

## Briefing Note

Employees and Commercial  
Agents

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### Statutory Provisions

#### Employees

Employees are protected by a number of statutory provisions. The Employment Rights Act 1996 provides employees with certain minimum rights in terms of their contract of employment and working conditions. There is a wealth of statutory authority providing employees with additional rights, for example in relation to health and safety in the workplace, discrimination and the national minimum wage. It is out-with the scope of this note to consider all of the protections afforded to employees. However it is important to note that once you have taken on an Employee you as an employer are subject to certain statutory responsibilities.

#### Commercial Agents

The position of commercial agents is governed by The Commercial Agents (Council Directive) Regulations 1993 (as amended). This provides commercial agents with rights, in some respects similar to those of employees, but less onerous in many circumstances. This is the only UK statute currently in force relating specifically to commercial agents. It seeks to incorporate into UK law European law regarding the protections afforded to and responsibilities of this type of worker.

### Definitions

#### Employee

An employee is “an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment” [section 230, 1996 Act.]

#### Commercial Agents

A commercial agent by contrast is: “a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal.....” [section 2(1) 1993 Regulations]

The 1993 Regulations provide that commodity agents, unpaid agents and “secondary agents” (those who carry on business on their own account and only act as an agent as an additional activity) cannot be commercial agents.

With regard to the terminology, the commercial agent in this case would be the person working for you and you would be known as the “principal.” The rules of agency, again broadly speaking, are such that the agent carries out work on behalf of a principal with a lot more flexibility and responsibility for his own work than would typically exist in the case of employee and employer. For example, an agent will commonly be expected to decide how to run his day to day business himself and may decide which hours to work depending on the level and type of business at the time. An employee, on the other hand, will be required to carry out the work given to him by the employer at the times he is required to attend work as specified by the employer.

## Contract

The differences between different types of worker are determined largely by the type of contract under which they are engaged.

## Employees

An employee’s terms and conditions are set out in an employment contract. This gives the employer the opportunity to set out in detail the conditions and parameters within which the employee will perform his duties. In so doing the employer must have regard to the minimum rights conferred upon employees by statute.

The 1996 Act provides all employees with a “right to statements of employment particulars” within two months of starting work. This is, a contract comprising the minimum rights to which all employees are entitled. In terms of Part 1 of the 1996 Act, this must include the following information:-

- Particulars of the names of the parties, date on which employment began and date on which the employee’s period of continuous employment began
- The scale or rate of pay, the intervals on which it will be paid, terms and conditions relating to hours of work, any terms and conditions relating to holidays, particulars relating to sickness pay, information on pensions and pensions schemes
- Details of the length of notice the employee is required to give and entitled to receive on termination
- The job title or brief description of his role
- The date employment will end or the period for which it is expected to continue
- The place of work
- Any collective agreements affecting his terms and conditions
- Details relating to employees required to work abroad for one month or longer
- A note relating to the employer’s disciplinary and grievance procedures

There are certain exceptions and specific rules relating to these requirements in different employment situations but the above list comprises the minimum amount of information required for an employment contract. The 1996 Act also provides Employees with certain minimum rights in relation to the above requirements. By way of example, all employees are entitled to 4 weeks holiday per year, inclusive of public holidays.

## Commercial Agents

Self employed workers, such as commercial agents, are usually also engaged under a contract. This helps to avoid disputes between the parties. A self employed individual usually works under a contract for service, in the case of a commercial agent this is referred to as an “agency contract.”

Section 13(1) of the 1993 Regulations provide that both the commercial agent and the principal will be entitled, on request to the other, to receive a written document setting out the terms of the agency contract including any terms subsequently agreed. For the reasons noted below, but in general terms for a successful working relationship between the parties, entering into an express agency contract is strongly advisable if you decide to hire salesmen as Commercial Agents.

The 1993 Regulations provide that principal and agent have duties to each other.

According to section 3 of the regulations the agent must:-

- Make proper effort to negotiate, and where appropriate conclude transactions for which he is responsible
- Provide all necessary information to his principal
- Comply with all reasonable instructions given to him by his principal

Section 4 of the regulations provides that the principal must comply with the following obligations to his agent.

