
THE EMPLOYMENT LAW REVIEW

EIGHTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

The Employment Law Review
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Eighth Edition

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ERIKA C COLLINS

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EDITOR'S PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this eighth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past seven years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2016 in nations across the globe, and this is the topic of the second general interest chapter. In 2016, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Last year we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2016, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this eighth edition of *The Employment Law Review* includes 48 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Robertson and Iain Wilson, for their hard work and continued support. I also wish to thank all of our contributors and my associate, Ryan Hutzler, for his invaluable efforts to bring this edition to fruition.

Erika C Collins

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New York

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Chapter 9

BERMUDA

Juliana M Snelling and Paul A Harshaw¹

I INTRODUCTION

The governing law on employment law in Bermuda is the Employment Act 2000 (the Act). The Act applies to employees working or performing services wholly or mainly in Bermuda for remuneration under a contract of employment, subject to certain statutory exceptions. The parties may not contract out of the Act except where the Act expressly allows it.

Employees may bring a complaint under the Act to an inspector employed by the Government's Department of Workforce Development within three months of the employer's alleged breach of duty under the Act, including unfair dismissal.

Where the inspector has reasonable grounds to believe that an employer has failed to comply with any provision of the Act but is unable to effect a settlement, he or she must refer the complaint to the Employment Tribunal (the Tribunal), which will hold a hearing on the matter as soon as practicable after the referral and must give the parties or their representatives a full opportunity to present evidence on oath and make submissions. The Tribunal comprises the chairman, deputy chairman and no more than 12 members appointed by the minister responsible for workforce development. Out of that panel, the Tribunal hearing a complaint will normally comprise a panel of three persons, which may or may not include an attorney. Save as where provided in the Act, the Tribunal regulates its own proceedings as it sees fit.

If the Tribunal determines that an employer has breached the Act, it must notify the parties in writing of the reasons for its decision and has the power to order various remedies. There is a right to appeal to the Supreme Court from an order of the Tribunal on a point of law. The appeal process is governed by the Employment Act (Appeal) Rules 2014 promulgated by the Chief Justice.

Leaving the Act aside, it is still open to an employee to pursue a common law claim for breach of contract or wrongful dismissal in the courts, notwithstanding the right to pursue statutory remedies for unfair dismissal under the Act. The Supreme Court has original

¹ Juliana M Snelling and Paul A Harshaw are directors at Canterbury Law Limited.

jurisdiction to hear claims valued at 25,000 Bermuda dollars or higher; breach of contract claims valued at less than 25,000 Bermuda dollars are brought in the lower magistrates' courts. Appeals against judgments of the Supreme Court are made to the Bermuda Court of Appeal and, in certain stipulated circumstances thereafter, to the Judicial Committee of the Privy Council in London.

II YEAR IN REVIEW

A clear trend in the employment market over the past couple of years has been the wave of mergers and acquisitions that has transformed the Bermuda insurance market and caused it to contract significantly. Major deals have included Ace buying Chubb, XL Group buying Catlin and Ren Re acquiring Platinum. This has led to a large number of redundancies of insurance executive staff, causing many to relocate from the island (e.g., when Endurance Re acquired fellow Bermudian reinsurer Montpelier Re in 2014, around 40 Montpelier staff were made redundant).

Another trend on the labour side has been a wave of civil protests by unionised workers in response to various political hot issues, such as the government's proposed new immigration laws, which would have resulted in thousands more residents becoming entitled to Bermuda status (which carries the right to vote and buy property). The Chief Justice pronounced that it was 'strongly arguable' that the union's call for a withdrawal of labour where there was no labour dispute in existence was an unlawful breach of the Labour Relations Act.

A hot topic was the introduction of the Bermuda Personal Information Protection Act 2016 (PIPA). Only the preliminary provisions of PIPA came into force on 2 December 2016; the rest are expected to come into force in 2018. PIPA seeks to regulate the use of 'personal information' by organisations in Bermuda (including employers) in a manner that seeks to protect both the rights of individuals and the need for organisations to retain and use personal information for proper purposes. Personal information 'means any information about an identified or identifiable individual' save to the extent that such information is publicly available. Every employer will, therefore, possess personal information about every employee and every applicant for employment. The operation of PIPA will be overseen by a Privacy Commissioner, who will be responsible for monitoring how PIPA is administered to ensure that its purposes are achieved. Once PIPA is fully in force, any person may complain to the Privacy Commissioner about an alleged breach of PIPA. A graduated regime applies to the complaint procedure, starting with mediation, then an inquiry by the Privacy Commissioner, followed by possible criminal sanctions. Every employer will be required to appoint a 'privacy officer' who will communicate with the Privacy Commissioner.

