THE EMPLOYMENT LAW REVIEW

Eleventh Edition

Editor
Erika C Collins

THE LAWREVIEWS

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CONTENTS

PREFACE

For the past decade, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. When updating the book each of the past 10 years, I reread the Preface that I wrote for the first edition 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. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 11 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 11th 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 this publication grow and develop to satisfy its initial purpose: 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.

This 11th edition also holds a special place in my heart because it is the first that I have prepared as a shareholder of Epstein Becker & Green, PC (EBG). I joined EBG at this time in part because, in 2019, EBG established an alliance with Deloitte Legal to provide clients with comprehensive and global services relating to employment law and workforce management. The alliance brings together Deloitte Legal's global reach and the strength of its multidisciplinary business approach with EBG's United States labour and employment attorneys and workforce management experience to form a global delivery model. Through this alliance, EBG and Deloitte Legal offer comprehensive employment law and workforce management services to clients. I firmly believe that this alliance is the 'wave of the future', to be able to offer clients integrated professional services, and this notion parallels the mission and purpose of this text.

In 2020 and looking into the future, global employers face growing market complexities, from legislative changes and compliance, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, negotiating collective bargaining arrangements or responding to increasing public attention around harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources

professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

Our most recent general interest chapter still focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, and 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 2019 in nations across the globe, and one of our general interest chapters discusses this. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, 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 in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on 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.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. 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 five general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 44 jurisdictions around the world. A special thank you to the legal practitioners across the

globe who have contributed to this volume for the first time, including Sedrak Asatryan, Janna Simonyan and Mary Serobyan (Armenia), Stefan Kühteubl and Martin Brandauer (Austria), Ignacio García, Fernando Villalobos and Soledad Cuevas (Chile), Tingting He (China), Jan Procházka and Iva Bilinská (Czech Republic), Véronique Child and Eric Guillemet (France), Guy Castegnaro, Ariane Claverie and Christophe Domingos (Luxembourg), Jack Yow (Malyasia), Charlotte Parkhill and James Warren (New Zealand), Petra Smolnikar, Romana Ulčar and Tjaša Marinček (Slovenia), Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas (Spain) and Caron Gosling (United Kingdom). This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associates, Ryan H Hutzler and Anastasia Regne, for their invaluable efforts in bringing this 11th edition to fruition.

Erika C Collins
Epstein Becker & Green
New York
February 2020

Chapter 10

BERMUDA

Juliana M Snelling and Olga K Rankin[1]

I INTRODUCTION

The Employment Act 2000 (the Act) is the governing employment legislation in Bermuda. 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 requirements of the Act except where the Act expressly allows it.

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

If the inspector has reasonable grounds to believe that an employer has not complied with the Act but is unable to cause a settlement to be reached, the inspector will refer the complaint to the Employment Tribunal (the Tribunal), which will hold a hearing on the matter as soon as practicable and must give the parties or their representatives a full opportunity to present evidence on oath and make submissions. The Tribunal comprises a chairman, a deputy chairman and no more than 12 members appointed by the Minister responsible for labour. The panel hearing a complaint will normally comprise three persons drawn from the Tribunal, which may or may not include an attorney. Except 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.

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

1 Juliana M Snelling is a director, barrister and attorney, and Olga K Rankin is an associate barrister and attorney at Canterbury Law Limited.

II YEAR IN REVIEW

The government's Labour Force Survey Report of May 2019 recorded Bermuda's working population as 35,083, the median gross annual income from a main job as Bd$62,695 and average weekly working hours to be 39.7. The island's unemployment rate was 5.2 per cent.

Bermuda's restrictive immigration policies came under strict scrutiny because the resident population is shrinking and ageing, causing a reduced tax base and revenue stream for the island. It is felt that without a clear and welcoming immigration policy, Bermuda will be unable to attract the global expertise and capital needed to overcome the challenges of a stagnant economy and decreasing workforce.

The Public Service Superannuation Amendment Act 2019[2] was passed in July 2019, raising the mandatory retirement age for public service workers from 65 to 68 years. The Act does not force public service workers to work past the age of 65, but gives them the option to do so.

III SIGNIFICANT CASES

i The Minister of Home Affairs and another v. Barbosa[3]

In what was considered an important test case, the Privy Council upheld the judgment of the Court of Appeal that Mr Barbosa did not qualify as a person who belongs to Bermuda for the purposes of Section 11 of the Constitution, which would have afforded him protections of freedom of movement and from discrimination against 'non-belongers'. He is one of approximately 300 people who were born in Bermuda to foreign nationals and who obtained British Overseas Territories citizenship by birth. He was granted indefinite leave to remain in Bermuda and was a British citizen, but was unable to apply for Bermudian status (citizenship).

