

Law of employment

The evolution and development of our complex, modern, Western societies have been accompanied by the need to regulate many of the activities of various groups of people. Without this regulation, society would not be what it is today. In the case of employment, the activities of employees were long regulated by legal institutions such as magistrates, who had, among a number of powers, the power to set rates of pay. More recently, the activities of employers became subject to increasing regulation in order to provide employees with greater protection in economic and physical terms. Factories legislation is just one example. Up to the 1980s the increasing power of trade unions, as distinct from individual work people, caused concern, particularly to Conservative governments, with the result that the power of unions has been reduced by legislation.

As stated above, until fairly recent times in history the responsibility for regulating conditions of employment rested largely on Parliament and on local magistrates. This was relatively easy while the number of categories of workers was small. Gradually, however, as society became

more industrialized it became increasingly difficult to exercise this control. The pendulum swung the other way. As was seen in the last chapter, various laws were passed that made it possible for both workers and owners to combine into trade unions and associations in order to bargain, until the stage was reached where the state appeared to avoid any direct involvement in the relationships between employers and employees. The whole system of bargaining and negotiation then rested on voluntary understandings between the workers and their employers. However, as industrial society developed even further, the power of trade unions grew and the concentration of certain vital resources and services into what became vulnerable positions made it possible for many groups of people to disrupt supplies to the whole community.

Before employment

Sex, race, age discrimination – e.g. advertising and interviewing
 Rehabilitation of offenders – certain offenders do not have to reveal spent convictions
 Employing overseas workers – work permits needed in certain cases
 Employing children – local authority approval needed
 Employing young persons – e.g. licensing law restrictions
 Employment agencies – who is the employer? who pays the agency?
 Disabled workers – physical impediments or obstacles to their employment to be removed
 Trade union membership – free to belong or not to belong

On starting employment

Contract of employment – certain terms and conditions to be given in writing
 Health and safety – e.g. induction, fire training, safety precautions
 Employer's liability insurance – needed to indemnify employees in case of accidents at work

During employment

Maximum hours
 Statutory paid holidays
 Health and safety at work – range of health and safety measures
 Disciplinary procedures – need to be communicated and fair
 Time off – for sickness, maternity, jury service, etc.
 Trade union membership – free to belong or not to belong
 Harassment – employer to take reasonable measures to prevent harassment
 Discrimination – e.g. in promotion
 Discipline and grievance procedures

Pay and other benefits

Minimum wages
 Equal pay – pay to be equal for men and women doing work of equal value
 Statutory pay for sickness and maternity
 Taxation and National Insurance – who is responsible for collecting tax and deductions
 Deductions – lawful and unlawful deductions

Termination

Termination procedures – resignations and dismissals
 Written reasons for dismissal
 Transfer of undertakings – protection of employment.

Figure 16.1 An illustration of the areas of employment regulated to a greater or lesser extent by the law (this is illustrative only)

The government therefore felt obliged to re-enter the field of relations between employers and employees by creating a legal framework for the conduct of what is called industrial relations or employee relations.

The role of the EU has become increasingly important also – not just to set out to improve employment conditions but also to ensure that all member states are competing on equal terms. The Social Chapter is a major EU initiative aimed at achieving this objective. Recent examples of such legislation include the introduction into the United Kingdom of the minimum wage, maximum hours and statutory paid holidays legislation.

Employment legislation is one of the more complex areas of legislation affecting employers so this chapter needs to be viewed as a very brief overview intended to illustrate its scope rather than its detail.

The law relating to employment is considerable now and it is only possible in this book to cover a small part of it. The major areas of employment law have been selected and summarized below.

Common law rights and obligations

Most aspects of the relationship between employer and employee are regulated by the contract of employment, much of which is now regulated by statute (i.e. Act of Parliament). Common law (judge made as opposed to Parliament made), however, also plays a part in setting minimum rights and duties.

The employer's duties are to pay the agreed wages, to provide work, to select and/or train competent workers, to provide adequate materials and to provide safe systems of work. Any breach of these common law obligations means that an employee could sue for damages, when an injury is sustained; or even to resign without notice and to sue for unfair constructive dismissal, when an employer creates circumstances in which an employee feels justified in resigning.

