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Contributing Editors:
Stefan Martin & Jo Broadbent
Hogan Lovells

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Q&A Chapters

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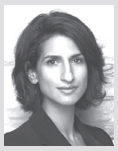
Bermuda



Fozeia Rana-Fahy

Dan Griffin

MJM Limited

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

From a statutory perspective, the main sources of employment law are the Employment Act, 2000 (as amended) ("the Employment Act"), the Workers' Compensation Act 1965 ("Workers Comp Act"), the Human Rights Act 1981 ("HRA") and the Occupational Safety & Health Act 1982 (and accompanying regulations) which collectively deal with employment standards, rights, compensation and workplace discrimination. In addition, there is a body of trade union legislation governing the rights of unionised employees.

The parties will also be governed by the contract of employment, which if governed by Bermuda law, will be subject to the common law and jurisprudence of the Bermuda Courts.

To the extent that provisions of Bermudian legislation are similar to that of the UK, the Bermuda Courts will be bound to follow and apply any relevant decision of the Privy Council. Further, the decisions of the Superior Courts of England and Wales are highly persuasive. Depending on the facts and the circumstances, the Bermuda Employment Tribunal ("the Tribunal") and Courts will often find assistance in the judgments of the superior Courts/tribunals of other common law and offshore jurisdictions (including various Canadian provinces and Caricom countries).

Effective 1 June 2021, the Employment Act was amended as a result of the Employment Amendment (No.2) Act 2020. The Trade Union Labour Relations (Consolidation) Act 2020 (the "Trade Union and Labour Relations Act") was brought into force on 1 June 2021 and effectively consolidates the various labour related legislation.

The below questions address the law as at the current date.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Employment Act defines an employee as being (i) "a person who is employed wholly or mainly in Bermuda for remuneration under a contract of employment"; or (ii) any other person who "performs services wholly or mainly in Bermuda for another person for remuneration on such terms and conditions that his relationship with that person more closely resembles that of an employee than an independent contractor". Independent contractors, do not therefore, acquire any rights or protections pursuant to the Employment Act, but expatriate workers do.

Individuals under the age of 16, casual workers, part-time employees (i.e. those who work less than 15 hours a week), temporary employees (i.e. those who work for no more than three months in any year by an employer), students and voluntary workers are excluded from the definition of employee.

"Worker", for the purposes of the Workers Comp Act, has the same meaning as employee under the Employment Act.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

From a statutory perspective, the Employment Act provides that a written "Statement of Employment" shall be given to the employee no later than one week after an employee commences employment with an employer. The Statement of Employment should contain various particulars of the employment relationship, including but not limited to the job title, brief description of the work to be conducted, salary details, hours of work/holiday, entitlement to rest days and meal breaks, entitlement to overtime, date of issue and expiry of work permit, notice and probationary period, the existence of the employee's written policy against bullying and sexual harassment and how the policy can be accessed.

From a contractual perspective, it is open to the employer to enter into a more detailed contract with the employee. Even a verbal agreement can constitute an employment contract, assuming it can be proven.

1.4 Are any terms implied into contracts of employment?

Yes. All employment relationships implicitly include, for example, the employer's obligation to provide work, to pay for the work and to provide a safe environment for its employees. With respect to the employee, every contract of employment implies that the employee will carry out the work and observe the duty of good faith and fidelity towards the employer.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum terms and conditions of employment are set out in the Employment Act and include, for example, vacation pay, overtime pay, hours of work, rest breaks, holidays, leave of absence and termination of employment. If the contract contains more favourable terms than the Employment Act, the contract prevails. Parties cannot contract out of the Employment Act's minimum requirements. There is no statutory minimum wage in Bermuda.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Terms and conditions of employment including but not limited to pay (standard rates and overtime rates) are agreed through collective bargaining with respect to unionised employees.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The rules relating to Trade Union Recognition are set out in the Trade Union and Labour Relations Act. A union has the right to be recognised as the exclusive bargaining agent for a group of workers in circumstances where an employer voluntarily recognises such right or, alternatively, where a union successfully makes an application for a certification ballot. Where a union can establish to the satisfaction of the Ministry of Labour that it has members in good standing comprising 35 per cent or more of the workers in a proposed bargaining unit, it can make an application to the public office of manager of labour relations (the "Manager") to be certified as the bargaining agent for that proposed bargaining unit. The employer may agree, in which case certification follows, or oppose the application thereby commencing a ballot among the workers requiring a 50 per cent majority in support of the union as their exclusive bargaining agent. Certification requires the employer to then deal with the union and engage in the process of collective bargaining. Certification may take place without a ballot where the Manager is satisfied that more than 60 per cent of the workers support it. Certification may be cancelled by a similar process, on application by a worker to the Manager showing the support of 35 per cent of workers followed by a ballot requiring 50 per cent support. Cancellation will be automatic if the Manager is satisfied with more than 60 per cent support.