It was held that he had no common law right to belong to Bermuda and neither did he belong to Bermuda under the Constitution since he did not fall within any of the categories of 'belongers' exhaustively listed therein; further that the common law could not overwrite those constitutional provisions through judicial interpretation.

ii Attorney General for Bermuda (Appellant) v. Ferguson and others (Respondents)[4]

On 26 November 2018, the Court of Appeal had declared same-sex marriage legal, upholding the Supreme Court's ruling that the Domestic Partnership Act 2018 (DPA) was unconstitutional on the basis that the DPA interfered with the respondents' freedom to manifest their beliefs. Additionally, the Court held that the DPA was passed for religious reasons and thus was unconstitutional. The government has since received permission to appeal to the Privy Council, which will be heard in 2020. If the Privy Council upholds the lower courts' decisions, this may cause Bermudians who heretofore have felt unwelcome at home to repatriate to the local workforce.

2 Police officers, firefighters and Bermuda Regiment soldiers are not affected by this change.

3 [2019] UKPC 41 (11 November 2019).

4 JCPC 2019/0077.

iii X Limited v. Y[5]

The Supreme Court held that deferred settlement payments owed to a former employee under a separation agreement in the private commercial context may potentially be prohibited by the Bribery Act 2016. The employer sued for a declaration that payments due to its former employee breached the 2016 Act because of a conflict arising between its own interests and those of the new employer, where the employee's new functions required impartiality, and the receipt of a financial advantage from the former employer compromised that impartiality.

While holding that the Act was potentially engaged, the Court dismissed the application on the employee's undertaking not to carry out any duties that a reasonable person would expect he could not properly discharge in relation to transactions involving the former employer. However, the Court noted that the Act's scope is wide and can apply to the private sector since private employees may be subject to fiduciary duties, or duties of good faith or impartiality.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

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

a the full names of the employer and employee;
b the date when the employment began;
c the job title and a brief description of the work;
d the place or places of work;
e the gross wage and the intervals at which it is to be paid;
f the normal days and hours of employment or the normal pattern of shifts;
g the entitlement to holidays, including public holidays and paid annual vacation;
h the entitlement to paid sick leave;
i the length of notice that the employee is obliged to give and receive to terminate the contract of employment;
j details of any pension provided;
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 the date on which it is to end;
m any probationary period;
n any dress code;
o the existence of any collective agreement; and
p such other matters as may be prescribed.

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

5 [2019] SC (Bda) 58 Civ (11 September 2019).

Where there are no particulars to be entered into under points (k) to (o), above, 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 one month.

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. These types of 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 what that period is and must also state if no probationary period applies. During the probationary period, the employer or employee may terminate the contract of employment for any reason (or no reason) and without notice. If a reason is given, it must be lawful (see Section XIII.i).

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.

If a foreign company that is based overseas 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 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-compete clauses in employment contracts subject to the following principles.

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

Post-termination, an express non-compete clause must be in place to lawfully prevent competition. However, Bermuda common law regards covenants in restraint of trade as *prima facie* unlawful. The court will enforce the covenant only if it goes no further than is reasonably necessary to protect the legitimate interests of the employer (for example, trade secrets or similar, highly confidential information, trade connections and workforce stability); it will strike down clauses that are unreasonably wide in time, geographical extent and scope of the restricted activity.

There may also be 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 be employed and receive normal wages and benefits.

If the contract contains neither type of clause, the employer may try to rely on the implied post-termination duty on an employee not to disclose or misuse the confidential information of his or her former employer. However, this is difficult to enforce.

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

VI WAGES

i Working time

There are no regulations on maximum working hours applicable to adults working in Bermuda, save that the Act mandates that employers 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 school hours. Persons under 18 may not lawfully 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 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 for more than 40 hours in a week is entitled to be paid at the overtime rate of one-and-a-half times the normal hourly wage. Alternatively, the employee may be paid the 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).

iii Proposed new minimum wage legislation

On 30 July 2019, the Employment (Wage Commission) Act 2019 came into force, setting up a commission tasked with recommending a minimum hourly wage (a single hourly rate of gross pay) and a living wage (the amount of income necessary to afford an employee and his or her household a socially acceptable standard of living). Labour specialists hotly debate what effect this will have on the labour market.

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 to obtain a work permit, the position must either be exempt from advertising or the Department of Immigration must be satisfied that there is no Bermudian, spouse of a Bermudian or Permanent Resident Certificate holder who is qualified and has applied for the position.

Foreign workers are protected by the same employment laws and generally pay the same taxes as local workers. On 15 October 2019, Parliament passed the National Pension Scheme (Operational Pensions) Amendment Act 2019, which, for the first time, requires pensions to be paid by employers in respect of expatriate workers who have been granted permission to work in Bermuda for at least one year. Self-employed expatriate workers are also now required to contribute to a pension scheme.