III SIGNIFICANT CASES

i The Minister of Home Affairs v. Bermuda Industrial Union et al [2016] SC (Bda) 4 Civ

The government obtained declarations that strikes by unionised workers had been unlawful as well as an interim injunction prohibiting further illegal strike action. It is unlawful in Bermuda for a union to engage in further strike action once the minister has declared that a labour dispute exists and has referred the matter to the relevant Tribunal. The strike arose over the government's stated wish to either reduce salaries or re-impose forced 'furlough days'

on civil servants (i.e., 12 unpaid and unworked days off per year) to avoid redundancies and to reduce government expenditure in the face of an alarming 2 billion Bermuda-dollar public deficit. While declaring the past strike illegal, the Supreme Court refused to grant a permanent injunction on the grounds that further illegal strike action was not imminent, the unions' freedom of association rights would be infringed, the government had failed to come with 'clean hands' by acting in a provocative manner towards the unions, and there was no judicial precedent for such a wide-ranging injunction.

ii Elbow Beach Hotel Bermuda v. Heidi Lynam [2016] SC (Bda) 96 App

The Employment Tribunal had found that the employee had been unfairly dismissed because her summary dismissal was not justified; both sides appealed certain aspects of the decision and both appeals were dismissed. Recognising the statutory scheme of an entirely layperson Tribunal, the Supreme Court further clarified the test for successful appeals from the Tribunal, holding that an appellant must establish not only an error of law but also that the error caused 'a substantial wrong or miscarriage of justice'. The Court found that while there was a technical breach by the Tribunal, it had applied the correct test in concluding that there was no basis for finding that the employee was guilty of theft, and thus there was no substantial miscarriage of justice to the employer. Equally, the Court found that while the Tribunal had breached the rules of natural justice by not making an explicit determination with regard to the finding of the employee's contributory fault before applying a discount to her compensation award, it was impossible for the Court to find that the finding was so perverse that a substantial wrong or miscarriage of justice had occurred.

iii Raynors Gas Station v. Bradshaw [2016] SC (Bda) 60 App

Similarly, in *Raynors Gas Station v. Bradshaw*, the Court dismissed the employer's appeal against the Tribunal's ruling that the employee had been unfairly dismissed after being accused of stealing a 50 Bermuda-dollar bill dropped by a customer. The Tribunal found in all the circumstances that dishonesty was not established and that a reasonable employer would have given him the benefit of the doubt. The Court again stressed that it is not enough for an appellant to demonstrate technical errors of law unconnected from any substantial injustice on the merits.

iv Dennie, Evans and Foote v. Commissioner of Police [2016] Bda LR 24

In *Dennie, Evans and Foote v. Commissioner of Police*, the applicant police officers were successful in arguing that, on the basis of a recent decision of the Court of Appeal, and on the basis of prior discussions with the Bermuda Police Service, they had a legitimate expectation that upon the completion of 10 years' service, their employment would become permanent and pensionable. While there was no express representation made, there was an established practice that upon completion of 10 years' satisfactory service, an officer on a fixed-term contract would be offered such employment. The Supreme Court held that it was well established that a legitimate expectation may arise from the existence of a regular practice that the claimant can reasonably expect to continue. The Commissioner had failed to show that the overriding public interest of reducing expenditure justified his failing to meet the applicants' legitimate expectations. His decision to terminate their employment was quashed on judicial review and they were granted a declaration that they could continue in their employment until the age of mandatory retirement.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment contract in the summarised form of a statement of employment (SOE) must be entered into between the parties under the Act no later than one week after an employee begins employment, and must be signed and dated by the employer and employee. The SOE must contain the following:

- a* the full names of the employer and employee;
- b* the date when the employment began;
- c* the job title and brief description of the work for which the employee is employed;
- d* the place or places of work;
- e* the gross wage or the method of calculating it, and the intervals at which it is to be paid;
- f* the normal days and hours of employment or, where the job involves shift work, the normal pattern of the shifts;
- g* the entitlement to holidays, including public holidays and paid annual vacation;
- h* the terms relating to incapacity for work resulting from sickness or injury, including provision for sick leave;
- i* the length of notice that the employee is obliged to give, and entitled to receive, to terminate the contract of employment;
- j* details of any pension provided, whether under the National Pension Scheme (Occupational Pensions) Act 1998 or otherwise;
- k* any disciplinary and grievance procedures applicable;
- l* where the employment is not expected to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date on which it is to end;
- m* any probationary period;
- n* any dress code;
- o* the existence of any collective agreement that directly affects the terms and conditions of the employment; and
- p* such other matters as may be prescribed.

The SOE may also contain other details relating to the terms and conditions of employment.

Where there are no particulars to be entered into under points (k) to (o), that fact must be noted in the SOE. The SOE may refer to a collective agreement or another document for its terms. Agreed amended terms must be confirmed in writing and signed by both parties within a month's time.

Fixed-term employment contracts are permissible, in which case the SOE must state the date on which the contract is to end.

Often parties will have more complex written contracts of employment that go beyond what is required to be included in the SOE by the Act. Such contracts may be amended pursuant to ordinary contract law principles.

ii Probationary periods

The Act provides that new employees may be required to serve a probationary period. The SOE must state whether a probationary period applies to the contract (and if so, what that period is). Where no probationary period applies, the SOE must state that fact. The Act provides that during the probationary period, the employer or employee may terminate the

contract of employment for any reason (or no reason) and without notice. Obviously, if a reason is given, it must be lawful; a dismissal based on a prohibited ground as set out in the Act (e.g., on grounds of race) will be an unlawful dismissal.

iii Establishing a presence

All new companies in Bermuda hiring employees must be registered with the Registrar of Companies, which is responsible for tracking, processing and administering all limited liability companies, including local companies, exempted companies, overseas companies and foreign sales corporations. A company that is not registered may not hire employees. Registration occurs by sending the prescribed form to the Registrar.

A foreign company in Bermuda may not hire employees in Bermuda through an agency or third party without registering; its very presence requires registration. If the foreign company is overseas and hires employees through an agency or third party in Bermuda, the agency will be the employer for the purposes of Bermuda law. However, the foreign company employer may in certain circumstances be deemed to be the real employer and may be sued in Bermuda for any cause of action arising in Bermuda under the External Companies (Jurisdiction in Actions) Act 1885.

V RESTRICTIVE COVENANTS

Bermuda law permits non-competition clauses in employment contracts subject to the following principles.

During employment, the employee is under an implied duty of good faith and fidelity and thus, regardless of what express terms exist in the contract, the court may restrain an employee from competing with his or her employer, or otherwise acting outside his or her employment, if such activities are harmful to the business. Breaching this implied duty may justify summary dismissal of the employee for serious misconduct. It is easier to rely on an express non-compete clause than on this implied duty.

Post-termination, the implied duty of loyalty no longer applies and thus an express non-compete clause is necessary to prevent competition. However, Bermuda common law regards covenants in restraint of trade as *prima facie* unlawful, to be treated with suspicion. The court will enforce the covenant only if it goes no further than is reasonably necessary to protect the legitimate interests of the employer; it will strike down clauses that are unreasonably wide in terms of time, geographic extent and scope of restricted activity.

Legitimate interests that justify a restraint-of-trade clause include trade secrets or similar highly confidential information, trade connections and workforce stability.

An alternative to a post-termination non-compete clause is the inclusion of a 'garden leave' clause in the employment contract. This allows the employer to prohibit the employee from working during the notice period while he or she continues to receive his or her normal wages and benefits. The employee may not work elsewhere until the expiry of the notice period.

If the contract contains neither type of clause, the employer may try to rely on the implied post-termination duty that an employee may not disclose or misuse the confidential information of his former employer. However, this is often difficult to enforce, so employers will prefer to invoke express non-competition clauses.