In turn, common law lays obligations upon employees as well. These include the duty to serve the employer according to the terms of the contract, to be obedient (i.e. to follow reasonable instructions), to work competently, to work for the employer in good faith – which includes not taking secret profits or commissions, to keep confidential information and not to set up in competition.

Contracts of employment

A contract of employment is the basis of the working relationship between employer and employee and is subject to the general principles covered by the law of contract. There are seven essentials for a contract to be valid. These are as follows:

- 1 *Offer and acceptance* – there must be an offer and an acceptance
- 2 *Intention to create legal relations* – each party must intend to create a legally binding contract
- 3 *Capacity* – each party to the contract must be legally able to make the contract
- 4 *Consent* – must be genuine and freely given
- 5 *Consideration* – something of value must be exchanged, e.g. money for work

- 6 *Legality* – the purpose of the contract must be legal
 7 *Possibility* – it must be possible to perform the contract.

A contract of employment may be oral, written, or the terms may be merely implied. It consists of an offer by one of the parties and an acceptance by the other. A consideration – i.e. an exchange of promises to perform certain duties and to pay certain wages and provide certain conditions, is necessary to create the contract. The consideration, as with all contracts, must have an economic value. The offer is usually (but not necessarily) made by the employer and should contain details of remuneration, hours, location and holidays. The offer may refer to other documents such as pension scheme booklets. Not all conditions have to be included, as some may be implied by custom and practice. The contract comes into existence when the offeror receives acceptance from the offeree.

Although, in common law, contracts need not be in writing, it is advisable that all offers and acceptances are in writing in order to avoid misunderstanding and possible problems. Furthermore, because most employees are entitled to a written statement of the main conditions of employment (see below), there is no real reason today for not preparing a proper, written contract of employment.

The Equal Pay Act 1970

The purpose of this Act was to remove differences in terms and conditions of employment between men and women employed in the same or very similar work, or work rated as of similar value. Employment tribunals deal with any complaints and are able to award arrears of pay and damages. Job evaluation plays a part in determining pay differentials between jobs.

Discrimination in employment

Discrimination against applicants for jobs and those in employment can be directed at a range of different groups of people including women, men, people of some ethnic groups, people with certain beliefs or with disability, people of gay, lesbian or bisexual orientation, people with criminal convictions and older people. The UK legislation is directed at eliminating discrimination in the workplace aimed particularly at women, ethnic minorities, people with disability and those who may be discriminated because of their religion or beliefs (see the Employment Equality (Religion or Belief) Regulations, 2003).

Discrimination can take two main forms: direct discrimination and indirect discrimination. Direct discrimination consists of acts that discriminate against another on grounds of their sex, racial origin or disability. Indirect discrimination consists of applying conditions that make it more difficult for people of one sex or a racial group to fulfil the conditions.

Sex Discrimination Act 1975 and 1986 . . .

These two acts were introduced in order to grant equal opportunities to both sexes in the fields of employment, education and training and to make it an offence to discriminate against a man or a woman on the grounds of sex alone. The main

provision of this Act is that if a job can be performed equally well by a man or a woman it is an offence to discriminate against a man or a woman on the grounds of sex alone. This applies to recruitment of new staff and also to promotion.

There are certain exceptions, of particular relevance to the hotel and catering industry, such as cloakroom attendants or where limited staff accommodation has to be shared. Positive discrimination may also be permitted in certain circumstances.

The Equal Opportunities Commission is responsible for ensuring that the provisions of the Equal Pay and Sex Discrimination Acts are implemented.

Race Relations Act 1976

This Act is directly analogous to the Sex Discrimination Act and was introduced to eradicate racial discrimination against ethnic minorities. The Commission for Racial Equality is responsible for ensuring that the provisions of the Race Relations Act are implemented.

Disability Discrimination Act 1995

This Act was introduced in order to prevent employers from discriminating against applicants and employees with disability. Disability also covers people with learning disability. Employers are expected to make reasonable alterations to working practices, layouts and equipment that might otherwise be barriers to the employment of people with disability. This Act also applies to other users of premises such as customers.

Rehabilitation of Offenders Act 1974

This Act permits people convicted of certain crimes to treat their sentences as 'spent' after a specified period of time has elapsed. Applicants for jobs do not have to reveal the conviction and sentence and the employer cannot dismiss the employee on the grounds of that conviction if they subsequently learn of the sentence. For example a sentence of up to six months in prison becomes spent after seven years.