VIII GLOBAL POLICIES

Internal rules on discipline 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 this. There are no other mandatory workplace 'rules' (as opposed to laws) that apply.

However, employers will often set out their internal disciplinary procedures in the employee handbook or on the intranet. Employees are commonly 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 an employee, after taking into account:

a the nature of the conduct in question;
b the employee's duties;
c the terms of the contract;
d any damage caused by the employee's conduct;
e the employee's length of service and his or her previous conduct;
f the related circumstances;
g the penalty imposed by the employer;
h the procedure followed by the employer; and
i the usual practice of the employer in similar situations.

IX PARENTAL LEAVE

Effective 1 January 2020, the Employment (Maternity Leave Extension and Paternity Leave) Amendment Act 2019 extends paid maternity leave from eight weeks to 13 weeks and introduces five days of paid paternity leave, provided, in both instances, the employee has worked for more than one year. If the length of service is less than one year, the maternity benefit is 13 weeks of unpaid leave (up from eight weeks) and five days of unpaid paternity leave (new under this Act).

Employment contracts may not be terminated while an employee is on parental leave; employment is deemed to be continuous during parental leave.

X 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.

Foreign nationals coming to work in Bermuda under the Portuguese Accord and those employed in construction are required to have a working knowledge of English to ensure that work duties are carried out safely. In cases where English language skills are questionable, the person will be landed (i.e., legally admitted) for seven days and may be required to undergo testing by the Department of Immigration as a condition of residence.

XI EMPLOYEE REPRESENTATION

The Trade Union Act 1965 provides that every employee has the right to be a member of a trade union, 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 does not have the right to refuse to be a member of the relevant union unless he or she agrees to pay appropriate contributions either to the trade union in lieu of membership or to a charity of his or her choice.

An employee who is a union member has the right to:

a take part in the activities of the trade union (including with a view to becoming a union official) at the 'appropriate time' (i.e., outside working hours or at a time agreed by the employer);

b seek or accept appointment or election; and

c hold office if elected.

An employer who interferes with these rights commits an offence.

A union's constitution sets out the election and removal procedures for union officer representatives (by a secret ballot of union members), the length of their terms and the frequency of meetings. There is no fixed ratio of representatives to employees.

Employers must comply with the trade union certification procedures as set out in the Trade Union Act 1965 and must deal with unions that have obtained certification in good faith for the purposes of collective bargaining.

Employers commit an offence if they do not allow representatives of a union that is certified in respect of a bargaining unit in the business reasonable access to the employer's premises for the union's lawful activities, but employers may impose reasonable restrictions in the interests of safety or to avoid undue disruption of the business. Further, employers may, by notice in writing addressed to a certified union, require that a representative not engage in union activities on the premises without its prior permission.

XII DATA PROTECTION

i Requirements for registration

The preliminary provisions of the Bermuda Personal Information Protection Act 2016 (PIPA) were introduced in 2016 but the substantive provisions have not yet come into force. The PIPA will regulate the use of personal information by organisations in Bermuda by protecting both the rights of individuals and the need for organisations to retain and use personal data for proper purposes. Personal information means 'any information about an identified or identifiable individual', except for information that is publicly available. Every employer will be required to appoint a privacy officer. The operation of the PIPA will be overseen by a privacy commissioner, responsible for handling data breach complaints. The complaint process will start with mediation, followed by an inquiry, followed by possible criminal sanctions.

ii Cross-border data transfers

All personal information protection policies apply to cross-border data transfers.

iii Sensitive data

The PIPA defines sensitive data as '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'.

iv Background checks

Background checks, credit checks and criminal record checks are permitted in Bermuda. Practically, the person being checked must consent to the release of 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. The PIPA will protect personal information provided by employees during background checks when its main provisions come into effect.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employee who is not on a fixed-term or project-based contract, or who has successfully completed a 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. 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, as well as formal employment details.

If the termination of a contract is for an invalid reason or for no reason, it constitutes an unfair dismissal meriting a complaint to an inspector. 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 involve protected characteristics under the Human Rights Act 1981.

The notice requirements of the Act must be satisfied. The employer is not allowed to give notice of termination during absences for certain types of leave.

Employees are entitled to at least one week's notice if they are paid weekly, two weeks' notice if they are paid every two weeks and, in other cases, one month's notice. If the contract stipulates a greater amount of notice, the longer notice period will apply. An employer may elect to make payment in lieu of notice and confer 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 in practice this rarely happens.

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 practically will not order 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 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 not less than four weeks' wages for each completed year of employment thereafter, up to a maximum equivalent of 26 weeks' wages.