The courts will more readily enforce non-solicitation or non-dealing clauses that prevent the employee from soliciting the business of clients of the former employer, or dealing with them, and thus protect trade connections. Courts will also prevent the poaching of key employees to protect the stability of the employer's workforce.

VI WAGES

i Working time

There are no maximum working-hour regulations applicable to adults working in Bermuda, save that the Act mandates that an employer provide employees with a rest period of at least 24 consecutive hours in each week, excluding police, prison and fire officers, medical practitioners and nurses.

The Employment of Children and Young Persons Act 1963 provides that no child under 13 is permitted to be employed without having a weekly continuous rest period of at least 36 hours. Children under 16 cannot be employed during school hours on school days, and may only be employed for up to two hours on school days outside of school hours. Persons under 18 cannot be employed at night unless they are over the age of 16, and then only until midnight.

ii Overtime

The Act provides for mandatory overtime pay, unless the parties expressly contract out of the requirement. Mandatory overtime pay also does not apply to a professional or managerial employee whose SOE provides that his or her annual salary has been calculated to reflect that his or her regular duties are likely to require him or her to work, on occasion, more than 40 hours a week.

Otherwise, an employee who works over 40 hours a week is entitled to be paid at the overtime rate of one-and-a-half times his or her normal hourly wage. Alternatively, the employee may be paid his or her normal hourly rate for the extra hours and be given the same number of hours off in lieu.

Many collective agreements provide for overtime pay, including double pay for hours worked on Sundays and public holidays.

There are no limits to the amount of overtime that may be performed in a given period, save for the mandatory rest period (see Section VI.i, *supra*).

VII FOREIGN WORKERS

All workers in Bermuda must either be exempt from immigration control (e.g., possess Bermuda status or have some other qualifying exemption under the Bermuda Immigration and Protection Act 1956) or be in possession of a work permit from the Department of Immigration.

There are no arbitrary restrictions on the number of foreign workers who may be employed in Bermuda, but in order to obtain a work permit, the Department must be satisfied that there is no Bermudian or spouse of Bermudian or Permanent Resident Certificate holder who is qualified and has applied for the position.

Foreign workers in Bermuda are protected by the same employment laws and generally pay the same taxes as local workers save that pension contributions under the National Pension Scheme (Occupational Pensions) Act 1998 are not mandatory for foreign workers. A foreign worker can 'opt in' to a pension plan in Bermuda.

VIII GLOBAL POLICIES

Internal discipline rules are not required by Bermuda law. Where disciplinary procedures exist, the SOE must contain the particulars and where there are none, the SOE must state that. There are no other mandatory 'rules' (as opposed to laws) that apply in the workplace.

Although it is not legally required, employers will often set out their internal disciplinary procedures in the employee handbook or on the intranet. It is normal for employees to be required to sign an acknowledgment that they have read the policies and agree to comply.

The Act provides that an employer may take disciplinary action, including issuing a written warning or suspending the employee, after taking into account: the nature of the conduct in question; the employee's duties; the terms of the contract; any damage caused by the employee's conduct; the employee's length of service and his or her previous conduct; the surrounding circumstances; the penalty imposed by the employer; the procedure followed by the employer; and the practice of the employer in similar situations.

IX TRANSLATION

English is the written and spoken language in Bermuda. There is no law requiring that contracts of employment be translated into the employee's native language. However, if the employer is aware that the employee does not understand the contractual terms, the contract may not be enforceable under common law unconscionable bargain or undue influence principles.

There is a sizeable amount of Portuguese foreign workers in Bermuda. As a matter of immigration policy, persons coming to work in Bermuda under the Portuguese Accord, as well as those employed in construction, are required to have a working knowledge of English. This is to ensure that work duties are carried out safely.

X EMPLOYEE REPRESENTATION

The Trade Union Act 1965 provides that every employee has the right to be a member of such trade union as he or she may choose and the right not to be a member of any trade union or to refuse to be a member of a particular trade union.

Where an agency shop agreement is in force, an employee shall not have the right to refuse to be a member of the relevant union unless he or she agrees to pay appropriate contributions to the trade union in lieu of membership or, alternatively, to a charity of his choice.