The Employment Rights Act 1996

This Act provides the rights of employees, who work over a certain number of hours, to minimum periods of notice dependent on their length of service, and the Act also requires that employees are given written details of certain conditions of employment.

Where a contract provides for longer periods of notice the terms of the contract will apply, whereas contracts containing shorter periods are overridden by the periods laid down by the 1996 Act. Payment in lieu of notice may be made by the employer or the employee.

Written particulars

These must be given to people within two months of employment commencing. This does not apply to casual workers whose contract is for one session of work at a time.

Written statements need not take any particular form but the contents are prescribed and they can refer employees to other documents such as manuals and booklets, which must be reasonably available to them. There is no requirement in

law for the employee or the employer to sign the statement. But it is advisable to issue all employees with a statement and to retain signed copies in the personal dossiers. The ideal procedure is to design letters of offer so that they satisfy the Employment Rights Act 1996 requirements. An example is shown in Figure 6.1.

Restraint on employees

In the case of some employees, such as chefs or managers, employers feel it necessary to include a clause in a contract which restrains an employee from divulging trade secrets, entering into direct competition by operating his or her own business, working for another person in the same line of business or using lists of customers prepared in the course of employment in order to entice customers away.

To obtain protection against such eventualities any terms in a contract need to be clearly stated and not implied. It is important, however, to make such a term reasonable in the circumstances, otherwise the right to any protection could be forfeited. At the same time such restraint clauses must be shown to be in the public interest and it is unlikely that such a restraint clause will be upheld.

Searching employees

It is always advisable to obtain an employee's permission before attempting to search his or her person or property. To search a person without permission, and without finding evidence of theft, can result in the employer being sued for assault and battery. In those cases where the employer's right to search is considered to be vital, such as in hotels and industrial catering organizations, a clause to this effect should be written into every person's contract of employment. Even so an employee cannot be forcibly searched if he or she refuses. Such a refusal instead becomes the subject of disciplinary or dismissal proceedings.

Dismissals

Under the Employment Rights Act (1996) there is protection for employees against unfair dismissal.

Until the 1960s, so long as an employer gave the agreed period of notice or money in lieu an employee had no recourse against the employer. The situation has changed and it is now necessary to show that reasons for dismissal were fair. Valid reasons include

- 1 lack of capability or qualification for the job for which an employee was employed
- 2 misconduct
- 3 redundancy, within the definition of the redundancy legislation
- 4 unsuitability due to legal restrictions (e.g. loss of Justice's licence)
- 5 some other substantial reasons (e.g. chronic sickness).

It should be noted that no complaint of unfair dismissal or of a worker's rights relating to trade unions will be heard by an employment tribunal until a conciliation officer has looked into the circumstances to see if a settlement can be reached without a tribunal hearing.

The 2002 Employment Act introduced very specific procedures for discipline and dismissal, with heavy penalties for employers who ignore them.

Instant or summary dismissal • • •

In certain instances an employer may be justified in dismissing an employee without giving the required period of notice or money in lieu. Although this may be permitted in such cases as an employee's permanent incapacity to perform his or her duties, in most cases it occurs where employees are guilty of serious misconduct. To dismiss a person instantly can have serious consequences for the employer if a dismissed employee sues him successfully for damages, so it is not a step to be taken lightly. Reasons for instant dismissal include

- 1 serious or repeated disobedience or other misconduct
- 2 serious or repeated negligence
- 3 drunkenness while on duty
- 4 theft
- 5 accepting bribes or commissions.

The argument underlying instant dismissal is that the employee, through serious misconduct, has repudiated the contract, and the employer chooses not to renew it.

An employer can normally only dismiss an employee for misconduct committed outside working hours and away from the place of work if other employees were involved, which could have an effect on the employer's business, or if the employee is in domestic service.

Where an employer dismisses a person instantly it should be done at the time of the misdemeanour or when it first comes to the attention of the employer. To delay may imply that the employer has waived his or her right to dismiss, but see the discussion of suspensions below. The reason for dismissal should be given at the time of the dismissal.

An employer may, in some cases, withhold money earned by an employee who has been instantly dismissed for good reasons, unless a contract states otherwise. However, legal advice should always be sought before taking such action.