2.2 What rights do trade unions have?

Trade unions have the fundamental right to collectively bargain with employers in circumstances where the union has obtained recognition, either voluntarily or through the statutory process. More generally, a union has the right to: (i) be registered as such; (ii) take in members and charge union dues; (iii) own property; (iv) sue and be sued; (v) intervene in labour disputes; and (vi) generally conduct business. In the context of collective bargaining, a union has the important right to initiate labour disputes and represent workers in relation to such grievances.

2.3 Are there any rules governing a trade union's right to take industrial action?

The Trade Union and Labour Relations Act sets out the rights a union has in terms of industrial action. It provides expressly for peaceful picketing and sets out a series of picketing rules. The newly-amalgamated Employment and Labour Relations Tribunal now has jurisdiction over labour disputes. The matter must first be referred to the Manager. The Manager must determine whether it is capable of resolution. If it is, the Manager must attempt a resolution between the parties. If the Manager fails to effect a resolution or determines that the dispute is not one amenable to resolution, he must refer the matter to the Minister of Labour (the "Minister").

The Minister is required to take steps to promote a settlement between the parties. If those steps prove unsuccessful, the Minister must refer the dispute to the Tribunal for determination or settlement. The right to strike is not enshrined in the legislation and, as a result, the common law principles are applicable. In relation to essential services and essential industries, lockouts, strikes and irregular industrial action short of a strike is unlawful unless a labour dispute exists and 21 days' notice of intended action has been given. The Ministry of Labour can intervene in labour disputes and avert industrial action by referring the dispute to arbitration.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No, although some collective bargaining agreements do provide for a joint consultation process in relation to certain terms and conditions of employment.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Bermuda.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Bermuda.

2.7 Are employees entitled to representation at board level?

No, employees are not entitled to representation at board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The HRA prohibits discrimination and harassment in the employment sector on the basis of any protected characteristic (including race, place of origin, colour, ethnic or national origin, sex or sexual orientation, pregnancy, marital status, disability, family status, religion or beliefs or political opinions or criminal record (except where there are valid reasons relevant to the nature of the particular offence for which he/she is convicted that would justify the difference in treatment)). Age is not a protected characteristic under the HRA.

3.2 What types of discrimination are unlawful and in what circumstances?

Employers are prohibited from: discriminating in respect of refusing to refer or to recruit; dismissing, demoting or refusing to employ or continue to employ; paying one employee at a rate

of pay less than another employee hired on substantially the same terms; refusing to train, promote or transfer an employee; subjecting an employee to probation or apprenticeship; establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons from employment or continued employment; maintaining separate lines of progression for advancement in employment or separate seniority lists; and providing in respect of any employee any special term or condition of employment.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The HRA provides that an employee has a right to freedom from sexual harassment in the workplace. As of 1 June 2021, pursuant to the Employment Act, employers must have in place a clear written policy against bullying and sexual harassment. Most businesses have developed their own internal policies to prevent and protect employees from sexual harassment, however, employers are required to present employees with the policy upon commencement of employment, and procedures are required to be put in place to assist every employee with understanding the policy. Employers should provide training to ensure that all employees understand the policy.