- Provide all necessary information and documentation to allow the agent to carry out his duties
- Inform the agent, within a reasonable time, if the amount of work he normally receives is to be reduced
- Inform the agent within a reasonable time if he has accepted, refused or failed to execute any transaction the agent has procured on his behalf.

It would be advisable to give an indication of a time scale acceptable to both parties in the agency contract, as “reasonable time” is a rather vague term which may result in disputes between agent and principal.

## Tax Implications

The tax implications of employees and/or commercial agents should be considered further. In basic terms, where someone is employed under a contract of employment the Employer is responsible for paying tax in the form of national insurance contributions and also deducting tax from employees through the PAYE system. Where a person is self employed they are responsible for paying their own tax through self assessment.

## Remuneration

### Employees

An employee is entitled to have the level and method of payment specified in his contract. This amount will be subject to the national minimum wage.

## Commercial Agents

The 1993 Regulations provide that, in the absence of any agreement between the parties, a commercial agent is entitled to the amount “customarily allowed in the place where he carries on his activities and, if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.” [regulation 6(1).] Given the rather broad scope of this provision it is advisable to set out the level of payment in a contract.

Commercial agents are specifically entitled to receive commission, under section 7 of the 1993 Regulations for work concluded during the period covered by their agency contract where he has completed the work or where a transaction has been concluded with a third party whom that agent has acquired as a customer for transactions of the same kind. Furthermore, he is also entitled to commission for work carried out in an area or with a specific group of customers over which he has exclusive rights under the contract.

## Termination

### Notice

Employees are entitled to a statutory minimum notice period of one week until they have been continuously for two years and thereafter notice entitlement will be one week for each completed year of service up to a maximum of 12 weeks’ notice.

Where a contract with a commercial agent is for an indefinite period, the 1993 Regulations provide for a minimum period of notice of 1 month for each year of the contract up to a maximum of 3 months’ notice for 3 years service. These notice periods must be adhered to by both parties.

### Employees – Rights on Termination

An employment contract terminates on the date specified in the contract if a fixed term is specified in the document. If an employee is dismissed prior to the date specified in the contract the Employer is at risk of a claim for unfair dismissal or breach of contract. There are certain exceptions to this e.g. where an employee is dismissed without notice due to gross misconduct.

### Commercial Agents – Rights on Termination

A commercial agent is entitled to commission on transactions carried out during the period of his contract even if this arises after termination of his contract, provided it was mainly attributable to his efforts and it was entered into within a reasonable period after his contract ended or a third party received instructions from him within a reasonable period before termination of his contract [section 8, 1993 Regulations.]

In terms of section 17 of the Regulations, a commercial agent is also entitled to indemnity or compensation on termination of his agency contract. Unless specified in the agency contract he is entitled to compensation rather than indemnity. The amount of indemnity is capped whereas the amount of compensation is not (as explained below).

The agent is entitled to indemnity if he has brought in new customers to the business or substantially increased the volume of work from existing customers in such a way as to bring substantial benefit to the business and the payment is equitable in all the circumstances. The amount an agent may claim is capped at the amount not exceeding one year's average commission.

An agent may also claim damages for breach of the agency contract instead of claiming compensation under the 1993 Regulations.

If an agent suffers loss as a result of termination of his contract and he would have received commission if the contract had been adhered to and / or termination results in the agent being unable to recover costs and expenses he has incurred as a result of carrying out his duties he may recover compensation from his Employer. Critically there is no upper limit on the amount of compensation which may be claimed.

### Commercial Agents – Exceptions to payment of indemnity / compensation

The Regulations provide that an Agent does not have the right to payment of indemnity or compensation in the following circumstances:-

- If the contract is terminated because of a fault of the agent which justifies immediate termination because of a failure to carry out all or part of his contract or where exceptional circumstances arise
- Where the agent terminates the contract in circumstances not attributable to the principal
- Where the agent terminates the agency because he cannot reasonably be required to continue his activities
- Where the agent, with the consent of the principal, assigns the agency to a third party.

If you require any advice or further information regarding the issues raised by this Briefing Note please contact David Ogilvy, Partner, or Elizabeth Bremner, Associate, on 0131 228 8111.

This document is a summary only and is not intended to be a definitive guide. The individual circumstance of each client must always be taken into account. Legislation is subject to change. No responsibility can be accepted for any action taken in reliance of this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.

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