

## Bitesize Business Newsletter

### Recording an Employee's Working Time

**A recent European Court of Justice ('ECJ') decision has held that an employer must keep records of all hours worked to fulfil its obligations under the Working Time Directive ('WTD').**

Under current UK law, Regulation 9 of the Working Time Regulations (WTR) requires employers to keep 'adequate records' to show compliance with the 48 hour working week and specific protections for night workers (whose normal hours must not exceed an average of 8 hours in any 24 hour period).

However, the WTR do not, at present, require all employers to record daily or weekly rest breaks or to record all hours of work, and under current government guidance employers can rely on existing records maintained for other purposes, such as pay, to meet their obligations.

The fear is that the decision of the ECJ will now result in the government amending the WTR to require recording of all hours of work and daily or weekly rest breaks.

In expectation of the government introducing new legislation, it may be worth employers reviewing their existing systems and upgrading these with a facility to record all working hours and rest breaks.

**If you require any further advice relating to the matters mentioned in this article or generally relating to employment issues please do not hesitate to contact Glyn Evans on 01934 623501 or email at [evans@powellslaw.com](mailto:evans@powellslaw.com).**



# Starting a Business, Partnership or Private Limited Company

We are often asked what the best structure for a new business, partnership or private limited company is. There is no right or wrong answer but here are some of the pros and cons to each.

## Formalities

A partnership requires no written agreement (even if it is advisable) and there is no registration process to go through. All financial information remains private.

However, with a limited company, there is a formal registration process with Companies House under the Companies Act and the need to file an annual confirmation statement. Accounts/financial statements also have to be filed and are open to public inspection.

## Profits and losses

All profits and losses belong to the partners who are taxed individually on their income from the partnership. If the partnership can't pay its debts, then creditors can pursue the individual partners and their personal assets.

With a limited company, the profits or losses belong to the company not the shareholders or directors. But if the company can't pay its debts the creditors cannot pursue the shareholders for the company's debts because their liability is limited to the amount they paid for their shares. Their personal assets are not at risk unless they have offered personal guarantees to any creditors.

## Outside Investment

The ability to attract outside investment is limited in a partnership because there is no defined portable interest which can be sold to the investor to represent his investment.

In a limited company, existing shares can be sold to an investor or new shares can be issued.

## Borrowing

Partnership borrowing will again be in the names of and at the personal risk of the partners to the business.

Borrowing by a limited company in theory gives the shareholders the benefit of limited liability. But in practice, this benefit can be illusory as banks will often require director shareholders to give personal guarantees for the liabilities of the company- particularly where the assets of the company are not sufficient to cover the amount of the loan facility.

## Which is best for you?

There is no simple answer to this, and it will depend on several factors including the nature of the business, the initial capital required and your attitude to risk. It is essential to take legal advice at the outset.

**For information and advice on starting your own business, partnership, or limited company, [click here](#), or contact the Commercial team at [PowellsLaw](#).**





# Suspending an Employee

**Suspension may arise in two contexts. First, suspension can be used as a disciplinary penalty in itself. Such cases are rare but if a power does exist employers must comply strictly with the terms of the right to suspend given in the employee's contract. Otherwise, the employer is likely to face a claim for breach of contract or an injunction to restrain breach.**

Second, and much more common, is the procedure to suspend an employee on full pay for the purpose of investigating allegations of misconduct.

It is not always appropriate for an employer to use a right to suspend, but if it is, it must be exercised reasonably in accordance with the duty of mutual trust and confidence which exists between an employer and employee. Failure to do so could lead to a claim for constructive dismissal.

The following is a check list for employers considering suspending an employee:

## Contract of Employment

Check that the employment contract or accompanying documents (for example, a disciplinary procedure) contain a right to suspend. If there is no express right to suspend it may still be possible to do so providing the employee does not have an implied right to work. An implied right to work usually exists where the employee has to attend work in order to earn his income e.g. commission-based employment.

## Act Reasonably

The right to suspend should be operated reasonably so the employer should consider such matters as the length of suspension, how to explain the absence to others inside and outside the organisation, treating any other employees who are simultaneously suspended consistently, and considering whether suspension is the best option or if there is any alternative available such as moving the employee to another area of the business.

## Pay

Employees should receive pay and contractual benefits throughout the period of suspension unless there is a contractual right to suspend without pay.

## Record Keeping

A member of the management team should be chosen to implement the suspension and he/she should keep a proper record of the decision-making process in case this is subsequently challenged by the employee.

## Practical Considerations

The employer needs to consider who will cover the employee's duties while he/she is suspended.

Once the decision to suspend has been made, the employer should inform the employee of the decision, and the reason for it, and make it clear that suspension is not a disciplinary action (save in the very rare circumstances identified at the beginning of this article).

Suspension can be a useful tool to investigate possible misconduct by an employee, but it should be used reasonably and not as a knee jerk reaction because total exclusion from work will frequently make employees feel belittled and demoralised. This can be to the detriment of the organisation as a whole.

**If you would like any further information about the matters raised in this article or more generally relating to employment matters please contact Glyn Evans on 01934 637911 or by email [evans@powellslaw.com](mailto:evans@powellslaw.com)**

# Business Transfers & Employment Liabilities



**A recent case has highlighted the importance of having properly drafted legal documentation to avoid employment liabilities relating to business transfers.**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') protect employees' rights on the transfer of a business in which they are employed. However, what if the transferor has ceased to operate. Is there still a 'business' to transfer?

In a recent case decided by the European Court of Justice ('ECJ') a Spanish company operated a music school for a Spanish public authority. Pupil numbers dropped and the company dismissed all its staff and ceased trading.

A new contract was awarded by the public authority to a different contractor 5 months later and a former employee brought a claim against the new operator on the basis that her employment had transferred to it. The ECJ held that despite the 5-month gap there was still an 'undertaking' (business) in existence which could transfer.

In an English case relating to a social club, the transferor surrendered the premises licence of a bar and the transferee taking over the bar later obtained a licence and re-opened it with its own staff.

The Employment Appeal Tribunal held that the period during which the bar was shut before re-opening did not mean that the business had ceased but had merely been 'suspended'.

There was, therefore, a business transfer for the purposes of TUPE and the former employee could bring a claim against the new owner.

These cases demonstrate that a business transfer under TUPE may have occurred without the transferor or the transferee realising it, leaving both parties potentially liable to claims from former employees.

The moral of the story is that buyers and sellers of businesses should ensure that they have properly prepared legal documentation which deals with the effects of TUPE as failing to do so could leave them exposed to expensive employment claims.

**The law relating to business transfers is very complex and specialist advice is essential. If you would like advice on this or any other employment issues please contact Glyn Evans on 01934 637911 or email [evans@powellslaw.com](mailto:evans@powellslaw.com).**

## Bitesize Breakfast meetings

**Have you heard about our Bitesize Breakfast meetings?** On the first Thursday of every month, we open our office to the local business community, with a chance to network and discuss topical business issues. Why not pop in for a coffee at our next session? **It is free to attend and everyone is welcome.**

**The next meeting of 2019 will be on Thursday 5th December at 9am.**

**Location:** 7-13 Oxford Street, Weston super Mare, North Somerset, BS23 1TE

If you would like to know more before attending, please call Rebecca Sage on **01934 637 908** or email [rsage@powellslaw.com](mailto:rsage@powellslaw.com).



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