3.4 Are there any defences to a discrimination claim?

Certain express statutory exceptions are made in the HRA. Discrimination with respect to the protected characteristic will generally not exist where there is a *bona fide* and material occupational qualification and a *bona fide* and reasonable employment consideration for the position.

The HRA states that nothing in the legislation confers the right to employment for which the employee is not qualified or is not able to perform, or of which he/she is unable to fulfil a *bona fide* occupational requirement, or any right to be trained, promoted, considered or otherwise treated in or in relation to employment, if his/her qualifications or abilities do not warrant such training, promotion, consideration or treatment.

With respect to disabled employees, employers are required to take steps to eliminate the effects of the disability in relation to the employment. However, the HRA qualifies this by stating that such steps need only be taken if they do not cause unreasonable hardship to the employer.

The HRA also makes exceptions with respect to employment involving physical stamina and strength and in hiring by religious, charitable and social non-profit organisations.

It also makes an exception with respect to the hiring of Bermudians and for to taking into account an individuals' nationality *bona fide* for reasons of national security.

3.5 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

An aggrieved employee may file a complaint with the Human Rights Commission ("the Commission") orally, electronically or in writing within six months after the alleged contravention. The Executive Officer of the Commission may, however, entertain a complaint up to two years after the alleged contravention if he is satisfied there are good reasons for the delay and that no one will be prejudiced by the delay.

The Commission will determine whether there are sufficient grounds to undertake an investigation and may conduct inquiries for this purpose. The Executive Officer has a duty to seek to settle the causes of the complaint (through mediation or conciliation by mutual consent of the parties) or to endeavour to cause the breach to cease. After giving the complainant an opportunity to be heard, if the Executive Officer is of the opinion that there is no merit to the complaint, he may dismiss the complaint at any stage of the proceedings.

If it is unlikely in the circumstances that the complaint will be settled or that the Executive Officer has attempted unsuccessfully for nine months to settle the complaint, and the complaint is not so serious as to warrant prosecution, the complaint must be referred to a tribunal.

3.6 What remedies are available to employees in successful discrimination claims?

The Human Rights Tribunal (the "HR Tribunal") may order any party who has contravened the HRA to carry out any act or thing that, in the opinion of the HR Tribunal, constitutes full compliance with such provision and to rectify any injury caused to the complainant by the contravention, and/or to make financial restitution (which includes injury to feelings) provided that financial restitution shall not be ordered for any loss which might have been avoided if the complainant had taken reasonable steps to avoid it. There is no cap on the financial restitution available. The HR Tribunal may also refer the complaint to the Director of Public Prosecution if it is of the view that an offence has been committed. An employee with a successful discrimination claim can only recover up to $1,000 of his/her costs of the proceedings.

In practice, the HR Tribunal has the power to order a person to cease any discriminatory practice and to restore rights, opportunities or privileges to the victim and/or to compensate the victim where appropriate.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No. Such "atypical" workers do not have additional protection, but they do benefit from the same protections which prohibit discrimination in employment for employees.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The only requirements in relation to whistleblowing are set out in the Employment Act. This prohibits termination of employment or imposition of disciplinary action on the ground that the employee made a protected disclosure as a whistleblower. There are no rules specific to whistleblowers who raise concerns about corporate malpractice but businesses have put into place internal policies which set out governance on this.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The Employment (Maternity Leave Extension and Paternity Leave) Amendment Act took effect on 1 January 2020. This piece of legislation provides an extension to maternity leave.

A pregnant employee has 13 weeks of paid maternity leave after one year of continuous employment as of her expected due date.

A pregnant employee who has been employed for less than one continuous year will be entitled to 13 weeks' unpaid leave.

In practice, some employers elect to provide more than the statutory minimum.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Entitlement to pay is referred to above.

Statutory and contractual benefits will continue during the paid maternity leave period.

4.3 What rights does a woman have upon her return to work from maternity leave?

If a woman intends to return to work from maternity leave without loss of seniority, she must notify her employer at least two weeks in advance of the date on which she intends to resume work. If the position no longer exists, the employer must provide the returning employee with at least the same level of wages and benefits as she was receiving before her maternity leave. If a woman returning from maternity leave fails to notify her employer at least two weeks in advance of the date she intends to resume work, the employee shall be deemed to have terminated her employment.