Suspensions

In some circumstances, particularly involving alleged misconduct, an employer may wish to suspend an employee until the circumstances have been looked into and a decision has been taken regarding the employee's future. It is quite in order to do this so long as pay is not withheld – unless a contract specifically permitting the withholding of pay is in existence.

Maternity rights

The 1996 Act together with the Employment Relations Act 1999 provide for a framework of basic rights governing maternity rights and parental leave.

Transfer of Undertakings Regulations

Under these regulations employees of an undertaking that are transferred from one owner to another have their employment rights protected. Effectively this means that a new employer is required to treat all of an employee's previous service with

the undertaking as uninterrupted. This is of crucial importance on matters such as redundancy, protection from unfair dismissal, etc.

Payment of wages

Employment Rights Act 1996

Generally speaking, arrangements for the payment of wages are regulated by the contract of employment. The 1996 Act, however, provides specific rules on deductions. These specify that an employer must not make deductions or receive payment (e.g. as a fine) unless

- the deduction is authorized by statute, e.g. National Insurance, income tax, court order
- the deduction is authorized in the contract of employment
- the worker has agreed in writing to the deduction.

Certain deductions are exempted from the above conditions, such as the recovery of an overpayment.

In the case of the retail trade, including catering, employees can be required, as a condition of the contract, to make good stock or cash shortages. However, such a deduction or payment must not exceed 10% of the gross pay due for the period. On termination of employment, however, such deductions may exceed 10%. They cannot be made retrospective for more than 12 months. Notice of intention to make such deductions has to be made in advance, and a written demand also has to be issued. Payment of wages may be in a form agreed in the contract. This may be in the form of cash, cheque or credit transfer.

Attachment of Earnings Act 1971

This Act enables a court to order an employer to make periodic deductions from an employee's earnings and to pay the sum deducted to the collecting officer of the court. The court specifies the amount and can make priority orders for payment of fines or maintenance of dependants, or non-priority orders for the clearance of civil debts. The court will also specify the protected earnings which is the level of income below which a person's earnings should not be reduced by these deductions. Any consequent shortfalls in payments will be carried forward.

Pay As You Earn (PAYE)

Employers are obliged to deduct tax payable on money paid to any of their employees' earning money falling under Schedule E (i.e. emoluments from any office or employment). Some items are not subject to deductions: business expenses, and rent-free accommodation or temporary accommodation allowances that are provided because of the nature of the employer's business.

This responsibility to deduct tax covers service charge earnings and tronc earnings where the employer is involved in their distribution. It is the duty of staff to declare tips where the manager or owner is not involved in their distribution.

Social security

The social security scheme provides a wide variety of benefits and welfare services such as benefits for unemployment, sickness, industrial injuries and retirement. Most people over school-leaving age and under pensionable age are insurable. Persons who are insurable must register and obtain a National Insurance number.

Employer's liability

There are two separate categories of liability that employers bear in relation to injuries suffered by their employees while in their employment. These are common law and statutory liabilities.

The common law responsibilities extend also to employees of other employers, such as contractors, while working on the employer's premises, and also to the employer's employees carrying out work for him or her on another person's premises, for example an outdoor caterer's staff.

In common law, employers are expected to provide protection that is reasonable in the circumstances. An employee will be compensated for injury if the employer was at fault in exposing the employee to unnecessary risk in the circumstances.

Unfortunately, common law is not able to provide for all developments in industry and therefore several statutes exist to specify the nature of protection to be provided and to lay down certain other regulations covering the working environment.

Health and Safety at Work Act 1974

The hospitality industry is not as dangerous as some other industries such as construction. However, there can be significant levels of risk to employees, managers and customers. These may include risks that are simple to recognize – such as falling on slippery floors, cuts and burns – through to less obvious risks such as damage to hearing due to very high noise levels, e.g. in discos, or violence from customers and other staff.

In 1975 the Health and Safety at Work Act 1974 came into force, which provides very flexible legislation protecting most employees at work. The Act is largely implemented through a number of different sets of regulations, including the Management of Health and Safety at Work Regulations 1992, amended by the Management of Health and Safety at Work (Amendment) Regulations 1994 and the Health and Safety (Young Persons) Regulations 1997. Other important regulations include the Manual Handling Operations Regulations 1992 and the Control of Substances Hazardous to Health Regulations 1994.

