remove an offending aspect of the restraint clause to make it fair and enforceable (known as blue pencilling).
- A restraint clause may be enforced through the courts by the award of an injunction.
- Rather than using a restraint of trade clause, the employer may use a garden leave agreement whereby an extended notice period is included in the contract. This is more expensive to the employer, but is enforced with greater certainty than are restraint clauses.

Insolvency

- Where an employer becomes insolvent, the employee can claim for any owed wages and in the event that the employer lacks the resources to settle the claim, they may seek assistance through the National Insurance Fund.

p. 642

Summary questions

Essay questions

1. Is it appropriate to have a national minimum wage? Given the differences in the cost of living throughout the country, and obliging the employer to pay an amount set by the State for employment when market forces may have been better able to regulate pay, evaluate the necessity for, and impact of, the National Minimum Wage Act 1998.
2. An employer is entitled to have their confidential information protected against unauthorized use by a rival. How have the courts determined what may be regarded as ‘reasonable’ in the award of this protection?

Problem questions

1. Clive works for Trusthouse Fifty, a chain of hotel and dining establishments. He was promoted to manager of the restaurant and bar department. He had not opted out of the Working Time Regulations, his contract provided that he was contracted to serve the employer for 42 hours per week, and he should endeavour to complete his work within this time.

   Despite this contract, Clive was told by the general manager at the establishment that he had responsibility for all aspects of the department. He hired the staff for the functions held there, he ensured the food was prepared to a sufficiently high standard, and he also had sales targets to meet regarding the quantity and price of wine that was sold. As a result, Clive was under great pressure and started to work 80 hours per week to complete his work.

   Clive did not complain to the general manager about this, but it was evident he was suffering health problems due to working excessive hours. After just six months in this job he had become very irritable, had been rude to employees, criticized their work, and had started drinking alcohol to excess. Clive exhibited none of these symptoms when first hired.

   When a concerned colleague (Zoe) informed the general manager of her concerns for Clive’s health, she was told that Clive must complete his tasks, and the manager did not care how long it took him to achieve this. Further, it transpires that the general manager has not maintained any records of the time staff work at the establishment.

   Clive has now suffered a breakdown and cannot work. Advise him on any claim he may have against the employer based on his statutory rights.

2. Devon is employed by All Bright Consumables (ABC) Ltd in the factory where it makes tablet computers. Devon is a senior manager and has responsibility for the production of the components and their assembly. He is also involved in senior planning meetings where strategies, including plans for patents, are discussed.

   Devon’s contract provides for a restraint of trade where Devon will not compete with ABC Ltd either through establishing his own business or working for a competitor, in the technology field, in the UK, Germany, the USA, China, the Middle East, and Africa, for one year after ceasing to work there. A further clause restricts Devon from

'employing ABC Ltd staff, or poaching customers'.

Some time later, Devon decides to leave ABC Ltd and establish his own company. It specializes in touch screen computers and he wishes to hire the chief designer and operations manager of ABC Ltd to help him in this new venture. Devon approaches both people with an offer to triple their current salary if they leave ABC Ltd with immediate effect. Devon is planning on developing and then marketing a new computer which uses 'gesture-based input' on both the front and back of the device. He was privy to this idea whilst working at ABC Ltd and he knows that ABC Ltd has not yet applied for a patent.

p. 643 ↵ Advise ABC Ltd on their likely arguments and success in preventing Devon competing with ABC Ltd, hiring the staff, and developing this new computer. How would your answer be developed if Devon said it was the company he established that had taken the actions when he left ABC Ltd?

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-23-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

O'Reilly, T. (2008) Health and Safety for Small Businesses Management Books: Cirencester.

Websites, Twitter, and YouTube channels

https://www.gov.uk/browse/working *<https://www.gov.uk/browse/working>*

A Government website specifically designed to provide employees with a comprehensive overview of their rights and responsibilities at work.

https://www.gov.uk/national-minimum-wage-rates *<https://www.gov.uk/national-minimum-wage-rates>*

Information regarding the National Minimum Wage.

https://www.gov.uk/maximum-weekly-working-hours *<https://www.gov.uk/maximum-weekly-working-hours>*

Information regarding the Working Time Regulations.

https://www.gov.uk/government/organisations/insolvency-service *<https://www.gov.uk/government/organisations/insolvency-service>*

The Insolvency Service provides guidance and the relevant forms for affected workers to facilitate any claims.

https://www.gov.uk/government/organisations/low-pay-commission *<https://www.gov.uk/government/organisations/low-pay-commission>*

The website of the Low Pay Commission, which makes recommendations on matters surrounding the national minimum wage.

http://www.legislation.gov.uk/uksi/1998/1833/regulation/4/made *<http://www.legislation.gov.uk/uksi/1998/1833/regulation/4/made>*

The Working Time Regulations 1998.

http://www.legislation.gov.uk/ukpga/1998/39/contents *<http://www.legislation.gov.uk/ukpga/1998/39/contents>*

The National Minimum Wage Act 1998.

http://www.hmrc.gov.uk *<http://www.hmrc.gov.uk>*

Her Majesty's Revenue and Customs.

http://www.legislation.gov.uk/ukpga/1974/37 *<http://www.legislation.gov.uk/ukpga/1974/37>*

The Health and Safety at Work etc. Act 1974.

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-23>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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