4.4 Do fathers have the right to take paternity leave?

An employee who is becoming a father and has worked for one continuous year by the expected date of birth is entitled to five days' paternity leave.

Employees who have not worked for a full year will be entitled to five days' unpaid leave. Employers can elect to provide more than the statutory minimum paternity leave.

4.5 Are there any other parental leave rights that employers have to observe?

Pursuant to the HRA, a woman is entitled not to be discriminated against because she is pregnant or may become pregnant.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

There is no statutory provision which entitles employees to work flexibly if they have responsibility for caring for dependants. Employers can choose to provide flexible working hours if they wish to do so contractually or informally.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Bermuda does not have the equivalent of the UK's TUPE legislation.

Upon the sale of shares by a vendor, the identity of the employer does not change but merely that of the shareholders. The employment contracts and collective agreements that are in force between the employer and its employees remain in full force and effect, and the employer retains all of its obligations and liabilities towards its employees.

The sale of assets operates to terminate the employment contract between the vendor and employees. It is then the purchaser's choice as to whether they should offer new contracts to those employees.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

As mentioned above, upon a sale of shares, all the obligations and rights of an employee are transferred to the purchaser. The purchaser must observe the terms of any collective agreement.

Upon a sale of assets, none of the obligations and liabilities are transferred to the purchaser unless contractually agreed upon in the sale and purchase agreement. Where the workforce is unionised, the purchaser will enter into discussions with the union with respect to a new collective agreement.

Pursuant to Section 5(6) of the Employment Act, where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to constitute a single period of employment with the successor employer, if the employment was not terminated and severance was not paid pursuant to the Employment Act.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no mandatory consultation rights specific to a business sale.

If there are to be any redundancies, the Employment Act states that the employee's trade union or other representative should be informed as soon as practicable about the reasons and impact of the proposed redundancies. No specific timeline for such communication is identified. The length of the process depends upon the union concerned and the likely negative impact on unionised positions. There are no formal sanctions for failing to inform.

If the sale of a business results in a large number of redundancies, the employer typically will provide advance notice to the Government ministry responsible for Work Force Development.

5.4 Can employees be dismissed in connection with a business sale?

A purchaser can decide to terminate the employment of employees upon a share sale or decide not to offer new employment to employees upon an asset sale. Severance provisions under the Employment Act or any applicable contract/collective agreement must be considered.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The purchaser may impose changed terms and conditions of employment with sufficient consideration. However, pursuant to the Employment Act, if the employment offered by the purchaser to the employee is refused on the basis that the new terms are less favourable than the terms upon which he/she was employed immediately prior to the termination, severance allowance will be payable.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Subject to the provision of the Employment Act, an employer may terminate the contract of employment for any reason and without notice during any probationary period an employee is required to undertake.

Otherwise, an employee's contract of employment cannot generally be terminated by an employer unless there is a valid reason for termination connected with the ability, performance or conduct of the employee or the operational requirements of the employer's business. If such circumstances exist, pursuant to the Employment Act, an employee is entitled to receive: a week's notice where the employee is paid each week; two weeks' notice where the employee is paid every two weeks; and one month in any other case.

The provisions of notice do not apply where an employee has reached retirement age or where the notice periods are regulated by the contract itself or by a collective agreement or otherwise by an agreement between an employer and the employee. Additionally, they do not apply where the giving of longer notice periods is customary, given the nature of the functions of the work performed by the employee.

In practice it is not unusual to see three months' notice provisions for professional/skilled employees.

An employer must give an employee a written warning setting out the misconduct and instructions for improvement.