The Act, in principle, obliges employers to ensure the safety of their employees (and also the general public) at the employer's premises, by maintaining safe plant, safe systems of work and safe premises, and also by ensuring adequate instruction, training and supervision. This Act also covers such aspects as cleanliness, overcrowding, lighting, temperature, ventilation and sanitary arrangements for work people. Other people, too, such as designers, manufacturers, installers, importers and suppliers of goods for use at work, are to ensure, in so far as they are responsible, that any health and safety risks are eliminated. Employees also are made responsible for the safety of others.

Risk assessment

From a management point of view probably the most important issue is that of risk assessment. 'Risk assessment' is the term used to describe the process an employer uses to identify risks associated with a business's day-to-day operations. If risk assessment is carried out effectively it will almost certainly reduce the risk of injury, but should an incident occur which leads to litigation it can be used to demonstrate 'due diligence', a legal term used to demonstrate that an employer has taken all reasonable steps to minimize risk. Risks and the likelihood of occurrence are classified as follows:

Hazard severity	Likelihood of occurrence
1 Minor injury	1 Low – seldom occurs
2 Off work for three days or more	2 Medium – frequently occurs
3 Death or major injury	3 High – near certain

Multiplication of the two factors – to give, e.g. 2, 4, 9 – indicates the overall degree of risk. The HCIMA Technical Brief, 'Health and Safety at Work' is included in Appendix 4.

All employers, other than those with fewer than five employees, must have a health and safety policy statement. See Figure 16.2 for one company's approach.

Children (Employment of Children Acts 1933–1969)

Children are defined as being under the minimum school-leaving age. The principal Acts are concerned primarily with protecting the physical well-being of children and with specifying the hours that they are permitted to work. Children, for example, are not permitted to work during school hours and where a child is under 13 years of age the legal restrictions are particularly strict, for example, limiting their hours of work to no more than one hour per day outside of school hours. Restrictions on the working hours of young persons who have left school but are under the age of 18 are also included in the Working Time Regulations 1998. There are also safety reporting requirements for young people within the Management of Health and Safety at Work Regulations 1999.

The regulations regarding children are quite detailed but can vary in detail from one part of the country to another, as they are administered mainly by local authorities. Regulations cover the following points:

- hours of work
- hours on the employer's premises
- hours off duty
- frequency and duration of rest and meal breaks
- permitted overtime
- holidays
- medical examinations.

For details of the regulations as they apply to a particular area it is advisable to contact the local office of the Department for Work and Pensions.

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Your Health & Safety	Page 3	<p>We want to make sure that our hotels and units are safe places for people to work and stay in. The Group fully appreciate the aims and provisions of the Health & Safety at Work Act & Regulations.</p> <p>The Company recognises that one of its most important duties and responsibilities to its staff is to provide and maintain safe, healthy and hygienic working conditions and practices. We ensure, through regular training, that the management in your hotel/unit share this responsibility through the policy laid down and that all members of staff have an individual responsibility for ensuring that the Company safety rules and regulations are adhered to. All staff must co-operate with the management in maintaining a safe and healthy working environment, and if you do not understand your responsibilities or are involved in work that requires specific training, then speak to your Head of Department immediately.</p> <p>OUR HEALTH AND SAFETY ORGANIZATION</p> <p>The Managing Director has ultimate responsibility for the implementation of our Health and Safety policy, via the Regional Directors for ensuring that all Managers are made fully aware of, implement and regularly review the Company's Health and Safety policy.</p> <p>Each individual <i>Manager</i>, with assistance of the hotel/unit <i>Personnel Manager</i>, has the responsibility for the effectiveness of Health & Safety training as well as drafting up and/or adapting the Health & Safety manual, to their own individual hotel/unit procedures; hazard analysis; and reporting structures. They are also responsible for ensuring that all the staff are aware of and trained in the relevant procedures and that records are kept of all training; accidents and health hazards. Each <i>Head of Department</i> is responsible for implementing the Company and hotel/unit policy within their own department.</p> <p>The Company believes that its members of staff can make a considerable contribution towards achieving the Health & Safety objectives, and is keen to encourage all employees, and in particular staff representatives on the Staff Consultative and/or Health & Safety committee to make positive recommendations where applicable.</p>
Our Health & Safety	Page 3	
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Figure 16.2 An example of some of the issues needing to be covered under health and safety law – one company's approach

Source: Reproduced by courtesy of Choice Hotels Europe.