Where an employee is a union member, he or she has the right to take part in the activities of the trade union (including with a view to become a union official) and the right to seek or accept appointment or election, and if elected, to hold office. He or she has the

right to take part in trade union activities at the ‘appropriate time’, namely either outside working hours or at a time during working hours that is agreed upon by the employer. An employer who interferes with these rights commits an offence.

The election and removal procedures for union officer representatives, the length of their terms, and the frequency of their meetings are set out in the union’s own constitution or body of rules. The union rules must provide for the taking of a secret ballot of union members for the election or removal of officers and executive members. There is no fixed ratio of representatives to employees.

The employer must comply with the trade union certification procedures as set out in the Trade Union Act 1965, and where a union has obtained certification, the employer must deal with that union in good faith and enter negotiations for the purposes of collective bargaining.

The employer commits an offence if it does not allow representatives of a union that is certified in respect of a bargaining unit in the business such access to the employer’s premises as is reasonable for the purposes of the union’s lawful activities, but the employer may impose restrictions as to time and place that are reasonable in the interests of safety or of avoiding undue disruption of the business. Further, the employer may, by notice in writing addressed to a certified union, require that a representative shall not engage in union activities on the premises, except with its permission. Where this happens, the permission must be in place before such activities occur.

XI DATA PROTECTION

i Requirements for registration

Bermuda’s provisions for data protection laws are still in their infancy, and, as such, Bermuda does not yet have any requirement for registration.

ii Cross-border data transfers

The same applies to cross-border data transfers.

iii Sensitive data

This is defined in the Personal Information Protection Act 2016 to mean ‘any personal information relating to an individual’s place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information’. The main provisions of the Act are not yet in force.

iv Background checks

Background checks, credit checks and criminal record checks are permitted in Bermuda. Practically, the person being checked will need to consent to the release of the information, but there are no legal requirements *per se* regarding consent. The Credit Association provides credit checks in certain industries and provides results to paying members. Criminal conviction records will not be released by the court or police without the express consent of

the offender. Protection comes with the common law duty of confidence, which prohibits the disclosure or misuse of confidential information. PIPA 2016 will soon affect personal information provided by employers during background checks.

XII DISCONTINUING EMPLOYMENT

i Dismissal

An employee who is not on a fixed-term or project-based contract, or not working within his or her probationary period, may not be dismissed without a valid reason connected with the ability, performance, or conduct of the employee, or the operational requirements of the employer's business. Further, the written warning procedures in the Act must be followed. Warnings must be given in the event of repeated misconduct (falling short of serious misconduct) or unsatisfactory performance, giving the employee time to improve. The employer must provide the employee with a 'certificate of termination' stipulating the reason for the termination if requested by the employee.

If the termination is for an invalid reason or for no reason, it is an unfair dismissal meriting a complaint being made to an inspector. Thus, termination 'at will' clauses are unlawful and unenforceable.

Further, the Act provides that an employee's dismissal is unfair if it is based on any one of a list of specified reasons, many of which are human rights-related.

The notice requirements of the Act must also be complied with and the notice period must be stated in the contract. The employer is not allowed to give notice of termination during absences for certain types of leave.

An employee is entitled to at least one week's notice if he or she is paid on a weekly basis, two weeks' notice if he or she is paid every two weeks, and in all other cases, one month's notice. If the contract stipulates a greater amount of notice, the longer notice period will apply. An employer may in its discretion elect to make payment in lieu of notice to an employee equal to the remuneration and confer on the employee all other benefits that would have been due up to the end of the employee's notice period. If the employee leaves without giving proper notice, the employer need only pay salary plus any accrued but unused vacation and benefits, up to the last day worked. If the employer suffers loss, it may sue the employee for compensatory damages but, practically, this rarely happens.

No specific categories of employees are protected from dismissal and no social plan is required in the event of a dismissal.

Notification to the relevant union is required before making an employee redundant.

As to rehire rights, if the Employment Tribunal upholds an employee's complaint of unfair dismissal, the Tribunal has the statutory power to award either reinstatement or re-engagement of the employee in comparable work. However, the Tribunal has never ordered this relief against an unwilling employer, just as the Courts will not specifically enforce a contract of employment at the suit of either party, since it is undesirable to compel an unwilling party to maintain continuous personal relations with another.