It is also possible for employers to terminate a contract of employment without notice in the following two ways: (i) where an employer is guilty of serious misconduct which is directly related to the employment relationship or which has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the employment relationship; or (ii) where the employee is guilty of misconduct falling short of serious misconduct or poor performance, subject to the appropriate statutory warnings having been complied with.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Garden leave may only be imposed upon an employee if this is contractually provided for in the contract of employment.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Where there is no valid reason for the termination or appropriate warnings have not been given, the employee can claim unfair dismissal and can seek to be reinstated/re-engaged and/or a compensation order. The circumstances where employees are treated as being dismissed are described above. Consent from third parties is not required before dismissal pursuant to the Employment Act.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Employees are protected against dismissals which are discriminatory pursuant to the HRA (for example, dismissals based on pregnancy or race).

Unionised employees may also have additional protections incorporated into their collective bargaining agreements.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so, how is compensation calculated?

As described in question 6.1, employers are entitled to dismiss for reasons related to the individual or for business-related reasons, as long as the necessary notice and warnings are provided.

Subject to some exceptions, automatic compensation (in addition to receipt of notice) is only available to an employee in the form of a severance allowance where the dismissal is due to: redundancy (where the employer's business has been sold or there has been a reorganisation of the business or reduction of workforce due to economic conditions); winding up or insolvency of an employer; death of the employer; or death of an employee from an occupational disease or accident resulting from that employment. Where an employee's contract is terminated, the employer is required to pay any sums due to the employee in relation to notice or severance within seven days or during the next payment cycle.

Severance allowance is calculated based on years of service: two weeks' wages, for each completed year of continuous employment up to the first 10 years; and three weeks for each completed year of continuous employment thereafter, up to a maximum of 26 weeks' wages.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The notice and warning provisions in the Employment Act must be adhered to. In addition, any enhanced procedures as set out in any disciplinary and grievance policy must be followed. Failure to follow such processes may result in a finding of unfair dismissal or wrongful dismissal.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Employees can bring claims of unfair dismissal and wrongful dismissal (although unfair dismissal can only be pursued through the Tribunal – not the Courts).

The remedies for unfair dismissal include: reinstatement; an order for re-engagement in a comparable position; and/or a compensation order.

A compensation order shall be of such an amount the Tribunal considers just and equitable in all the circumstances (including how the parties contributed to the dismissal). The amount of compensation shall not be less than two weeks' wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment; four weeks' wages for each completed year of continuous employment in other cases. The compensation order has a cap at 26 weeks' wages.

Damages for wrongful dismissal will include, for example, contractual entitlement to notice and all other compensation and benefits due during a notice period.

6.8 Can employers settle claims before or after they are initiated?

Yes. This is typically carried out by way of a separation/settlement agreement which will normally include adequate waivers, non-disparagement and protection of confidential information.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Where numerous dismissals are taking place (for example, due to redundancy) and depending on the industry, some employers elect to provide advance notice to the Government ministry responsible for Workforce Development.

If the dismissals relate to unionised positions, the employer should ensure that any additional obligations under the collective bargaining agreement are also followed.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The process and consequences are the same in relation to both individual and mass dismissals. The affected employees are able to file complaints and claim remedies pursuant to the Employment Act. Unionised employees may have additional rights pursuant to labour law.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants are generally considered to be void unless they are reasonable and necessary for the legitimate protection of the employer's business. The typical type of restrictive covenants recognised in Bermuda, subject to being reasonable, include provisions protecting the confidentiality of information pertaining to the employer's business, non-solicitation/non-dealing clauses prohibiting the solicitation/dealing of the employer's customers, suppliers and staff as well as non-competition clauses.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants must be reasonable in their duration, in their geographical scope and in the scope of activities that are prohibited. Courts will not "read down" or modify a covenant that they find to be unreasonable. The clause will simply be declared to be entirely unenforceable.

Although the enforceability of restrictive covenants has not been tested in the Bermuda Courts in recent times, in practice non-competition clauses of six months are generally considered to be enforceable for professional and senior executives.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Yes, consideration is required in order to enter into a restrictive covenant with the employee. When restrictive covenants are given at the time of an employee's hiring, the employment of the employee constitutes sufficient consideration for the restrictive covenant. Additional consideration is required if the restrictive covenant is entered into during employment.