Employment of non-EU subjects

The employment of non-EU subjects needs Home Office approval, through the granting of a work permit. Under the Asylum and Immigration Act 1996 it is a criminal offence to employ a person who does not have authorization to work in the UK. The penalty is £5000 for each offence. (Figure 16.3)

Trade union legislation

The main legislation currently covering trade unions is contained in a number of Acts, including the Trade Union and Labour Relations (Consolidation) Act 1992, the Trade Union Reform and Employment Rights Act 1993 and the Employment Relations Act 1999. These Acts contain legislation concerned with 'collective' employment issues.

PRIVATE AND CONFIDENTIAL

04 June 1999

Dear

Please find enclosed a letter confirming our offer of employment as a Food and Beverage Assistant in John T's Bar and I would be grateful if you could complete the enclosed forms and return them to me in the Human Resources Department as soon as possible.

Also, in accordance with the Asylum & Immigration Act 1996, all new employees are now required to provide proof that they are eligible to work in the United Kingdom. You should bring one of the following documents to the Human Resources Department on your first day:

- A document from a previous employer, the Inland Revenue, the Benefits Agency, the Contributions Agency, or the Employment Service, showing your name and National Insurance Number, e.g.
 - a P45
 - a payslip
 - a P60
 - a National Insurance Number Card
 - a letter from one of the agencies named above
- A passport confirming that you are a British citizen or European Economic Area National.
- A birth certificate confirming birth in the UK or Republic of Ireland.
- A letter from the Home Office confirming that you are allowed to work in the UK.
- A work permit issued by the Department for Education and Employment.

Please note that without these completed forms and proof of eligibility to work in the UK, we will be unable to process your details on our payroll system, which will delay payment of wages.

If you have any queries with any of the above, or your offer letter, please speak to me or any other member of the Human Resources Department.

Yours sincerely,

Michelle Walton
Human Resources Officer

Figure 16.3 An Asylum and Immigration Act statement
 Source: Reproduced by courtesy of Marriott Hotels.

Recognition

To qualify for most rights under trade union legislation, trade unions have to be certified as independent by the Certification Officer. Employers themselves need only recognize trade unions if they themselves wish to do so. 'Recognition' means that the employer recognizes the right of the union to represent employees in membership of the trade union. Issues covered in such recognition can include terms and conditions of employment, recruitment and termination procedures, work allocation, discipline and negotiating procedures. The Act contains a 60-page schedule on recognition.

Information

Employers who recognize trade unions are required, by law, to disclose information that is necessary for collective bargaining. The Freedom of Information Act to be enacted at the beginning of 2005 was likely to pose additional challenges for HRM departments.

Trade disputes and immunities

Trade disputes only attract immunity from actions for damages if they are disputes between employees and their employer and are concerned with matters central to their employment relationship. In addition, any action must have been approved in a ballot by a majority of those voting.

Picketing

Picketing is only lawful if carried out as part of a trade dispute and should be at or near the place of work.

In 1999, the Employment Relations Act enacted improvements and new approaches to the statutory rights of trade unions such as recognition and made it a legal right for an employee to be accompanied at disciplinary or grievance hearings. There are also developments in the area of resolving disputes between workers and their employers, via the Employment Act, 2002, which has attempted to reduce the high number of Employment Tribunals by assisting the earlier resolution of such problems well before they get to Tribunal. This will extend the influence of the ACAS and the content of its codes of practice. The year 2004 had seen the implementation of the regulations regarding the non-discrimination of people at work because of their religion or beliefs.

Concluding statement

As stated at the start of this chapter employment is an extremely complex area of law so this chapter must be viewed as a simple introduction to some of the key issues.

Further Reading and References

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Questions

- 1 Describe the main distinct areas of law affecting employment.
- 2 Describe the 'fair reasons' for terminating employment.
- 3 Describe a 'fair disciplinary' procedure (see also Chapter 14).
- 4 Discuss the proposition that a contract of employment is much more than the 'written statement' required by the Employment Rights Act 1996.
- 5 Evaluate the approach adopted by an employer you know well to managing their labour force as the law requires.
- 6 Discuss the proposition that government intervention through statute law has no place in the employment relationship.