In the event of an unfair dismissal, the amount of compensation that the Tribunal orders to be paid must not be less than two weeks' wages for each completed year of continuous employment for employees with no more than two completed years of continuous employment, and four weeks' wages for each completed year of employment for longer serving employees, up to a maximum equivalent of 26 weeks' wages.

The parties are free to enter in a settlement agreement to settle their disputes, which is construed and enforced in accordance with normal contract law principles. A stamp duty of 25 Bermuda dollars should be applied to the agreement to be enforceable (unless the employer is an exempted company), pursuant to the Stamp Duties Act 1976. Where a complaint was filed with the Department of Workforce Development, a written confirmation of the fact of settlement signed by both parties must be sent to the Department for it to close its file. The terms need not be disclosed.

ii Redundancies

An employee is redundant under the Act where his or her termination is, or is part of, a reduction in the workforce that is a direct result of any of the conditions of redundancy, namely:

- a* the modernisation, mechanisation or automation of all or part of the employer's business;
- b* the discontinuance of all or part of the business;
- c* the sale or other disposal of the business;
- d* the reorganisation of the business;
- e* the reduction in business, necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory; or
- f* the impossibility or impracticality of carrying on the business at the usual rate or at all, as a result of:
 - shortage of materials;
 - mechanical breakdown;
 - act of God; or
 - other circumstances beyond the control of the employer.

A lay-off that exceeds a period of four months amounts to a termination by redundancy. A redundant employee is entitled to:

- a* Notice – sufficient notice of termination or payment in lieu of notice must be provided by the employer (see Section XII.i, *supra*).
- b* Severance allowance – where an employee has completed at least one continuous year of employment, the redundant employee is entitled to be paid severance allowance. The amount depends on the length of service, the statutory minimum being two weeks' wages for each year of completed service up to 10 years, and three weeks' wages for each year of completed service over 10 years, subject to a maximum of 26 weeks' wages. If the contract provides for a greater amount of severance, it will prevail. Severance allowance is not payable where the employee unreasonably refuses to accept an employer's offer of re-employment at the same place of work under no less favourable terms than he was employed prior to the termination.
- c* Certificate of termination – if requested by the employee, the employer must provide the employee with a certificate of termination that contains various formal details about the employment, as well as the reason for termination.
- d* Itemised pay statement – the employee is also entitled to a written itemised pay statement at or before the payment of any wages, including his or her final payment after being made redundant. Deductions that were not agreed beforehand are unlawful.

- e* Pension transfer – the employee’s pension (mandatory for employees who are Bermudian or spouses of Bermudians) is transferable on redundancy, including the employer’s portion of contributions that have vested, usually two years after the employment commenced.
- f* Notice to trade union – the Act mandates that, before making an employee redundant, as soon as practicable, the employer shall inform the trade union or other representative of:
- the existence of the relevant condition of redundancy;
 - the reason for the termination contemplated;
 - the number and categories of employees likely to be affected; and
 - the period over which such termination is likely to occur.

In addition, the employer must consult on:

- the possible measures that could be taken to avert or minimise the adverse effects of such redundancy on employment; and
- the possible measures that could be taken to mitigate the adverse effects of any termination on the employees concerned.

Often there will be a collective agreement delineating the requirements to be followed and the benefits to be paid in the event of an intended lay-off or redundancy.

No notification need be made to the Bermuda government of redundancies, but it is advisable as a matter of good labour practice to inform the minister of impending redundancies affecting a sizeable pool of Bermudian workers.

No social plans are required in Bermuda. The employee has no rehire rights save those that might otherwise be provided in any relevant collective bargaining agreement. No category of employee is protected from dismissal.

The parties are free to enter into a settlement agreement to settle their disputes (see Section XII.i, *supra*).

XIII TRANSFER OF BUSINESS

Bermuda does not have any specific protection for employees whose employment is threatened by a transfer of business or undertaking. The Act provides that 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 pay was not paid under the Act. Acceptance of severance pay by an employee has the effect of terminating the employee’s employment.