7.4 How are restrictive covenants enforced?

An employer can enforce a restrictive covenant by seeking an injunction (including a springboard injunction) to prevent the employee from violating the covenant or by commencing a legal action against the employee (and sometimes from his/her new employer) claiming damages suffered by the former employer as a result of the breach, by the employee, of the restrictive covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Bermuda's data protection rights are enshrined in the Personal Information Protection Act 2016 ("PIPA"). The substantive provisions of PIPA have not yet come into force save for the creation of the Office of the Privacy Commissioner which is now producing guidance for employers on their privacy obligations.

Once in force, employers must ensure the proper protection of employees' personal information under the employer's control. Personal information must be processed fairly and with a lawful basis (ordinarily because processing is necessary for the performance of the employment contract or in the legitimate interest of the employer or necessary to bring and defend legal claims or comply with a legal obligation). The employer should provide employees with a privacy notice setting out how their personal information is processed. The data held must not be excessive in relation to the purpose for which it is collected, should be kept securely and retained only for as long as is necessary. Employees will have rights to receive copies of their personal data held by the employer and in limited circumstances rights to rectification, blocking, erasure and destruction of personal data. Employees may initiate a complaint with the Privacy Commissioner in the event of a dispute with an employer over the use of personal data.

Subject to these requirements, an employer may transfer data to other countries provided the requirements for transfers to an overseas third party are met. The employer must make its own assessment to determine that the overseas third party offers a comparable level of protection. In making that determination, the employer may rely on the Privacy Commissioner designating a particular jurisdiction or certification mechanism as providing a comparable level of protection (equivalent to the European Commission's adequacy decisions). Alternatively, or in addition, they must employ standard contractual clauses or binding corporate rules to ensure the overseas third party provides a comparable level of protection.

Exemptions to the restrictions on overseas transfers do not apply where the transfer is necessary for the establishment, exercise or defence of legal rights or where the transfers are small scale, occasional and unlikely to prejudice the individual. These exemptions are unlikely to permit regular transfers of employee data to overseas third parties.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes. Once PIPA comes into full effect, with certain exceptions, employers must allow employees access to their personal information.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There is no statutory provision which prevents pre-employment checks on prospective employees. The employer should not, however, discriminate against a candidate on the basis of one of the prohibited grounds of discrimination as set out in the HRA.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

There is no prohibition against monitoring employee's emails, telephone calls or use of the employer's computer system. However, any collection, use and storage of personal information must comply with the requirements of PIPA.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Restrictions may be placed on usage of social media both during and outside of work to the extent that it is required to protect its business. Employers may, for example, state in a social media policy that employees are not to disclose confidential information regarding the employer's business or otherwise make statements regarding the employer's business which could cause disrepute or statements regarding other employees or clients which could be viewed as disparaging.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Tribunal as established by Section 35 of the Employment Act has jurisdiction to hear filed complaints. The typical Tribunal is made up of three members, including the Chairman who must either be an attorney of at least five years, standing or considerable experience in labour relations, one member representing the interests of the employee, and the other member representing the interests of the employer.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Where an inspector has reasonable grounds to believe that an employer has failed to comply, he shall, as soon as practicable, inquire into the matter. Conciliation is therefore mandatory. The inspector has the ability to request information from the parties. After conducting an initial inquiry into the complaint, the inspector shall then endeavour to conciliate and effect a settlement. Where the inspector has reasonable grounds to believe that an employer has failed to comply with any provision of the legislation or is unable to affect a settlement, the complaint is then referred to a tribunal.

9.3 How long do employment-related complaints typically take to be decided?

Complaints will typically be heard within one to two years following the filing of the complaint.

9.4 Is it possible to appeal against a first instance decision and if so, how long do such appeals usually take?

A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law. It should be lodged within 21 days after receipt of notification of the determination or order. An appeal could take approximately three to 12 months to be determined depending upon the stance taken by the parties and the Court schedule.