The parties are free to enter into a settlement agreement, which is construed and enforced in accordance with normal contract law principles. Stamp duty of Bd$25 should be applied to the agreement to be enforceable (unless the employer is an exempted company), pursuant to the Stamp Duties Act 1976. If a complaint has been filed with the Department of Labour Relations, 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 when 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 a reorganisation of the business;

e a 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:

- a shortage of materials;
- a mechanical breakdown;
- an 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 the following:

a Notice – the employer must provide sufficient notice of termination, or payment in lieu of notice (see Section XIII.i).

b Severance allowance – if an employee has completed at least one continuous year of employment, he or she 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 thereafter, 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 when an employee unreasonably refuses to accept the employer's offer of re-employment at the same place of work under no less favourable terms than those under which he or she was employed prior to the termination.

c Certificate of termination – see Section XIII.i.

d Itemised pay statement – at or before the payment of any wages, including his or her final payment. Deductions that were not agreed beforehand are unlawful.

e Pension transfer – the employee's pension is transferable on redundancy, including the employee's vested contributions, which will vest one year 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 the termination is likely to occur.

Further, the employer must consult on:

a the possible measures that could be taken to avert or minimise the adverse effects of the redundancy on employment; and

b 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 of redundancies needs to be given to the government, but it is advisable as a matter of good labour practice to inform the minister responsible for labour relations of impending redundancies affecting a sizeable pool of Bermudian workers.

The employee has no rehire rights save those that might otherwise be provided in any relevant collective bargaining agreement.

No specific categories of employees are protected from dismissal (including redundancy), and no social plan is required in the event of a dismissal or redundancy.

The parties are free to enter into a settlement agreement to settle their disputes (see Section XIII.i).

XIV TRANSFER OF BUSINESS

There is no specific protection for employees whose employment is threatened by a transfer of business or undertaking. The Act provides that when 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 prohibition to outsourcing work, and this is an increasing trend given the high cost of local labour. However, where this leads to job losses for Bermudians, unionised workplaces may engage in protests, including work stoppages.

XV OUTLOOK

There is growing serious disquiet about cost increases placed on employers and the effect these will have on employment, including increased social insurance contributions, payroll tax and healthcare premiums, and higher regulatory compliance costs. The new obligation for employers to pay pensions to foreign workers and increased paid parental leave will add to the burden.

The employment market continues to pin its hopes on fintech to deliver jobs with a regulatory framework in place. The government is allowing fintech companies to bring in five employees, provided they also hire and train Bermudians. Circle International Bermuda became the first major crypto-finance firm to be licensed in Bermuda.

The Bermuda reinsurance landscape continues to contract with a series of mergers and takeovers. Nonetheless, there is good reason to believe Bermuda will remain a global reinsurance hub as it provides a gold star regulatory environment and is one of only two countries in the world that has regulatory equivalence with both the United States and the European Union. The Insurance Linked Securities market continues to thrive, although the catastrophic losses of the past two years have curbed the enthusiasm of investors.

Given the great uncertainty that Brexit brings for Bermudians who live and work in Europe, as well as for businesses that operate in both jurisdictions, the government is forming a post-Brexit working group to examine the impact Brexit will have on the island.

Appendix 1

ABOUT THE AUTHORS

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Juliana Snelling (née Horseman) is a Rhodes Scholar, a director and partner of Canterbury Law Limited and a member of the Bar of England and Wales (1994), the Law Society of England and Wales, and the Bermuda Bar (1995). She is also a member of the Honourable Society of the Inner Temple and a member of the Chartered Institute of Arbitrators.

Ms Snelling's principal work involves advising local and exempted companies and senior-level business executives on a whole range of issues concerning Bermuda employment and labour law. She also practises in most areas of civil litigation.

She currently serves on the Bermuda Medical Council, assisting with legal matters concerning medical practitioners. 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.

Who's Who Legal: Labour & Employment 2019 writes: 'Juliana Snelling is recommended by peers internationally for her labour and employment practice, which includes advising offshore companies and senior executives on employment matters.'

The 2018 edition of *Who's Who Legal: Labour & Employment* stated: 'Juliana Snelling stands apart as the top labour and employment lawyer in Bermuda, according to our research, thanks to her comprehensive understanding of the area.'

OLGA K RANKIN

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Olga Rankin was called to the Bermuda Bar in 2009 after completing her studies and obtaining her bachelor's degree in social sciences with a focus on international studies from New York University (*summa cum laude*) (2003); a master's degree in humanities and social thought from New York University (2004); an LLB degree from the University of Kent (first-class honours) (2007); and a postgraduate diploma in legal practice (LPC) from the College of Law at Guildford.

Ms Rankin has practised in civil litigation since 2009, with a focus on employment and labour law since joining Canterbury Law Ltd in March 2018.

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