There is no legal inhibition to outsourcing work, and this is an increasing trend given the high cost of local labour.

XIV OUTLOOK

All employers in Bermuda will face an additional administrative and financial burden in the ensuing two years when the Personal Information Protection Act 2016 will come into force. Information currently required by employers from personnel and payroll files

will be 'personal information' requiring protection and may be 'sensitive' requiring greater protection. Employers now have to start considering how best to protect and control access to that information, both physically and electronically.

It is expected that the insurance market will continue to contract through future consolidations and thus more redundancies are expected, to the detriment of the Bermuda economy.

Labour unrest is also giving rise to economic instability which Bermuda surely does not need as it emerges out of its recent recession and into the exciting year of 2017, when it will host the America's Cup international sailing event for the first time, an event that promises employment to thousands of Bermuda residents.

Appendix 1

ABOUT THE AUTHORS

JULIANA M SNELLING

Canterbury Law Limited

Juliana Snelling (nee Horseman), is a Rhodes Scholar, a director and partner of Canterbury Law Limited and a member of the Bar of England and Wales, the Law Society of England and Wales, and the Bermuda Bar.

Ms Snelling's principal work involves advising local and exempted companies, senior level business executives, trade unions and other institutions on a whole range of issues concerning Bermuda employment and labour law. She also practises in most areas of civil litigation, regularly appearing in the Supreme Court of Bermuda.

Ms Snelling was called to the Bar of England and Wales in 1994 and the Bermuda Bar in 1995. She is a member of the Honourable Society of the Inner Temple and is also a qualified solicitor with the Law Society England and Wales and a member of the Chartered Institute of Arbitrators.

She served for three years as chair of Bermuda's Land Valuation Appeal Tribunal and for several years as a member of the Professional Conduct Committee of the Bermuda Bar Association and the Treatment of Offenders' Board. Her education is as follows: graduate, Inns of Court School of Law (Outstanding Designation), London, England (1993–1994); BA (Jurisprudence), St John's College, Oxford University (first-class degree, Rhodes Scholar), England (1991–1993); UCLA School of Law, California (1990–1991); BA (History), Stanford University, California (Phi Beta Kappa Hons) (1985–1989); and L'Institut d'Etudes Politiques, Paris, France (1986–1987).

In 2011 Juliana was recognised by the Bermuda Government's Department of Human Affairs as one of the 100 Women/100 Vision honourees, an award that highlights the achievements of 100 women in Bermuda who have had a positive impact on the island in the economic and business sector. In 2012, she was the winner of *The Bermudian* magazine's services award for legal services, for being the 'go-to' lawyer for employment and immigration representation.

In 2015, Ms Snelling won the 'Best of Bermuda Award' in *The Bermudian* magazine for being Bermuda's most tenacious lawyer.

She is the published author of the Bermuda chapter of *Carter-Ruck on Libel and Privacy* (6th ed 2010), Reed Elsevier (UK) Ltd.

PAUL A HARSHAW

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Mr Paul Harshaw was called to the Bar of England & Wales in 1997 and the Bermuda Bar in 1998. He is a member of the Honourable Society of the Lincoln's Inn and the Bermuda Bar Association. He was the founder and partner of his former law firm, Harshaw & Co.

He practises in international matters, including letters of request for judicial assistance from foreign courts, enforcing foreign judgments in Bermuda, advising and representing parties (including liquidators and trustees) in bankruptcy and in major cross-border insolvency proceedings, and provides advice and representation in company, personal insolvency, and employment related proceedings.

Mr Harshaw has chaired boards of inquiry under Bermuda's Human Rights Act and has lectured on Bermuda's Proceeds of Crime and Anti-Money Laundering legislation and the tension between that legislation and the law relating to confidentiality and the constitutionally protected right of legal professional privilege in Bermuda.

He embarked on a career in law following a 15-year career in electrical engineering. He obtained his LLB with Honours at the University of Buckingham (England) in 1995.

After being called to the Bermuda Bar in 1998, Mr Harshaw practised commercial litigation in the international law firm Conyers Dill & Pearman. Mr Harshaw owned and managed Harshaw & Co from 2009 to 2012 before joining with Ms Snelling to establish Canterbury Law Limited.

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