10 Returning to the Workplace after COVID-19

10.1 Can employers require employees to be vaccinated against COVID-19 in order to access the workplace?

There is no legislation permitting mandatory vaccinations. Employers can mandate vaccinations by introducing a contractual requirement. If consent is not given, employers may have to take steps to unilaterally impose the requirement. Alternatively, they can ask for employees to be vaccinated. If employees fail to accept the contractual change or if the employer must take disciplinary action taken as a result of non-compliance, this may give rise to an infringement of the Human Rights Act 1981 and the Employment Act 2000. In practice, employees are encouraged rather than forced to be vaccinated without any disciplinary action.

10.2 Can employers require employees to carry out COVID-19 testing or impose other requirements in order to access the workplace?

There is no legislation permitting mandatory testing. Employers may either introduce the requirement for testing in the contract of employment, handbook/policy, or ask employees to undergo testing. If the test is refused, the employer may commence disciplinary proceedings. An employer's duty to provide a safe place of work provides a compelling reason for enforcing workplace policy despite HRA concerns. For example, a recognised local business association in Bermuda considers that testing all unvaccinated staff every seven days was justified by the requirement to provide a heightened level of safety.

Some employers are also requesting "SafeKey" certification from employees. This is a digital verification issued by the government confirming that individuals must either be fully vaccinated or have recently received a negative test result. This is becoming standard practice in the professional services industry in Bermuda.

10.3 Do employers need to change the terms and conditions of employment to adopt a "hybrid working" model where employees split their working time between home and the workplace?

Best practice would involve changing the terms and conditions of employment to adopt a hybrid working model. However,

this presents practical difficulties because material changes to an employee's contract requires consent of the employee. Some employers have chosen to adopt working from home or hybrid models without formal changes to the contract especially where it is anticipated that working from home is temporary.

10.4 Do employees have a right to work from home if this is possible even once workplaces re-open?

There is no right to work from home if this is not provided for in the employment contract. If the employment contract specifies that the employee would be office-based, an employer may require that employees return to the workplace. This is subject to creating a safe working environment. All employers should determine this based on government legislation and guidance bearing in mind the nature and use of their businesses. Testing and use of SafeKey certification together with prescribed social distancing is generally considered to be sufficient for this purpose in the professional services industry.

Fozeia Rana-Fahy is a Director and Head of the Dispute Resolution Team at leading Bermuda-based law firm MJM Limited. Fozeia has extensive experience acting for local and international clients in a wide range of complex disputes including employment and immigration litigation as well as general commercial and high-value trusts litigation. Fozeia routinely advises and gives presentations on topical employment and regulatory issues for the private client, banking, and insurance/reinsurance sectors in Bermuda and overseas, and is also an accredited mediator.

Fozeia also advises employers and employees with respect to complex executive disputes, executive benefit and incentive programmes, shareholder disputes, large-scale redundancies connected with mergers and acquisitions as well as union disputes. She is also one of the leading practitioners on the island for immigration advice.

MJM Limited
Thistle house, 4 Burnaby Street
Hamilton HM 11
Bermuda

Tel: +1 441 294 3612
Email: franafahy@mjm.bm
URL: www.mjm.bm

Dan Griffin is a Registered Associate in the Dispute Resolution Team with experience in dispute resolution work including banking, finance and intellectual property. He also advises commercial clients on data protection compliance.

Dan qualified as a solicitor in 2015 and prior to joining MJM was a commercial litigator in the UK.

His broad range of experience includes:

- Acting on behalf of commercial borrowers in credit derivative and interest rate hedging product claims, including conduct of *Suremime v Barclays 2013*.
- Claims in the UK and Northern Ireland arising from the RBS GRG complaints process.
- Undue influence, duress and breach of fiduciary duty claims arising from the demerger of a major UK house builder.
- Advising US listed companies on data privacy requirements and overseas data transfers to the UK.
- Advising commercial clients on their response to data breaches and enforcement action by the Information Commissioner.
- Acting in copyright and trade mark infringement proceedings in the High Court and Intellectual Property Office Tribunal.

MJM Limited
Thistle house, 4 Burnaby Street
Hamilton HM 11
Bermuda

Tel: +1 441 294 3647
Email: dgriffin@mjm.bm
URL: www.mjm.bm

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